SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL RAY BURGENER, Defendant and Appellant.	CAPITAL CASE Case No. S179181

SUPREME COURT
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Riverside County Superior Court Case No. CR18088
Honorable Craig G. Riemer, Judge

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STATEMENT OF THE CASE

On August 18, 1981, a Riverside County jury convicted Michael Ray Burgener of first degree murder by use of a firearm (Pen. Code, §§ 187, 189, 12022.5), robbery by use of a firearm and with the infliction of great bodily injury (Pen. Code §§ 211, 12022.5, 12022.7), and being a felon in possession of a firearm (Pen. Code, § 12021). The jury also found true the special circumstance that Burgener committed the murder during the course of a robbery. (Pen. Code, § 190.2, former subd. (a)(17)(i) [now § 190.2, subd (a)(17)(A)].) (1981 CT 190-196, 200-205.) On August 24, 1981, the jury returned a death verdict (1981 CT 314, 315), and the trial court sentenced Burgener to death on September 4, 1981 (1981 CT 341-343). Burgener's automatic appeal followed. (Pen. Code, §1239, subd. (b).)

On March 27, 1986, this Court affirmed the guilt and special circumstance verdicts, but reversed the penalty judgment on the grounds that trial counsel, pursuant to Burgener's instructions, presented no mitigating evidence or argument at the penalty phase. (*People v. Burgener* (1986) 41 Cal.3d 505, 542-543.) The case was remanded to the superior court for a second penalty phase trial. (*Ibid.*)

In 1988, the jury at the penalty phase retrial again returned a verdict of death. (1988 4CT 1061; 1988; 59 RT 7615.) However, the trial judge granted Burgener's motion to modify the verdict under Penal Code section 190.4, subdivision (e), and sentenced Burgener to life without the possibility of parole. (1988 5CT 1424; 60 RT 7734, 7752-7753.) The Court of Appeal reversed, finding the trial court had considered improper factors in reducing the death verdict and remanded the case to allow the trial court "to reconsider and rule upon the motion in accordance with the factors listed in Penal Code section 190.4, subdivision (e), and 190.3 and no others." (*People v. Burgener* (1990) 223 Cal.App.3d 427, 430, 435.)

On remand the case was reassigned to Judge Heumann because the trial judge who had presided over the penalty phase retrial, Judge Mortland, had retired. (*People v. Burgener* (2003) 29 Cal.4th 833, 886 ("*Burgener III*").) On March 29, 1991, Judge Heumann denied Burgener's motion to modify the jury's death verdict. (*Ibid.*) On January 3, 1992, Judge Heumann imposed a sentence of death, and denied Burgener's motion for a new trial. (1992 SCT 262, 267-268; SRT 76, 99, 102.)

On January 27, 2003, this Court vacated the penalty verdict based on its finding that the trial court had applied the wrong standard of review in ruling on the modification motion under Penal Code section 190.4, subdivision (e). (*Burgener III, supra,* 29 Cal.4th at p. 893.) This Court remanded the case for a new hearing to allow the trial judge to reconsider the motion to modify the verdict under the correct standard of review. (*Ibid.*)

On remand, Judge Heumann granted Burgener's request to represent himself on the motion to modify the death verdict. (*People v. Burgener* (2009) 46 Cal.4th 231, 235 ("*Burgener IV*".) On November 7, 2003, the trial court denied the motion. (*Ibid.*)

Following this denial of the automatic motion to modify the verdict, this Court found that the record was insufficient to determine that Burgener had knowingly and intelligently waived his right to counsel as the trial court's explanation of the risks of self-representation was deficient. (*Burgener IV, supra,* 46 Cal.4th at pp. 234, 243.) On May 7, 2009, this Court vacated the judgment of death and remanded the matter to the trial court for reconsideration of Burgener's request for self-representation and the automatic motion to modify the death verdict. (*Id.* at pp. 245-246.)

On this latest remand, Judge Craig G. Riemer again granted Burgener's request to represent himself on August 28, 2009 (1 RT 21-22), and denied the automatic motion to modify the death verdict pursuant to

Penal Code section 190.4, subdivision (e) on December 11, 2009 (1 RT 42, 44; 1 CT 83-92.) Burgener's instant appeal is "limited to issues related to the modification application." (*Burgener IV, supra,* 46 Cal.4th at p. 231.)

STATEMENT OF FACTS

The automatic motion to modify the death verdict required the trial court to consider and evaluate evidence presented at Burgener's penalty phase retrial. At the retrial, the prosecutor's case-in-chief included an abbreviated version of the guilt phase evidence describing the circumstances of the murder and robbery. This Court summarized the penalty retrial evidence in *Burgener III*:

> Shortly after 4:00 a.m. on October 31, 1980, Christine Boyd stopped by the 7-Eleven on Rutland Avenue in Riverside for her morning cup of coffee on her way to work. From her car, she noticed the store's clerk, William Arias, was not behind the counter. A White male with shoulder length, curly brown hair and wearing a cowboy hat left the store with a paper sack. Boyd entered the store to find Arias "all bloody." She called the police.
>
> Riverside Police Officer Gregg Dunn arrived at 4:14 a.m. Arias told the officer, "He shot me. He shot me four or five times, in the face, in the stomach and in the back," then began to lose consciousness. Around $50 was missing from the cash register.
>
> Arias died from loss of blood caused by bullet wounds. He had been shot five times with a .22-caliber weapon. Gunpowder residue on his face indicated he had been shot from a distance of about 12 inches. He had no offensive or defensive wounds.
>
> When [Burgener] was arrested approximately 12 hours later, he had long, curly brown hair and was wearing a cowboy hat that looked like the hat Boyd had seen on the man leaving the 7-Eleven store. He also had a .22-caliber handgun. According to the criminalist, expended bullets and bullet fragments recovered from the crime scene could have come from [Burgener's] weapon. The sole of [Burgener's] left shoe

> produced a weak positive under a hemastix test, which is used as a presumptive test to detect the presence of blood. There was insufficient material to perform any other test to confirm the substance as blood.
>
> A crumpled 7-Eleven paper bag with two $5 bills stuck in the wrinkles was found in the trash can at the apartment where [Burgener] had spent the night. A small bag of .22 caliber ammunition was found in the common bathroom at the apartment complex four days later. This cache of bullets matched the bullet fragments recovered from Arias's body in their elemental composition and could have come from the same melt of lead.

(*Burgener III, supra*, 29 Cal.4th at pp. 847-848.)

The prosecution also presented evidence of Burgener's prior convictions for robbery, attempted grand theft, attempted murder, and battery on a correctional officer. (*Burgener III, supra*, 29 Cal.4th at pp. 851-852.) In addition, the prosecution introduced evidence of prior criminal acts involving force or violence committed by Burgener while in prison. (*Ibid.*)

Burgener presented evidence in an effort to establish lingering doubt. He denied committing the crimes and claimed that his former girlfriend, Nola England, and prosecution witness Joseph DeYoung had framed him for Arias's murder. (*Burgener III, supra*, 29 Cal.4th at pp. 848-851.) Other mitigating evidence presented by Burgener included evidence of his family background and childhood, consisting of physical abuse, alcoholism, and financial hardship. (*Id.* at pp. 853-855.) Burgener spent most of his adult life in prison. Less than three months after being released from prison, he committed the instant crimes. (*Id.* at p. 854.)

At age 10, Burgener was placed in a home for boys and received psychiatric care. Accordingly to psychiatrist Lorna Forbes, Burgener suffered from attention deficit disorder and at age 7 was referred to a mental health center. Dr. Forbes further opined that Burgener was

suffering from an adjustment disorder with depressed mood and antisocial personality disorder, characterized as "extreme" because of severe abuse he suffered as a child and his multiple incarcerations. She also believed, that as a result of his experiences, Burgener had developed a paranoid view of the world. Burgener expressed remorse to Dr. Forbes for the crimes he committed, but claimed he had been "set up" for the current offenses. (*Burgener III, supra*, 29 Cal.4th at pp. 853-855.)

