SUPREME COURT COPY

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In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VALDAMIR FRED MORELOS, Defendant and Appellant.	CAPITAL CASE Case No. S051968

SUPREME COURT
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Santa Clara County Superior Court Case No. 169362
The Honorable Daniel Creed, Judge

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STATEMENT OF THE CASE

On December 16, 1993, following three days of preliminary hearing at which appellant Valdamir Fred Morelos was represented by counsel, the court held him to answer to a charge of murder with a firearm in the commission of robbery, sodomy and oral copulation, and involving torture. (1 CT 3; 2 CT 336-342.)

On December 27, 1993, an information was filed in Santa Clara County Superior Court charging appellant with the murder of Kurt Anderson. (Pen. Code, § 187.[1]) It was further alleged that appellant used a handgun (§§12022.5(a), 1203.06), and that three special circumstances applied: (1) murder in the commission or attempted commission of robbery (§190.2. subd. (a)(17)(A)); (2) murder in the commission or attempted commission of specified sexual acts (sodomy and oral copulation) (§ 190.2(a)(7)(D),(F)); and, (3) intentional murder that involved the infliction of torture (§ 190.2, subd. (a)(18)). (2 CT 351-353.) Prior convictions for robbery and burglary were also alleged for enhancement purposes. (2 CT 353-354.)

On July 19, 1995, appellant filed a petition to proceed in propria persona, relying on *Faretta v. California* (1975) 422 U.S. 806. (2 CT 403-409.) A hearing on the motion was conducted that day. Following an extensive colloquy, the court found appellant competent to represent himself and well aware of the risks of representing himself in a capital prosecution. The court determined that appellant was freely and voluntarily relinquishing his right to an attorney. (2 CT 416; RT [07/19/1995] at pp. 3-14.) The court ordered the Public Defender to transfer "all appropriate files" to appellant. The court also ordered the Department of Corrections to

[1] References to sections are to the California Penal Code unless otherwise specified.

allow appellant to keep two boxes of legal materials and writing supplies in his cell. (2 CT 415-417; RT [07/19/1995] at pp. 14-15; see also, RT [07/21/1995] at pp. 15-21.) Appellant waived a jury for the guilt and penalty phases, although the waiver was not immediately accepted. (2 CT 424-425, 427.)

A first amended information was filed on September 6, 1995, alleging the murder, firearms use, and special circumstances as detailed above. (2 CT 443-444.) It was further alleged that appellant had previously been convicted of robbery, in violation of sections 211/212.5, subd. (a), and of an assault with a deadly weapon (a knife) and by means of force likely to produce great bodily injury in violation of section 245, subd. (a), with a finding of great bodily injury pursuant to section 12022.7. Both offenses were brought and tried separately within the meaning of sections 667(a) and 1192.7. The assault with a deadly weapon is a violent felony as specified in section 667.5(c), a for which appellant served a separate prison term, within the meaning of section 667.5(a). It was also alleged that appellant had been convicted of burglary of an inhabited dwelling, in violation of sections 459/460.1, for which he served a separate prison term, and upon release did not remain free of custody for five years, within the meaning of section 667.5(b). (2 CT 445-446, 449.)

Appellant waived arraignment, entered a plea of not guilty, and denied all further allegations. (2 CT 355.)

On December 8, 1995, appellant filed an application for appointment of advisory counsel. (3 CT 479-481.) He withdrew the application on December 20, 1995. (3 CT 528; see RT [12/20/1995] at pp. 1-7.)

Appellant's court trial commenced on January 3, 1996. (3 CT 528-530.) He waived the right to make an opening statement. (3 CT 528.) The prosecution rested its case on January 9, 1996. (3 CT 537.) Appellant made a motion to dismiss the second special circumstance, per section

1118, which was denied. (3 CT 537.) Appellant testified, then rested his case. There was no rebuttal. (3 CT 537.) The evidence of appellant's prior convictions was presented to the court. The court found appellant guilty of murder, and found true the firearm use enhancement, the three special circumstances, and the prior conviction allegations. (3 CT 537-538.)