ARGUMENT

I. AS BURGENER KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL AFTER A THOROUGH ADVISEMENT OF THE RISKS INHERENT WITH SELF-REPRESENTATION, THE TRIAL COURT PROPERLY GRANTED HIS REQUEST TO REPRESENT HIMSELF AT THE SECTION 190.4, SUBDIVISION (E) HEARING

Burgener contends that the trial court erred in granting his request to represent himself at the Penal Code section 190.4, subdivision (e) proceedings because his request was allegedly equivocal and purportedly his decision was made without being sufficiently advised of the dangers associated with self-representation. He further suggests that the court improperly granted him *pro se* status as he had no statutory or constitutional right to self-representation at the hearing on the automatic motion to modify the death verdict, and because he supposedly made the decision out of "frustration" rather than an actual desire to waive his right to counsel. (AOB at 11.) Contrary to Burgener's contentions, the trial court properly granted him the constitutional right of self-representation at the section 190.4, subdivision (e) hearing. The record clearly demonstrates that Burgener accepted the responsibility knowingly and intelligently, following a thorough colloquy with the trial court regarding the risks of exercising that right.

A criminal defendant has a Sixth Amendment right under the United States Constitution to act as his own counsel and conduct his own defense so long as he knowingly and intelligently waives his right to the assistance of counsel. (*Faretta v. California* (1975) 422 U.S. 806, 835-936 [45 L.Ed.2d 562, 95 S.Ct. 2525] (*Faretta*); *Burgener IV, supra,* 46 Cal.4th at pp. 240-241.) A trial court has a duty to advise a criminal defendant of the dangers and disadvantages of self-representation such that the record makes clear " ' "he knows what he is doing and his choice is made with eyes open." [Citation.]' " (*Burgener IV, supra,* 46 Cal.4th at p. 241, quoting *Faretta, supra,* 422 U.S. at p. 835.) There are no particular words or warnings a trial court must provide when faced with a defendant seeking self-representation. (*Burgener IV, supra,* 46 Cal.4th at p. 241, citing *People v. Koontz* (2002) 27 Cal.4th 1041, 1070.) Rather, the standard for a valid waiver of counsel is "whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of a particular case." (*Burgener IV, supra,* 46 Cal.4th at p. 241; *People v. Riggs* (2008) 44 Cal.4th 248, 276.)

On appeal, this Court must independently examine the proceedings below to determine whether Burgener knowingly and intelligently waived his right to counsel. (*Burgener IV, supra,* 46 Cal.4th at p. 241, citing *People v. Doolin* (2009) 45 Cal.4th 390, 453.)

A. The Sixth Amendment Right To Self-Representation Extends To Penal Code Section 190.4, Subdivision (e) Proceedings

Burgener alleges there is no constitutional or statutory right to self-representation at a hearing on an automatic motion to modify a death verdict pursuant to section 190.4, subdivision (e). He complains that without such a right, the trial court's grant of self-representation was an improper exercise of discretion. (AOB at 16-21.) Burgener's contention is

contrary to numerous decisions by this Court, including this Court's decision in *Burgener IV*, recognizing the right to self-representation post-penalty verdict.

This Court has impliedly recognized the right to self-representation post-penalty verdict in several decisions. Most recently, in *People v. Elliott* (2012) 53 Cal.4th 535, 592, 593, this Court upheld the trial court's granting the defendant *pro se* status where the defendant had been represented by counsel throughout the guilt and penalty phases, and wished to represent himself at the sentencing hearing. Additionally, in *People v. Mayfield* (1997) 14 Cal.4th 688, 810, this Court discussed the timeliness of a request for self-representation made after the jury had rendered a death verdict, thus impliedly recognizing that such a right exists at that stage of a capital proceeding. Most importantly, this Court in *this case* impliedly approved the right to represent oneself at a section 190.4, subdivision (e) hearing, when it reversed the death judgment based on the inadequacy of the trial court's admonition regarding Burgener's waiver of the right to counsel. (*Burgener IV, supra,* 46 Cal.4th at pp. 241-242.)

Moreover, this Court addressed a similar argument in *People v. Blair* (2005) 36 Cal.4th 686, where the defendant complained that the trial court violated his Sixth Amendment right to counsel by allowing him to represent himself at the penalty phase of his capital trial. (*Id.* at pp. 736-737.) After noting its consistent holdings that the Sixth Amendment right of self-representation extends to the penalty phase (*Id.* at p. 737, citing *People v. Koontz, supra,* 27 Cal.4th at pp. 1073-1074; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365) this Court explained that "the penalty phase of a capital case is merely a stage in a unitary capital trial." (*People v. Blair, supra,* 36 Cal.4th at p. 737, internal quotation marks omitted.) A defendant's autonomy interests are no less compelling at the penalty phase of trial than at the guilt phase. (*Id.* at p. 738.) Likewise, a defendant's

autonomy interest is no less compelling at the motion to modify the verdict rendered at the penalty phase.

Like the defendant in *Blair*, Burgener relies on *Martinez v. Court of Appeal of California, Fourth Appellate District* (2000) 528 U.S. 152 [120 S.Ct. 684; 145 L.Ed.2d 597] (*Martinez*), and claims it shows that the Sixth Amendment right of self-representation does not extend to post-penalty verdict proceedings. (AOB at 16-17; see *People v. Blair, supra,* 36 Cal.4th at p. 737.) In *Martinez*, the United States Supreme Court held that the right to represent oneself is applicable only to the right to defend oneself at trial, and does not permit self-representation for purposes of appeal. (*Martinez, supra,* 528 U.S. at p. 154.) In so holding, the Court observed that the Sixth Amendment itself speaks to trials, and does not include any right to appeal. (*Id.* at pp. 159-160.) Accordingly, the ability to appeal is a statutory creation. (*Id.* at p. 160.) And, at the appellate stage of criminal proceedings the defendant's status has "dramatically" changed. (*Id.* at p. 162.) He is no longer presumptively innocent, but rather has been convicted of a crime beyond a reasonable doubt. (*Ibid.*) "[A]ppellate proceedings are simply not a case of 'haling a person into its criminal courts.'" (*Id.* at p. 163, quoting *Faretta, supra,* 422 U.S. at p. 807; see also *People v. Blair, supra,* 36 Cal.4th at p. 737.)

Burgener claims that based on the United States Supreme Court's reasoning in *Martinez*, a criminal defendant's Sixth Amendment right to self-representation ceases at the moment the jury renders its death verdict and does not extend to section 190.4, subdivision (e) proceedings. He suggests that because a motion to modify the penalty verdict is "automatic," and because at that stage the defendant is no longer facing a trial at which he can present a defense, the proceedings are more akin to an appeal where there is no right of self-representation. (AOB at 18.) Finally, he contends that because the provisions of section 190.4 subdivision (e) act "as an

additional safeguard against arbitrary and capricious imposition of the death penalty in California" (*People v. Lewis* (2004) 33 Cal.4th 214, 226, citing *People v. Frierson* (1979) 25 Cal.3d 142, 179; *Pulley v. Harris* (1984) 465 U.S. 37, 51-53 [79 L.Ed.2d 29, 104 S.Ct. 871]), the state's interest in the accuracy and fairness of the proceedings is at its highest and thus the benefits of representation would also be at their highest. (AOB at 18.)

Contrary to Burgener's contentions, the motion to modify the death verdict should be viewed, just as the penalty phase is, as "merely a stage in a unitary capital trial." (*People v. Blair, supra,* 36 Cal.4th at p. 737.) It is a necessary part of the capital trial, and thus the Sixth Amendment right of self-representation applies to it as well regardless of whether it is a statutory or constitutional creation. (*Id.* at p. 738.) Where a defendant is granted the right to self-representation pre-trial in a capital proceeding, certainly he maintains that right through the motion to modify the verdict as it is part and parcel of the capital trial. It would be illogical that his right of self-representation would terminate the moment the jury returned a penalty verdict. Further, as this Court noted in *Blair*,

> although the decision in *Martinez* speaks of the diminution of a defendant's autonomy interests after conviction and on appeal, *Martinez* does not address the level of autonomy interest enjoyed by a defendant during sentencing . . . The defendant at sentencing is still in the position of being "haled into court" by the state (see *Faretta, supra,* 422 U.S. at p. 807), and thus still has an interest in personally presenting his or her defense. (See *id.* at p. 819.)

(*People v. Blair, supra,* 36 Cal.4th at p. 738.) The autonomy interest a defendant possesses at a section 190.4 subdivision (e) hearing is significantly greater than on appeal. At the hearing, the defendant retains the ability to convince the trial court to impose a sentence less than death based on the court's independent review of the penalty phase evidence.

Furthermore, the entire purpose of requiring a trial court to state reasons for its decision at a section 190.4 proceeding is to facilitate "thoughtful and effective appellate review." (*People v. Frierson, supra,* 25 Cal.3d at p. 179.) Accordingly, Burgener's attempt to analogize the section 190.4, subdivision (e) proceeding to appellate proceedings fails because the automatic motion to modify the death judgment is reviewed as part of the automatic appeal process — as the procedural history of this case aptly illustrates.

Moreover, parsing out the section 190.4, subdivision (e) proceedings from the remainder of the capital trial for purposes of the Sixth Amendment right of self-representation would be contrary to the principles established in *Faretta*. There, despite its clear concerns with an unskilled defendant representing himself at a criminal trial, the Court resolved the conflict between the benefit of representation and the right of self-representation in favor of self-representation where the request was made weeks before the commencement of trial at time when the benefit of counsel was it its highest. (*Faretta,* 422 U.S. at pp. 834-836.) Resolving the same conflict in the setting of a section 190.4, subdivision (e) hearing, the benefits of representation by counsel could hardly be lower. The proceeding is limited to the review of evidence that has already been presented at trial. Accordingly, it is clear that the need for counsel is not any where near that which was rejected by the United States Supreme Court in *Faretta.*

Further, even assuming the right of self-representation does not extend to capital sentencing, or specifically, the motion to modify the verdict, Burgener's argument that the trial court improperly extended this right to him is immaterial. As the United States Supreme Court has observed, the right to self-representation "exists to affirm the accused's individual dignity and autonomy." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 178 [104 S.Ct. 944, 79 L.Ed.2d 122]; *People v. Marshall* (1997) 15

Cal. 4th 1, 46.) Thus, at most, if the trial court extended the right of self-representation to a capital sentencing hearing at which Burgener was not entitled to the right, then the trial court afforded him a level of dignity and autonomy to which he was not entitled. Burgener must show more than he was granted a request to which he had no right. In order for the granting of his request for self-representation to be significant, Burgener must show that the court categorically lacked the authority to grant his request. In other words, he must show that the court had a duty to deny his request — a curious proposition for which Burgener offers no support.

B. Burgener's Waiver Of Counsel Was Unequivocal

Burgener contends that, assuming he had a constitutional right to represent himself at the section 190.4, subdivision (e) hearing, the trial court erred in granting him *pro se* status as his request was equivocal and based on no more than frustration. Specifically, he argues that the record shows he had no actual desire to represent himself, but rather sought to do so to expedite the proceedings and ensure that jury's death judgment would remain unmodified. (AOB 21-26.) Contrary to Burgener's contention, the record reflects his genuine, unequivocal request to represent himself for purposes of the motion to modify the verdict.

Unlike the right to representation by counsel, the right to self-representation is waived unless a defendant articulately and unmistakably demands to proceed *pro se.* (*People v. Danks* (2004) 32 Cal.4th 269, 295 (*Danks*).) A motion for self-representation "made out of temporary whim, or out of annoyance or frustration, is not unequivocal." (*People v. Stanley* (2006) 39 Cal.4th 913, 932.) "*Faretta's* emphasis 'on the defendant's knowing, voluntary, unequivocal, and competent invocation of the right suggests that an insincere request or one made under the cloud of emotion

may be denied.'" (*People v. Danks, supra,* 32 Cal.4th at p. 295, quoting *People v. Marshall, supra,* 25 Cal.4th at p. 32.)

Cases in which requests for self-representation have been found to be equivocal involve impulsive decisions based upon the circumstances confronting the defendant at that moment. For instance, in *Danks* counsel procured several continuances of the capital defendant's trial over the defendant's objection. (*People v. Danks, supra,* 32 Cal.4th at pp. 290-295.) Out of clear frustration at a discovery hearing, the defendant raised a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), and defense counsel countered by questioning the defendant's competence and requesting that he be examined pursuant to Penal Code section 1368. (*Id.* at p. 292.) During the *Marsden* hearing, the defendant not only complained about the number of continuances defense counsel had sought, but also his treatment in prison, and additionally made evident his desire to avoid further psychiatric evaluations. (*Id.* at pp. 292-295.) It was apparent to the trial court, and this Court on appeal, that the defendant never seriously sought to represent himself. (*Id.* at p. 296.) To the contrary, the defendant would simply ask "what about going pro per," following a series of complaints, thus showing that his request was not unequivocal, but rather out of dissatisfaction with the way the proceedings were unfolding. (*Ibid.*)

Not so here. The procedural history of this case evidences that Burgener had years to consider his desire to represent himself, and thus his was not a decision made out of temporary whim, annoyance, or frustration. It was in 2006 that he first waived his right to counsel, and this Court reversed the trial court's decision permitting him to do so in 2009. (*Burgener IV, supra,* 46 Cal.4th 231.) When he appeared in the trial court for his new section 190.4, subdivision (e) hearing in 2009, he waived his right to counsel once again. Thus, his desire had not changed over the

course of three years, suggesting that it was not made out of whim, annoyance, or frustration.

Burgener interprets the record as showing that he chose self-representation solely to expedite the process and then made no effort to advance an argument in support of the motion to modify the death verdict to ensure that the motion would be denied. (AOB at 24-26.) In support of this argument, Burgener points to his informing the trial court that he was confident the judge would deny the motion because the judge would simply be reading the record of the penalty phase retrial and would not have the opportunity to observe the demeanor of the witnesses. He stated, "I realize that whether I have the top criminal defense attorney in the world or myself . . . what is going to happen is going to happen regardless." (1 RT 16-17.) He further explained if the ruling was going to be the same if he proceeded with or without counsel, then the benefit of proceeding without counsel, in his mind, was that it would take less time to procure a ruling. (1 RT 18-19.) Finally, Burgener informed the court that he believed a sentence of life would be worse than a sentence of death. (1 RT 19.)

These facts do not demonstrate a decision made out of temporary emotion. To the contrary, they demonstrate that Burgener had carefully considered the request and sincerely desired to represent himself. Wishing the matter to proceed forward in a timely manner does not indicate a decision made out of frustration, nor does Burgener's preference for the death penalty. A defendant convicted of a capital crime may legitimately choose a strategy of obtaining a death sentence as some individuals may rationally prefer death to a sentence of life without the possibility of parole. (*People v. Taylor* (2009) 47 Cal.4th 850, 865; *People v. Bloom* (1989) 48 Cal.3d 1194, 1222-1224, reversed on other grounds, *Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267.) "The defendant has the right to present no defense and to take the stand and both confess guilt and request imposition

of the death penalty." Accordingly, a defendant's announced intention to seek a death verdict does not compel the denial of a motion for self-representation. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365, 1371-1372.)

Additionally, Burgener's contention that his "fatalistic attitude" was based on his misconception of the decision to be made by the trial court at the section 190.4, subdivision (e) proceeding finds no support in the record. He asserts that he misunderstood the trial court's duty to independently review the evidence and determine whether the jury's death verdict was contrary to that evidence or the law, and instead believed the trial court simply had to determine whether there was sufficient evidence to support the verdict. (AOB 25, citing 1 RT 16-17.) First, Burgener's description of the purpose of the hearing was much more thorough than he represents on appeal. When asked what legal issues were to be decided at the section 190.4, subdivision (e) proceeding, Burgener responded, "You're to reweigh the mitigating, aggravating circumstances against each other and determine whether the jury's findings were enough to give me death . . . or whether you should overturn to life without." (1 RT 16-17.) Thus, Burgener did understand the independent review to be undertaken by the trial court. Second, Burgener's "fatalistic attitude" was not based on any misconception of the hearing, but rather based on his opinion that the trial court would not be able to assess witness credibility based upon a cold record and, therefore, he believed the trial court would deny the motion. (1 RT 16-17.) In no way does Burgener's belief that the trial court would deny his motion with or without counsel suggest a rash, impulsive decision. Rather, the record evidences that he had considered his decision and firmly believed that given the limited scope of the section 190.4, subdivision (e) hearing, he could accomplish just as much as any attorney could accomplish on his behalf. (1 RT 17, 20.)