On January 10, 1996, the penalty phase of appellant's trial began. (3 CT 552-553.) Appellant again waived his right to be represented by an attorney and to have a jury hear the penalty phase. (2 RT 329.) The prosecution presented its penalty phase witnesses, with little or no cross-examination by appellant. The prosecution rested. (3 CT 567; 2 RT 329-454.) Appellant called one witness (2 RT 454-456), and then took the stand himself. (3 CT 467-568; 2 RT 463-471.) After extensive cross-examination by the prosecution, appellant rested his case. (2 RT 472-517.) The prosecution presented no rebuttal. (2 RT 517.)

On January 19, 1996, after hearing argument from the prosecution (2 RT 521-532), the court asked appellant if he had anything he wanted to say. Appellant requested "an immediate transfer after a speedy sentence, please." (2 RT 532.) After reiterating its findings on the guilt phase, the trial court made the following ruling:

> This is an unusual case because the defendant has wished to plead guilty since the proceedings began and has wanted to admit the special circumstances. Defendant stated he believes the appropriate penalty is death.
>
> We have gone through a court trial which the court would characterize as a slow plea.
>
> Court was kind of troubled by the procedure, but the court will note at this time the court sought guidance from the California Supreme Court in <u>*People versus Bloom*</u> that can be found at 48 Cal.3d 1994.
>
> Mr. Morelos has offered no defense to the charges. He has offered no mitigation in the penalty phase of trial. In fact, the

defendant has exercised his constitutional right to testify and has taken the stand and under oath admitted his crimes, admitted the enhancement, the special circumstances, and has given testimony to justify the finding for the court to impose the death penalty.

(2 RT 532-533; italics added.)

After analyzing the enumerated factors to decide the appropriate punishment for the record, the court found that, based on the totality of the evidence, facts presented and witness testimony, the appropriate penalty was death. (2 RT 533-540.)

This appeal is automatic.

STATEMENT OF FACTS

INTRODUCTION

Appellant Valdamir Fred Morelos found Kurt Anderson in a gay bar on Stockton Avenue in San Jose, California, on October 17, 1992. Appellant believed that Anderson owed him $40, because appellant had fronted him some methamphetamine. Appellant lured Anderson out of the bar, then pulled a gun on him and forced him to drive to appellant's hotel room in Anderson's Jeep. Appellant bound Anderson with his hands behind him. He took Anderson's watch and wallet. He kept his guns at hand. Appellant committed both forcible sodomy and forcible oral copulation while his victim was bound with his hands behind him and pleading to be released.

Appellant washed Anderson in the shower, dried him off, and made him lie on the bed while appellant napped beside him. Appellant tortured Anderson to obtain his personal identification number (PIN). Appellant wrapped a ligature tightly around Anderson's testicles, ran a knife over his face and body, pricked him with a knife, and threatened him to be sure he got the correct PIN. Leaving Anderson hogtied and gagged, with his feet bound to his neck and his neck and testicles connected to a ceiling fan so he

would hang if he struggled and fell off the bed, appellant used Anderson's ATM card to access his bank accounts. The PIN was correct, but appellant was unable to obtain any cash, because the accounts were nearly empty. Angry, he returned to the hotel and tortured the young man further, beating and slapping him and using the ligature around his genitals to "pay him back" for not having any funds in his account. There was extensive bruising to the victim's genital area, indicating a very painful experience.

It was always part of the plan to kill Anderson to make sure he would not be around to testify against appellant, who was on parole. Appellant showed the victim his guns as soon as they got to the hotel. From that moment on, appellant knew Anderson was going to die, although he described, as part of the torture, alternately giving the victim false hope of surviving, then dashing it. Appellant took Anderson to a remote location on Mount Hamilton and shot him in the head, delivering a "coup de grace" contact shot, when the first shot did not immediately prove fatal. He hid the body in the underbrush and drove off in the victim's Jeep.