Further, to the extent Burgener now suggests that he made the request for self-representation solely to expedite the proceedings (AOB 24-25), the record again belies his claim. The trial court specifically informed him that it would take some time to rule on the motion regardless of whether he was represented by counsel because the court would have to read all of the penalty phase retrial transcripts. The court wanted the record to be clear that Burgener was not seeking self-representation based on an assumption the court would issue a ruling that day. (1 RT 19.) Burgener stated that he understood, and explained it was not the speed of the proceedings that was driving his decision, but rather his belief that he could perform as well as any attorney could given the limited scope of the motion before the court. (1 RT 20.)

Finally, the defense attorney who had been appointed to represent Burgener remained present in the courtroom during the discussion regarding self-representation. He informed the court that he had had lengthy conversations with Burgener regarding his request, had spoken with appellate attorneys regarding the request, and after having done so, spoke with Burgener again. The attorney was satisfied that Burgener was well-aware of the legal principles involved, the scope of the hearing at hand, and he expressly "acknowledge[d] [Burgener's] constitutional right to represent himself." (1 RT 21.)

Accordingly, the record reveals Burgener articulately, unmistakably, and unequivocally demanded to exercise his right of self-representation (See *People v. Danks, supra,* 32 Cal.4th at p. 295.) As his request was sincere and not the product of whim, emotion, or frustration, the trial court properly granted the motion.

C. Burgener Waived His Right To Counsel Following Thorough Advisement From The Trial Court Regarding The Risks Associated With His Decision

Burgener alleges that his waiver of counsel was not knowing and intelligent in that the trial court did not adequately advise him of the dangers of self-representation. (AOB at 27-31.) While he acknowledges that the trial court did advise him of the pitfalls of self-representation generally, he complains that the trial court did not advise him that "foregoing defense counsel's superior knowledge of the complex rules of procedure at a section 190.4, subdivision (e) hearing, including the necessity of objecting when appropriate, could result in a waiver of any claim of error in this highly technical area of the law." (AOB at 28-29.) Contrary to Burgener's assertion, the trial court had no duty to advise him of the risks of self-representation in the context of this particular hearing. Rather, the trial court fulfilled its obligation to create a record showing Burgener understood the dangers of waiving counsel, and made his choice with eyes open.

In *Burgener IV*, this Court vacated the death judgment on the grounds that while the record indicated that the trial court was aware of its obligation to advise Burgener of the risks associated with self-representation, the record was unclear that the trial court actually advised him of those risks or that Burgener understood them when he waived his right to counsel. (*Burgener IV, supra,* 46 Cal.4th at pp. 241-242.) In so ruling, this Court summarized what is required of a trial court in warning a defendant of the consequences of self-representation:

> A defendant seeking to represent himself 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." [Citation].' (*Faretta, supra*, 422 U.S. at p. 835.) 'No particular form of words is required in admonishing a defendant who seeks to

> waive counsel and elect self-representation.' (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070 [119 Cal. Rptr. 2d 859, 46 P.3d 335].) Rather, 'the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case.' (*Ibid.*; accord, *People v. Lawley* (2002) 27 Cal.4th 102, 140 [115 Cal. Rptr. 2d 614, 38 P.3d 461]; *People v. Marshall* (1997) 15 Cal.4th 1, 24 [61 Cal. Rptr. 2d 84, 931 P.2d 262].)" (*People v. Blair* (2005) 36 Cal.4th 686, 708 [31 Cal. Rptr. 3d 485, 115 P.3d 1145].) Thus, "[a]s long as the record as a whole shows that the defendant understood the dangers of self-representation, no particular form of warning is required." (*People v. Pinholster* (1992) 1 Cal.4th 865, 928–929 [4 Cal. Rptr. 2d 765, 824 P.2d 571]; accord, *U.S. v. Lopez-Osuna* (9th Cir. 2001) 242 F.3d 1191, 1199 ["the focus should be on what the defendant understood, rather than on what the court said or understood"].)

(*Burgener IV, supra,* 46 Cal.4th at p. 241.) For purposes of appellate review, this Court "independently examine[s] the entire record to determine whether the defendant knowingly and intelligently waived the right to counsel." (*Ibid.*, citing *People v. Doolin* (2009) 45 Cal.4th 390, 453.)

In *Burgener IV*, this Court delineated those items missing from the trial court's advisement during the 2006 proceedings:

> On this record, where the trial court not only failed to advise defendant that the district attorney would be both experienced and prepared, that defendant would receive no special consideration or assistance from the court and would be treated like any other attorney, that he would have no right to standby or advisory counsel, or that he would be barred from challenging on appeal the adequacy of his representation, but instead actively encouraged defendant to represent himself, we cannot conclude that defendant's waiver of counsel was knowing and intelligent.

(*Burgener IV, supra,* 46 Cal.4th at p. 243.)

In contrast to the situation presented in *Burgener IV*, here, the trial court's colloquy with Burgener fully satisfied the requirements for a knowing and voluntary waiver of the right to counsel. The judge asked

whether Burgener understood the issues before the court and Burgener responded that he was there for the "automatic motion to modify the penalty from death to life." (1 RT 16.) When asked what legal issues would be decided at the hearing, Burgener responded, "You're to weigh the mitigating, aggravating circumstances against each other and determine whether the jury's findings were enough to give me death . . . or whether you should overturn it to life without." (1 RT 16-17.) The court warned Burgener that he would be opposing one of the most experienced prosecutors in Riverside County; Burgener stated he understood. The court warned it could not give Burgener any advice; Burgener understood. (1 RT 17.) The court warned that it would not provide Burgener with any special treatment simply because he had no attorney; again, Burgener understood. (1 RT 17.) The court informed Burgener that he would not be able to change his mind and request counsel midway through the proceedings. Additionally, the court advised that Burgener would not be able to raise any claim of ineffective assistance of counsel following his conviction. Burgener understood these consequences of self-representation as well. (1 RT 20.) Further, instead of encouraging self-representation the trial court made clear that proceeding with counsel was the better option. The court encouraged Burgener to proceed with the attorney who had been appointed to represent him; Burgener declined. (1 RT 20-21.) Ultimately, the court stated, Burgener had thought through the issue in a careful and rational manner, and although he was making a bad choice, it was a rational one. (1 RT 22.)

The record amply demonstrates that the trial court granted Burgener's request to represent himself based on a knowing and voluntary waiver of the right to counsel with full appreciation of the risks and consequences involved. He had previously been represented by counsel at the initial trial as well as at the penalty phase retrial and at previous section

190.4, subdivision (e) proceedings. He represented himself at the section 190.4, subdivision (e) proceeding prior to the instant one. At the proceeding that is the subject of this appeal, Burgener indicated he understood what self-representation involved, and the trial court made him fully aware of his right to proceed with the attorney that had been appointed to represent him. As noted previously, that attorney affirmed that Burgener understood the nature of the proceedings and was equipped to represent himself at the limited hearing. The trial court did not encourage Burgener to represent himself, and to the contrary, advised him that his choice was unwise. Given that Burgener was all too familiar with the nature of the section 190.4, subdivision (e) proceedings in light of the procedural history of this case, and had experienced those hearings both with representation by counsel and without, the trial court thoroughly advised him of the perils of self-representation. Nothing more was required.

Burgener's central complaint about the trial court's advisement seems to be that the court did not specifically warn him of the risks involved with foregoing experienced defense counsel's knowledge at a "complex" section 190.4, subdivision (e) hearing, including the necessity of objecting to preserve appellate issues. (AOB at 28-30.) There is simply no authority requiring the trial court to advise a defendant seeking self-representation that doing so may waive appellate claims should he fail to object. Contrary to Burgener's contention (AOB 30), this is not part of the trial court's "searching or formal inquiry before permitting an accused to waive his right to counsel . . . ." (*Patterson v. Illinois* (1988) 487 U.S. 285, 299-300.) Conversely, no particular form of warning is necessary (*Burgner IV, supra,* 46 Cal.4th at p. 241; *People v. Koontz, supra,* 27 Cal.4th at p. 1070) and, in fact, a defendant's technical legal knowledge is irrelevant to the inquiry (*People v. Halvorson* (2007) 42 Cal.4th 379, 433). Moreover, there is nothing particular complex about a section 190.4,

subdivision (e) hearing, particularly as compared to defending oneself at trial, and even more particularly in this case given the number of such hearings Burgener had previously experienced. Similarly, the forfeiture rule does not apply uniquely in the context of section 190.4, subdivision (e) proceedings, but rather throughout the entirety of criminal trial proceedings, and yet there is no authority requiring a trial court advise a defendant seeking self-representation of his obligation to object even when he makes the request pretrial. The focus of the *Faretta* warnings is on the defendant's understanding of the importance of counsel and the function counsel can perform on the defendant's behalf, not on the defendant's knowledge of substantive or procedural law. Here, the trial court's warning that it would not provide Burgener any advice and would not "cut him any slack" simply because he had no counsel, along with its warning that Burgener would be opposing a very experienced prosecutor, sufficed to put Burgener on notice of the court's expectation that he would have to follow the rules of law and procedure. (1 RT 17; see *People v. Koontz, supra,* 27 Cal.4th at p. 1072 [court's general warning that defendant would be required to follow the law was sufficient absent specific warning that this requirement applied to motions, objections, evidence, voir dire, and argument].)

The foregoing demonstrates that the trial court carefully admonished Burgener about the dangers of proceeding without counsel, and Burgener made his choice to represent himself with eyes open. (See *Burgener IV, supra,* 26 Cal.4th at p. 241.) Accordingly, Burgener's waiver of the right to counsel was voluntary, knowing, and intelligent.

D. Any Alleged Deficiencies In The Warning Regarding The Dangers of Self-Representation Are Subject to Harmless Error Analysis And Not Reversible *Per Se*

In discussing whether a defective *Faretta* waiver is reversible *per se*, this Court noted in *Burgener IV* that the United States Supreme Court "has stated somewhat cryptically that the right to be presented by counsel, 'as with most constitutional rights, [is] subject to harmless-error analysis . . . unless the deprivation, by its very nature, cannot be harmless. See, e.g., *Gideon v. Wainwright,* 372 U.S. 335 (1963.)'" (*Burgener IV, supra,* 46 Cal.4th at p. 244, quoting *Rushen v. Spain* (1983) 464 U.S. 114, 119, fn.2 [104 S.Ct. 453, 78 L.Ed.2d 267] (*per curiam*).) Courts in this state and across the country remain deeply divided on the issue of whether a defective *Faretta* warning can be subject to harmless error analysis. (*Burgener IV, supra,* 46 Cal.4th at pp. 244-245.) Here, after multiple section 190.4, subdivision (e) proceedings, and Burgener's election to represent himself after obtaining a reversal based on inadequate advisement regarding the pitfalls of self-representation at such a hearing, the facts of this case provide a good illustration as to why errors in administering *Faretta* warnings should be subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [386 U.S. 824; 17 L.Ed.2d 705].) The record in this case permits this Court to determine beyond a reasonable doubt that any alleged error in the trial court's recitation of the dangers and consequences of self-representation did not contribute to the section 190.4, subdivision (e) ruling.

In *Burgener IV*, this Court reversed the death judgment finding that the trial court had not adequately advised Burgener of the pitfalls of self-representation. (*Burgener IV, supra,* 46 Cal.4th at p. 245.) After years in which to reconsider his decision, and with the benefit of the prior reversal, upon remand, Burgerner received a proper and thorough warning and

waived his right to counsel once again. (1 RT 16-22.) In the instant appeal, the only deficiency Burgener complains of in the trial court's advisement was that the court did not inform him that his failure to object at the hearing would forfeit claims of error for appellate purposes. (AOB at 28-29.) He otherwise concedes that the trial court properly advised him, in general, regarding the dangers of self-representation. (AOB 28, 34.) Here, it can be said without any doubt that had Burgener been warned of his obligation to object, it would not have impacted his decision to proceed without counsel. The record makes clear that under any circumstance, and the trial court thoroughly discussed those circumstances, Burgener wished to represent himself. In the midst of discussing the dangers of self-representation, the trial court urged Burgener to accept the assistance of the attorney who had been assigned to his matter; Burgener refused. (1 RT 20-21.) Burgener firmly believed that no defense attorney could do any more than he could representing himself for the limited purpose of the motion to modify the verdict. (1 RT 17, 20.) Moreover, if failing to object to the manner in which the court conducted the 190.4, subdivision (e) proceeding is the principal harm Burgener believes he suffered from the trial court's allegedly deficient *Faretta* warning, then if it is shown beyond a reasonable doubt that even had Burgener objected he would not have achieved a more favorable result at the hearing, then the complained-of deficiency is one susceptible to harmless error analysis and not one that should be automatically reversed. As Argument II demonstrates, Burgener's claim that the trial court improperly declined to consider inadmissible information at the section 190.4, subdivision (e) hearing is meritless, and thus any deficiency in the *Faretta* warning was harmless beyond a reasonable doubt.[1]

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[1] In the same sense, even had Burgener proceeded with counsel,
(continued...)

II. IN DENYING THE AUTOMATIC MOTION TO MODIFY THE DEATH JUDGMENT, THE TRIAL COURT PROPERLY REVIEWED THE PENALTY PHASE RETRIAL EVIDENCE AND WAS NOT REQUIRED TO CONSIDER THE PRIOR FACTUAL FINDINGS OF THE JUDGE WHO RULED ON A PREVIOUS MOTION

Burgener contends that the trial court prejudicially erred in declining to consider the factual findings of the judge who presided over the penalty phase retrial and ruled on a prior section 190.4, subdivision (e) motion. He suggests that since the judge who was actually present at the penalty phase retrial could make credibility determinations of witnesses based upon more than a cold record, the judge ruling on the instant motion should have considered those determinations, and having declined to do so, his ruling on the motion was inaccurate and unreliable. (AOB 35-44.) Burgener further contends that had the current judge considered the prior factual findings, it is reasonably probable that he would have modified the judgment to life without the possibility of parole. (AOB at 44-47.) As a preliminary matter, Burgener has forfeited his contention by failing to object below on the grounds he now raises for the first time on appeal. In any event, the trial judge considered the proper information in rendering his denial of the automatic motion to modify the verdict. Penal Code section 190.4, subdivision (e) requires the court to consider the penalty phase evidence independently, and accordingly there is no requirement that the court consider the prior findings of any judge who ruled on any previous motion.

After the jury at Burgener's penalty phase retrial returned a verdict of death, the trial judge, Judge J. William Mortland, granted the motion to

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(...continued)
based on the court's thorough analysis as discussed in Argument II, it can be said beyond a reasonable doubt that the court would have denied the motion to modify the verdict nonetheless.

modify the verdict pursuant to section 190.4, subdivision (e), and sentenced Burgener to life without the possibility of parole. (*Burgener III, supra,* 29 Cal.4th at pp. 885-886.) The Court of Appeal reversed that ruling however, finding that Judge Mortland had considered improper factors and remanded the matter to the trial court for reconsideration of the motion to modify the verdict. (*Id.* at p. 886.) At the time the Court of Appeal issued its opinion, Judge Mortland had since retired, and accordingly, the matter was reassigned to Judge Ronald R. Heumann. (*Ibid.*) Judge Heumann reviewed the evidence and arguments from the penalty phase retrial and denied Burgener's motion to modify the verdict. (*Ibid.*) This Court reversed that ruling, finding that the record did not indicate that Judge Heumann understood his obligation to independently weigh the penalty phase evidence and independently determine whether that evidence supported the death verdict, as opposed to deferring to the jury's implied findings. (*Id.* at pp. 891-892.)