A roommate who saw appellant painting the Jeep black with a spray can, who knew about appellant's guns, and to whom appellant matter-of-factly confessed both the Anderson murder and other violent crimes recently committed in Oregon, reported the license plate number of the disguised Jeep and appellant's confession to police. City of Santa Clara Police, appellant's parole officer, and a SWAT special response unit apprehended appellant when he drove up to the roommate's house in the Jeep. When apprehended, appellant was reaching toward a blue gym bag containing a loaded .45-caliber semiautomatic handgun. Appellant waived his *Miranda* rights confessed his crimes to police, provided details only the killer would know, and led police to Anderson's body. The details follow.

EVIDENCE PRESENTED AT THE GUILT PHASE

A. Appellant Drifts In and Out of the Bay Area, Adding Names to his List

In July of 1991, Nicholas Picklesimer met appellant at a gay bar called Renegades in San Jose. During that summer they occasionally encountered each other at Renegades and their acquaintance developed into a friendship. (1 RT 23-26.) Picklesimer thought appellant was interesting and was particularly intrigued by his "colorful lifestyle." Their relationship was purely plutonic and was never a "physical" one. (1 RT 27-28.) In December, appellant moved into the three-bedroom home that Picklesimer was renting on Calabazas Boulevard in Santa Clara. Appellant moved in with Harold Terry, a man appellant had begun dating that fall. The three men split the rent and utilities. (1 RT 28-29.)

In May of 1992, after some arguments had "built up" between appellant and Terry, appellant forced Terry to move out. (1 RT 29.) Sometime early that year appellant had lost his job. (1 RT 29-30.) When appellant and Terry moved in they brought bedroom furnishings that were later the cause of a fight between appellant and Terry. They had a dispute over the ownership, which resulted in the police being called. It was Picklesimer's impression that the bedroom furniture was mostly Terry's. However, appellant and the furnishings remained at Picklesimer's residence. (1 RT 30.) Terry was now on appellant's "list." (2 RT 273-274.)

One of the odd jobs appellant had was transporting auction pieces. (1 RT 34.) Appellant told Picklesimer about a Gargoyle-adorned antique clock. Although Picklesimer never saw the antique clock, he knew that appellant had a dispute over the ownership of it with Jaime Cota that eventually resulted in the police being called and appellant being arrested. (1 RT 34-35.) Picklesimer knew that appellant was mad at Cota. He

recalled that Cota once briefly stopped by to visit appellant. It was around that time that appellant told Picklesimer he wanted to kill Cota because appellant had been arrested during the clock dispute. (1 RT 36-37.) Although Picklesimer bailed out appellant, he never knew if any charges were filed against appellant and never got the bail money back. (1 RT 37.) Cota was now on the list. (2 RT 273-274.)

In July of 1992, appellant told Picklesimer that he had made a decision about his life. By this time appellant had been unemployed for several months and owed Pickelsimer $1800 for back rent and his share of the utilities. Picklesimer let appellant "slide" on what he owed because Picklesimer knew appellant was getting odd jobs now and again. (1 RT 30.) When appellant said he had made a decision about his life, Picklesimer wondered what appellant's decision was but decided not to pry any further. Based on his knowledge of appellant's violent past, he was not sure he wanted to know. (1 RT 31-32.)

In August, appellant packed up his belongings and told Picklesimer that he was going to live with his mother in Oregon. (1 RT 32-33.) At the time, appellant owned a light-blue mid-1980's Ford Fairlane, but it had a transmission leak. Picklesimer fixed the automobile so appellant could drive to his mother's home in Oregon, but the automobile broke down again on the drive. (1 RT 33.) Appellant called Picklesimer a few times while he was in Oregon. During one of the calls appellant mentioned how impressed he was that he could openly carry a gun in Oregon. (1 RT 37.) After that, Picklesimer did not hear anything from appellant until October. (1 RT 34.)