On remand, Judge Heumann again denied Burgener's motion to modify the verdict. (*Burgener IV, supra,* 46 Cal.4th at p. 234.) This Court reversed again, finding that Judge Heumann had improperly permitted Burgener to represent himself without advising him of the dangers and consequences of doing so. (*Ibid.*) Recognizing that Judge Heumann had passed away prior to the issuance of the opinion, this Court noted that on remand the motion would be heard by another judge of the same court. (*Id.* at p. 245.)

Most recently, the section 190.4, subdivision (e) proceedings were reassigned to Judge Craig G. Riemer. (1 RT 12.) Judge Riemer, in an effort to avoid yet another reversal, prepared a list of written questions as to how to proceed on the automatic motion to modify the verdict, asked the prosecutor to respond to those questions, and offered Burgener the

opportunity to address the prosecutor's response. (1 RT 35-37, 40.) One of the questions Judge Riemer posed was the following:

> In the People's memorandum of points and authorities filed February 8, 1991, the People suggested that this Court is bound in part by the factual findings made by Judge McFarland when he ruled on the application for modification of verdict concerning the original penalty phase verdict.

(CT 59.[2]) The court asked whether that was an accurate interpretation of the prosecutor's position and, if so, whether it remained so and what authority supported it. (CT 60.) An additional question posed by the court asked:

> In conducting its independent review of the strength of the evidence, the Court must evaluate the credibility of the witnesses. Generally, credibility evaluations are left to the finders of fact who have actually heard and seen the witnesses testify. In this case, by contrast, because of the unfortunate procedural circumstances in which we find ourselves, the Court is asked to make that evaluation without hearing or seeing any of the witnesses, but merely from the cold written record of their testimony from over 20 years ago. . . . Does that in any way change or affect the Court's duty to independently evaluate the credibility of the witnesses? If so, in what way?

(CT 61.)

In response to the first question, the prosecutor argued that the trial court was not bound by the factual findings of any judge who had previously ruled on motions to modify the judgment. (CT 69, citing *People v. Crew* (2003) 31 Cal.4th 822, 859 (*Crew*); *Burgener III, supra,* 29 Cal.4th at pp. 888-889.) The prosecutor then clarified that the position taken in 1991 was *refuting* the defense argument that the trial court was bound by the factual findings of Judge Mortland, whose ruling was reversed by the

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[2] Judge McFarland presided over Burgener's original guilt and penalty trial.

Court of Appeal. The prosecution's argument was that if the trial court was bound by Judge Mortland's factual findings, then it was likewise, and more appropriately, bound by Judge McFarland's factual findings. "The point was that if [Burgener's] reasoning held true, then the trial court would not merely be bound by findings of the judge who erroneously granted an application, but also by the judge who erroneously denied an earlier application." (CT 69.) Thus, the prosecutor articulated, that his position remained unchanged as section 190.4, subdivision (e) required the court to review the evidence and not the prior judges' findings. (CT 69.)

As to the second question, the prosecutor responded that this Court's decision in *People v. Lewis* (2004) 33 Cal.4th 214, 226 (*Lewis*), required the court to review the cold record and evaluate the credibility of the witnesses as best as the court could. (CT 71.)

Burgener did not respond to the court's written questions.

A. Burgener Has Forfeited His Claim; The Trial Court Was Not Required To Consider The Factual Findings Of Any Judge Who Had Previously Ruled On The Motion To Modify The Death Judgment

As a preliminary matter, Burgener forfeited his contention that Judge Riemer improperly declined to consider Judge Mortland's factual findings when he failed to raise an objection on these grounds at the time of the most recent section 190.4, subdivision (e) hearing. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1316.) Judge Riemer gave both parties the opportunity to provide input as to whether he should consider those prior findings. (1 RT 35.) While initially Burgener stated he saw no benefit to responding to the prosecutor's brief on the matter (1 RT 37), he subsequently secured an order from the court permitting him to research the issue in custody (1 RT 40). Ultimately, Burgener failed to raise the issue he raises now for the first time on appeal in writing or in open court. Thus, he has forfeited his contention.

Should this Court reach the merits of the contention, there is no authority for Burgener's proposition that the trial court erred by not considering the factual findings of the judge who observed the witnesses at the penalty phase retrial. In fact, the authority dictates the contrary. Section 190.4, subdivision (e), requires that the judge ruling on the motion "shall review the evidence" and "shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." Accordingly, the plain language of the section itself makes evident the lack of an obligation to consider prior findings by a judge or judges who ruled on the previous motions.

The procedural history of *Crew* is strikingly similar to the instant matter. In *Crew*, the judge who presided over the defendant's trial in which the jury returned a verdict of death granted an automatic motion to modify that judgment pursuant to section 190.4, subdivision (e), thus reducing the penalty to life without the possibility of parole. (*People v. Crew, supra,* 31 Cal.4th at p. 858.) The Court of Appeal reversed that ruling and ordered a limited remand for purposes of reconsidering the motion to modify the judgment. (*Ibid.*) The judge who had presided over the trial and issued the ruling was unavailable, and the matter was reassigned to a different judge. (*Ibid.*) The new judge reviewed the transcripts, the Court of Appeal's opinion, and the arguments of counsel; the judge did not consider the previous judge's factual findings. (*Id.* at pp. 858-859.)

Following the trial court's denial of the section 190.4, subdivision (e) motion in *Crew*, this Court found no error in the trial court's decision not to take into consideration the previous judge's findings. (*People v. Crew, supra,* 31 Cal.4th at p. 859.) This Court reasoned that "[s]ection 190.4, subdivision (e) requires the judge ruling on the motion to review *the evidence* and to take into account and be guided by the statutory

aggravating and mitigating evidence," which is precisely what the judge in *Crew* did. (*Ibid.*, emphasis added.)

The matter before this Court is indistinguishable from *Crew*. Here, the trial court's ruling on the section 190.4, subdivision (e) motion states that it considered all of the testimony, exhibits, and arguments presented to the jury at Burgener's penalty phase retrial. (CT 85-86.[3]) The court also considered the written arguments filed by the prosecution in 2009 and the defense in 1991 related to the motion. (CT 86.) The court thoroughly and accurately discussed the question it was to answer in the proceeding (CT 86-88), and summarized:

> In short, the Court's job when confronted with a 190.4(e) application is to independently determine the credibility and probative value of the evidence, but not to independently decide what the penalty should be. Instead, the Court decides only whether the evidence, weighed in accordance with the Court's own evaluation of its strength, supports the jury's verdict as to the penalty. If so, the application to modify the verdict must be denied, even if equally credible evidence also supports a different conclusion favored by the Court.

(CT 87.) The court's ruling also specifically stated that it declined to consider the factual findings previously made by Judges McFarland and Mortland because doing so would interfere with the court's duty to independently review the evidence. Additionally, the court observed that Judge McFarland's findings in support of his ruling had been implicitly vacated when the original penalty phase was reversed, and Judge Mortland's findings in support of his ruling were implicitly reversed by the Court of Appeal. (CT 88.) Ultimately, after reviewing all of the statutory aggravating and mitigating evidence (CT 88-92), the trial court found "that

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[3] While the court's ruling is labeled as a tentative ruling (CT 85), the court adopted the tentative ruling as its final one. (1 RT 44.)

the jury's verdict of death and the jury's implicit finding that the aggravating circumstances outweigh the mitigating circumstances, is supported by the law and the evidence presented at the retrial of the penalty phase," and accordingly denied the motion to modify the verdict. (CT 92.)

Burgener concedes that Judge Riemer was not bound by the factual findings made by Judge Mortland, but argues that it was error not at least to consider those findings. (AOB 40.) Burgener's true complaint is with this Court's refusal to find that only the trial judge who presided over a penalty phase is constitutionally entitled to rehear a motion pursuant to section 190.4, subdivision (e), and in the event that judge becomes unavailable for any reason, then the defendant is entitled to have his death sentence reduced to a sentence of life without possibility of parole. (See AOB 43.) Recognizing that this Court has rejected such a rule, Burgener tries to reach the windfall inherent in the rule that this Court has rejected by urging, at a minimum, where the judge who presided over the penalty phase is no longer available, this Court should require the judge hearing the section 190.4 subdivision (e) motion to consider the previous judge's factual findings and credibility determinations. (AOB 43.)

The lengthy procedural history of this case already has afforded this Court the opportunity to consider and reject a similar contention raised in *Burgener III.* There, Burgener complained that when Judge Heumann was assigned the motion to modify the death verdict, he failed to give weight to Judge Mortland's declaration stating that even following reversal by the Court of Appeal, he maintained the motion should be granted and the sentence modified to life without the possibility of parole. (*Burgener III, supra,* 29 Cal.4th at p. 888.) Judge Heumann stated that the declaration had no bearing as to the propriety of the jury's verdict, and this Court ruled that was correct:

> The task of a judge under section 190.4, subdivision (e) is to review the evidence and, guided by the aggravating and mitigating circumstances set forth in section 190.3, make a determination whether the jury's decision that the aggravating circumstances outweigh the mitigating circumstances is contrary to law or the evidence presented. The evidence presented, of course, refers to "the evidence presented to the jury." (*People v. Lewis* (1990) 50 Cal.3d 262, 287 [266 Cal. Rptr. 834, 786 P.2d 892] [improper to consider probation report]; *People v. Lang* (1989) 49 Cal.3d 991, 1044 [264 Cal. Rptr. 386, 782 P.2d 627] ["the trial court is prohibited by statute from considering, when ruling on the modification motion, any evidence not presented to the jury during the trial"]; *People v. Burgener, supra*, 223 Cal. App. 3d at p. 435, fn. 3.)

(*Id.* at pp. 888-889.) This analysis applies equally to any factual findings made by any judge who previously ruled on Burgener's section 190.4, subdivision (e) motion.

The statutory language and this Court's prior decisions make clear that a section 190.4, subdivision (e) proceeding "is limited to review of the evidence that was before the jury . . . ." (*People v. Lewis* (2004) 33 Cal.4th 214, 224, citing *People v. Sakarias* (2000) 22 Cal.4th 596, 648; *People v. Beeler* (1995) 9 Cal.4th 953, 1005-1006; *People v. Brown* (1993) 6 Cal.4th 322, 336; *People v. Edwards* (1991) 54 Cal.3d 787, 847.) A prior judge's factual findings are not evidence that was before the jury. "Judge Mortland's *views* as to defendant's character or the circumstances of the offense, gleaned solely from the penalty retrial, are not themselves *evidence* bearing on those points." (*Burgener III, supra,* 29 Cal.4th at p. 889, original emphasis.) Moreover, while Burgener argues that there is no good reason to deprive the most recent judge of the factual findings of a judge who was present at the penalty phase, a good reason is readily apparent: the most recent judge must be able to fulfill the requirements of section 190.4, subdivision (e) of making an independent determination as to whether the jury's penalty findings are contrary to the law or evidence unencumbered

by the influence of a former judge. Requiring a trial judge ruling on a section 190.4, subdivision (e) application to consider the findings of a previous judge would require this Court to ignore the directive of the code section requiring an "independent" determination by the new judge. As this Court stated with regard to the proceedings before Judge Heumann:

> The judge hearing the application for modification was still obligated to reweigh the evidence and make an *independent* determination whether the weight of the evidence supported the verdict of death. [Citation.] In making that ruling, Judge Huemman was not bound to adopt Judge Mortland's views on subsidiary issues, whether expressed at the initial hearing or through a declaration following his retirement. [Citation.]

(*Burgener III, supra,* 29 Cal.4th 833, original emphasis.) Burgener makes no effort to explain why this Court's analysis rejecting his previous complaint that the trial court should have considered information other than evidence before the jury does not equally apply to his current, virtually identical complaint.

Additionally, while Burgener disagrees with the prosecutor's position that if Judge Riemer were to consider the factual findings of Judge Mortland, then he would also be required to consider the conflicting findings of Judge McFarland, his argument is inconsistent with the very position he advances. (AOB at 43.) If section 190.4, subdivision (e) provides an additional safeguard against the arbitrary and capricious imposition of the death penalty, then it would be illogical to not consider the factual findings of the judge who presided over the original guilt phase to the extent that he observed the same witnesses and testimony as the judge who presided over the penalty phase retrial. Burgener's primary complaint seems to be that Judge Mortland had observed the testimony of witnesses Nola England and Joseph DeYoung who were important witnesses in the prosecution's guilt presentation; he asserts this credibility determination is imperative to his penalty retrial defense of lingering

doubt.[4] (AOB 46-47.) Judge Mortland found both witnesses to be less than credible. But as the prosecutor noted in the 1991 points and authorities referenced by Judge Riemer's written questions, the judge who had the best opportunity to make a credibility determination regarding England and DeYoung was Judge McFarland who observed them testify at length during the guilt phase, and not Judge Mortland who only observed limited testimony at the penalty phase retrial when they were called as defense witnesses in an attempt to impeach their own prior testimony. (1 CT 42 (1991).[5]) Accordingly, under Burgener's own reasoning, to the extent Judge Riemer was able to avail himself of findings of two judges who observed these witnesses at different phases of his capital trial, the accuracy of the determination was likely to be all the more enhanced by considering the findings of two judges who observed the same witnesses, and not simply the judge who ruled most favorably for him. (See AOB at 43-44.)

Additionally, this Court rejected the defendant's argument in *Lewis* that where the judge who presided over the penalty phase trial was no longer available to hear a section 190.4, subdivision (e) motion upon remand, he should be permitted to present live testimony such that the new judge would be able to make credibility determinations on more than a cold record. (*People v. Lewis, supra,* 33 Cal.4th at pp. 224, 225.) This Court rejected that notion, stating "re-representation of evidence is not the evidence presented." (*Id.* at p. 224, internal quotation marks omitted.) This Court simultaneously acknowledged, however, that in rendering a ruling on

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[4] This Court thoroughly detailed the lingering doubt evidence offered by the defense at the penalty phase retrial in *Burgener III, supra,* 29 Cal.4th at pp. 848-851.

[5] As Burgener notes (AOB at 38, fn.7), these points and authorities are part of the record in *Burgener III, supra,* 29 Cal.4th 833. The pleading was filed by the prosecution on February 8, 1991. (1991 1CT 38-43.)

the motion to modify the death verdict, judges are necessarily called upon to assess the credibility of witnesses. (*Id.* at p. 225, citing *People v. Rodriguez* (1986) 42 Cal.3d 730, 793.) In recognizing that where the original judge is replaced for purposes of a modification hearing the new judge would be limited to the penalty phase record in making these assessments, this Court noted that there was no reason why a trial court could not consider the trial transcript and make the independent determination required by section 190.4, subdivision (e). (*People v. Lewis, supra,* 33 Cal.4th at pp. 224-226.) The purpose of a motion to modify the death verdict is quite limited. "[T]he trial court's obligation was not to substitute its view as to penalty in place of the jury's verdict, but to reweigh the evidence and make an independent determination whether the weight of the evidence supports that verdict." (*People v. Sheldon* (1994) 7 Cal.4th 1136, 1142-1143.) This obligation can be accomplished by doing precisely what Judge Riemer did here — independently reviewing the transcripts, evidence, and arguments without the influence of another judge's factual findings.

Further, this Court rejected in *Lewis* a similar contention raised by *Burgener* that by not considering the prior judge's factual findings, he was deprived of a reliable penalty determination in violation of the Eighth Amendment. (AOB at 40-41.) This Court held, "when the original trial judge is unavailable, necessity requires the replacement judge to evaluate the credibility of the witnesses as best he or she can from the written record. We find no constitutional obligation to provide more." (*People v. Lewis, supra,* 33 Cal.4th at p. 226.)

Thus, the thorough, independent review of the penalty phase evidence by Judge Riemer afforded Burgener the additional safeguard provided by a section 190.4, subdivision (e) motion, ensured that the jury's death verdict was supported by the law and the evidence, and protected

against the arbitrary and capricious imposition of the death sentence. As the trial court was neither bound by, nor required to consider, anything other than the evidence before the jury — and the prior factual determinations of other judges were not before the jury — its denial of the automatic motion to modify the death verdict was proper.