On Saturday, October 17, 1992, Picklesimer received a call from appellant asking to be picked up from the Arena Hotel on The Alameda in San Jose. Appellant was staying in room 319. (1 RT 38-40.) They went out to some of the gay bars around the Stockton Avenue area of San Jose,

including the Renegades Bar where Picklesimer and appellant initially met. (1 RT 39-40.) They talked to a few people while having some drinks, but didn't run into anyone in particular that they knew. While at Tinker's Damn, appellant met a friend named "Mario," a person whom Picklesimer did not know. (1 RT 40-41.) Picklesimer was not sure if he took appellant back to his hotel room or left him at Renegades Bar that night, since it was such a short walk from there to the Arena Hotel. They had made plans to meet the next day to go to an airshow at Moffett Field. Appellant said he would call Picklesimer when he was ready to be picked up. (1 RT 41.)

On Sunday morning, October 18, 1992, appellant called Picklesimer and said he had a friend he wanted to bring along to the air show. But when Picklesimer arrived at the Arena Hotel to pick appellant up, the friend was no longer there. Appellant and Picklesimer attended the air show and stayed until around 3:00 or 4:00 p.m. (1 RT 42.) When they returned to Picklesimer's house on Calabazas, Picklesimer called a friend and they all went to a movie together at the Town Theater. After the movie, the trio went for dinner at an Italian restaurant called Vesuvius on El Camino Real in Santa Clara. (1 RT 43-44.) After dinner, Picklesimer dropped appellant off around 10:00 or 11:00 pm. (1 RT 44.)

B. Kurt Anderson is Reported Missing

In October 1992, Kurt Anderson and James Hehnke had known each other for 18 months and had been living together in a monogamous relationship for about a year. (1 RT 106-107.) They shared an apartment on East Santa Clara Street in Santa Clara. (1 RT 107.) At that time Hehnke owned a Nutmeg brown 1985 Jeep CJ-7, which both men drove. (1 RT 107-108.) On October 18, 1992, Anderson left the house about 3:00 p.m., because Hehnke was working on some drawings for work and Anderson was distracting him. (1 RT 112.) Anderson left to run some errands and Hehnke did not think anything of it. (1 RT 112.) Anderson had his own set

of keys to the Jeep. (1 RT 112-113.) Anderson had never mentioned appellant's name and Hehnke had never seen appellant around San Jose. (1 RT 114.) Hehnke completed his work by 7:30 p.m. and by 10:00 p.m., when he had not heard from Anderson, he became worried and decided to call Renegades to see if Anderson had been there that evening. Hehnke spoke with the bartender, David, who said that Anderson had just left. (1 RT 117.) Hehnke thought that Anderson might have stopped by another bar in the area on the way home, Gregg's Ballroom. When Hehnke called Gregg's Ballroom and asked if Anderson was there, he was told that Anderson had not been seen in the bar that evening. (1 RT 118.)

After calling around to bars without any success, Hehnke called a couple of friends to see if they had seen Anderson. Some mentioned they had seen him earlier. (1 RT 123.)

Hehnke decided to go to bed. He woke up the next day, Monday, and went to work. He kept calling people he thought might have seen Anderson or taken him home with them if Anderson felt he was too intoxicated to drive himself home. (1 RT 123.) By 3:00 in morning on Tuesday, October 20, Hehnke still had no idea of Anderson's whereabouts. Hehnke called the authorities in Santa Clara to report his Jeep as stolen and Anderson as a missing person. (1 RT 123-124.) Later that day, while at work, Hehnke received a call from Sergeant Zaragoza of the Santa Clara Police Department who told him the case relating to his report had been transferred to Sergeant Sterner at the San Jose Police Department. (1 RT 124.) When Hehnke called and learned that Sergeant Sterner was working for the Homicide Unit, Hehnke knew that Anderson must be dead. (1 RT 124.)

Hehnke and Anderson had discussed sado-masochistic sexual experiences (S&M), and Anderson had said he would want to be in control. (1 RT 119.) Hehnke described how, at the time, he and Anderson were

using a quarter of a gram of methamphetamine about two to three times a month. (1 RT 120-121.) They shared a couple of lines of methamphetamine that Saturday night and had stayed up to about 3:00 a.m. (1 RT 121-122.) Hehnke did not use any methamphetamine on Sunday and, as far as he knew, neither had Anderson. (1 RT 122.)

When Hehnke last saw Anderson, he was wearing a pair of blue jeans, brown work boots, a white T-shirt and a sheep-skin lined jeans jacket with a Mickey Mouse cap. (1 RT 125.) Hehnke identified a picture of his Jeep, Anderson's keys to the Jeep and the apartment, a diamond ring he had given Anderson on his birthday, a nipple ring, a Halston watch, a Security Pacific Bank ATM card in Anderson's name, and a wallet. (1 RT 107-117.)

C. Appellant Described the Murder to His Sister on Monday Morning

On Monday morning, October 19, 1992, appellant visited his sister Michelle Salas at her home in San Jose. Salas was living with her four children ages 4-5 months, 1 year, 10 and 12 years, and their father. (1 RT 175.) Salas was surprised to see appellant because the two were fighting and she had not seen her brother since before he left for Oregon. (1 RT 176, 183-184.) At the time, Salas was on a home monitoring system as a condition of her probation. (1 RT 176.) Appellant told Salas about the murder he had just committed. Salas became worried because she was a probationer and her brother was talking about murder. (1 RT 176-177.) Appellant had told her about the murder in such a "matter-of-fact" manner, that Salas did not believe him at first, until her son went to give appellant a hug and said that appellant had "lots of guns on him." Salas told appellant he had to leave her home because she was expecting a visit from her probation officer that day. (1 RT 177-178.) Salas advised her brother to leave the area. (1 RT 178.)

Appellant showed Salas one of the handguns he had and told her how he had killed somebody. She asked appellant if he needed any money and he replied that he had money and the victim's Jeep. (1 RT 179.) Appellant told Salas he shot the victim because he was mad at the parole department for putting him in jail for something he did not do. "[H]e [appellant] had a lot of anger in him." (1 RT 179.) Salas recalled that, before appellant left for Oregon, he threatened to kill someone over a clock because he was put in jail for four days and lost his job. (1 RT 180.) Appellant told his sister that he shot the victim in the head and left the body in the hills where they would not find it. (1 RT 180.) Appellant told Salas, in detail, how he had tied the victim up deliberately around his genitals and neck to a ceiling fan. "[T]he guy was making fun of him." (1 RT 185.) As appellant was about to leave, Salas went out front and saw the Jeep he was driving. Later that afternoon, appellant told her how he had just spray-painted the Jeep. (1 RT 181-182.) When appellant returned to her place that afternoon, Salas tried anew to convince her brother to leave the area. (1 RT 185-186.) Appellant told his sister that he wanted a shootout with the cops, "He said we'll all go down together. He wasn't going to live through it." (1 RT 186.)

D. Appellant's Confessions to His Roommate and the Police

On Monday, October 19, 1992, Picklesimer was at work in Menlo Park when he got a call from appellant. Appellant said that he was running out of money to stay at the hotel and asked Picklesimer if could stay at his house for awhile. Since appellant still had a key to his house, Picklesimer told appellant he could stay. (1 RT 46.) When Picklesimer got home that evening at around 6:00 p.m., he saw appellant in the driveway painting a red-colored Jeep black. Appellant told Picklesimer that he was painting the Jeep black to disguise it. (1 RT 47.) Picklesimer did not ask appellant how

he got the Jeep, he just assumed appellant was painting the Jeep because it was stolen. (1 RT 48.) Appellant mentioned going to a junk yard off the Monterey Highway to obtain a license plate. (1 RT 60.) While Picklesimer was preparing his dinner, appellant began to tell him about his picking up a young man at one of the bars on Stockton Street the night before. (1 RT 48-49). Picklesimer testified he did not learn the name of the victim until the next day. Appellant referred to the victim as "the kid". (1 RT 74). Appellant described how they went back to his motel room and had sex. Appellant went into detail about how he tied "the kid" up to the ceiling fan and turned the radio on so "the kid" would not hear him leave the room. Appellant then closed the door loudly so that "the kid" would think that he had left. Appellant waited awhile and then went over to "the kid" and pricked him with a knife to let him know he was still there. (1 RT 49.)