B. There Is No Reasonable Probability That Had Judge Riemer Considered Judge Mortland's Prior Factual Findings He Would Have Granted The Motion To Modify The Death Verdict

At the outset, while Burgener contends that it was prejudicial error for Judge Riemer to decline to consider Judge Mortland's previous factual findings, his discussion of the applicable harmless error standard evidences the absence of error in the first instance. This Court has previously applied a harmless error analysis in situations where the trial court improperly considered *evidence not presented to the jury* at a section 190.4, subdivision (e) hearing. In doing so, this Court has asked whether there is a reasonable probability that consideration of improper information affected the trial court's ruling on the motion. (*People v. Whitt* (1990) 51 Cal.3d 620, 661 [no reasonable probability that the trial court's improper consideration of a probation report affected its section 190.4 decision]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1202 [same].) Judge Mortland's findings, like a probation report, were not evidence presented to the jury, and thus it cannot be said that there was any error, much less prejudicial error, in Judge Riemer's decision not to consider those factual findings.

In any event, it cannot be said that had Judge Riemer considered the previous findings, there is a reasonable probability he would have modified the death verdict. Here, Judge Riemer in a written ruling clearly and correctly set forth his duty under section 190.4, subdivision (e) to independently review the penalty phase retrial evidence and to determine

whether the jury's verdict, indicating that the aggravating circumstances outweighed the mitigating circumstances, was contrary to the law or evidence presented. (1 CT 86-88.) Judge Riemer proceeded to address the statutory aggravating and mitigating factors based on his review of the record. As to the circumstances of the crime (Pen. Code, § 190.3, subd. (a)), the court found the murder in the course of the robbery "utterly unjustified" and unnecessary to accomplish the robbery. (1 CT 88-89.) As to Burgener's prior history of criminal acts involving force or violence (Pen. Code, § 190.3, subd. (a)), the court found Burgener's history to be violent and lengthy, including a prior attempted murder in the course of a robbery in 1977 and numerous acts of violence in prison between 1973 and 1975, including assaults and stabbings of correctional officers. The court found credible, however, evidence in mitigation showing that in his more recent custodial commitments, Burgener had not been violent, but rather had been a "calming influence on younger, more violent inmates." (1 CT 89.) As to Burgener's prior felony convictions, the court noted that he had two prior convictions for which he was sentenced to prison, and re-offended both times within months of his release. (1 CT 89.)

As to whether Burgener was under extreme mental or emotional disturbance at the time he committed the murder (Pen. Code, § 190.3, subd. (d)), the court found credible psychiatric evidence that Burgener had untreated mental health issues, but further found that the evidence did not demonstrate those issues rose to the level of extreme mental or emotional problems. The court found no evidence to suggest that the victim in any way participated in the homicidal act (Pen. Code, § 190.3, subd. (e)), that Burgener committed the murder under the belief that it was justified in some manner, or that Burgener acted under extreme duress (Pen. Code, § 190.3, subd. (g)). (1 CT 90.) As to whether Burgener's capacity to appreciate the criminality of his conduct was impaired by mental disease,

defect, or intoxication (Pen. Code, § 190.3, subd. (h)), the court found that although the evidence demonstrated he had taken Valium several hours before the murder, there was no evidence that Burgener's mental capacity was impaired by any substance. (1 CT 90-91.) However, the court found credible evidence that the defendant's psychological condition was a "significant cause" of his crimes, and that he committed the instant crime to punish himself. The court believed that credible evidence supported the conclusion that his psychological condition may have impacted Burgener's capacity to conform his conduct to the law, and thus found this factor to be "somewhat mitigating." (1 CT 91.)

The court considered Burgener's age not to be a mitigating factor (Pen. Code, § 190.3, subd. (i)). Additionally, the court found the only credible evidence supported that Burgener was the sole perpetrator of the murder and he was not merely an accomplice (Pen. Code, § 190.3, subd. (j)). (1 CT 91.) Finally, the court noted as to Penal Code section 190.3, subdivision (k):

> There is no evidence, credible or not, that establishes, or even suggests, the existence of any extenuating circumstances that tend to partially justify or excuse the crime, or that could have been reasonably believed to justify or excuse the crime. Therefore, this factor does not mitigate against a death sentence.

(1 CT 91.)

The trial court expressly considered non-statutory factors as well, and found credible the mitigating evidence that Burgener had a traumatic childhood in a dysfunctional family, but found incredible that he had had a religious conversion in the months immediately preceding the murder. In particular, the court considered the defense penalty phase retrial presentation of lingering doubt evidence:

> Much of the emphasis by the defense during the penalty phase retrial was on evidence that was offered to suggest the

> possibility that the defendant was not guilty of the crime. In particular, the defense presented evidence (1) that the significance of a positive reaction to a hemastix test of the defendant's shoes during the guilt phase was greatly overstated, (2) that Nola England was not a credible witness, and (3) that Joseph DeYoung had the motive and opportunity to, and did in fact frame the defendant for the crime.
>
> While the court agrees with the first two contentions, it does not agree that the weight of the evidence supports the third. To the contrary, the evidence of guilt, although circumstantial, is compelling. While there is a possibility that the defendant was framed, it is not a realistic possibility. The Court does not find that any doubt in the defendant's guilt is strong enough to mitigate against the death penalty.

(1 CT 92.)

The foregoing shows that Judge Riemer satisfied the statutory requirements in this case and provided thorough reasoning in support of his denial of the motion to modify the verdict. After carefully reviewing each of the applicable factors and considering the evidence relevant to each factor, Judge Riemer concluded the circumstances in aggravation outweighed those in mitigation and determined that the jury's death verdict was not contrary to the law or evidence. Even had Judge Riemer considered the prior factual findings of Judge Mortland, there is no probability Judge Riemer would have modified the verdict.

Burgener argues that it is this issue of lingering doubt upon which the factual findings of Judge Mortland would have had the greatest impact, particularly Judge Mortland's opinion that both witnesses England and DeYoung were of suspect credibility (*People v. Burgener, supra,* 223 Cal.App.3d 427, 432). (AOB at 46-47.) With regard to England, Judge Riemer reached the same conclusion as Judge Mortland, finding she was not a credible witness. (CT 92.) Therefore, even had Judge Riemer considered Judge Mortland's finding as to England, the decision would

remain the same. With regard to DeYoung, although the judges reached different conclusions, Burgener has provided no support, nor could he possibly, that had Judge Riemer considered Judge Mortland's opinion as to his credibility, Judge Riemer would have modified the penalty to life without the possibility of parole. From a cold record, a judge is amply equipped to evaluate the entirety of the evidence and assess whether there is a lingering doubt as to guilt. More importantly, it does not matter whether any judge personally would have entertained a lingering doubt as to guilt. Rather the question section 190.4, subdivision (e) asks is whether the lingering doubt evidence combined with the other mitigation evidence was such that the law and evidence did not support the jury's finding that the factors in aggravation outweighed those in mitigation. That is precisely the analysis that Judge Riemer employed here. He was not persuaded that Burgener had been "framed" for the murder, and he was persuaded after independently weighing all of the evidence at the penalty phase retrial, that the jury's finding was supported by the law and the evidence. (1 CT 92.) Thus, even had he considered Judge Mortland's prior factual finding as to De Young, Judge Riemer obviously disagreed with it, and accordingly, there is no reasonable probability he would have granted the section 190.4, subdivision (e) motion.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: July 17, 2012

Respectfully submitted,

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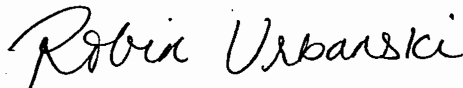

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 11,920 words.

Dated: July 17, 2012

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Attorney General of California

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Michael Ray Burgener**
Case No.: **S179181**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 17, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 17, 2012, at San Diego, California.

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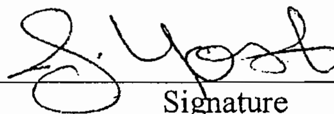
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