Appellant stole the kid's ATM card and tried to get money out, but got very little. (1 RT 50.) Appellant went back to the hotel and was nice to the kid by asking if he was comfortable or if the ropes were too tight. Appellant said he untied the kid from the ceiling, but kept his hands tied behind his back as he took the kid out to the Jeep in the parking lot and drove him up to the hills. (1 RT 50-51.) Picklesimer asked appellant where in the hills he took the young man, but appellant would not say. Appellant told Picklesimer he did not want to get him involved. (1 RT 51-52.) Appellant told Picklesimer how, when they got up into the hills, the kid was crying and pleading for his life. Appellant said he shot the kid in the head and the young man fell to the ground. When he saw the young man was still alive, appellant shot him again. (1 RT 52.) Appellant said he covered the body with leaves and brush and left. Appellant then explained that he had to return to the scene of the murder because he had dropped two ammunition clips. (1 RT 53.)

This conversation occurred in the dining room, but then appellant took Picklesimer into his bedroom and showed him a .45-caliber semi-automatic pistol, a .357-caliber revolver and a smaller revolver. Appellant indicated he used the .45 to kill the victim. (1 RT 53-54.) Appellant also showed Picklesimer a green t-shirt which he said he used to tie the victims hands. This was obtained from a blue gym bag in the room. (1 RT 54.) Picklesimer saw two Security Pacific Bank cards on the couch. Appellant said he would not let Picklesimer see the name on them because he did not want to get him involved. (1 RT 54-55.)

While Picklesimer was eating dinner at the kitchen table, appellant showed Picklesimer the young man's Halston watch. (1 RT 55.) Appellant said he did not feel any remorse for killing the kid. (1 RT 55.) When Picklesimer went to bed around 10:00 or 11:00 p.m. that night, he was nervous because of appellant's matter-of-fact recounting of how he murdered someone. (1 RT 55-56.) In addition to the Anderson murder, appellant told Picklesimer about other violent incidents he committed while in Oregon. This scared Pickelsimer, but not as much as the murder appellant told him he had recently committed. (1 RT 56.) Picklesimer knew that he could not live with knowledge of a murder being committed and would have to turn in appellant. (1 RT 56.)

The next morning, October 20, 1992, Picklesimer was preparing to leave for work when he saw appellant doing his laundry in the garage. (1 RT 56-57.) The Jeep was still in the driveway, so Picklesimer memorized the license plate number. (1 RT 57.) While discussing the murders he committed, appellant told Picklesimer that, even if he had gotten all the money he wanted, he still would have killed the kid. (1 RT 57.) When Picklesimer mentioned to appellant that he did not have to kill the young man and could have just kept him tied up to the tree, appellant said it was

part of a plan. Appellant explained how he would have been caught if he did not kill the kid to cover up his crimes. (1 RT 58.)

Appellant explained that he was not done, that he had some unfinished business because he intended to murder Jaime Cota as well. (1 RT 60.) Appellant said that killing the kid was the most expedient thing to do. (1 RT 58-59.) As appellant described the murder he was calm and matter of fact. (1 RT 59.) When Picklesimer arrived at work he called the Menlo Park Police Department. (1 RT 59.) An officer came to his work and Picklesimer described how appellant had spray-painted black the stolen Jeep he was driving. (1 RT 59-60.) Picklesimer told the Menlo Park police officer how, as he was leaving for work that morning, he saw appellant with a .45-caliber automatic and two clips in his waistband. (1 RT 60-61.) Picklesimer was later told that the case was within the Santa Clara Police Department's jurisdiction. (1 RT 61.)

On October 20, 1992, at 9:50 a.m., Picklesimer meet with Sergeant Zaragoza of the Santa Clara Police Department. (1 RT 61, 151-152.) Pickelsimer told Sergeant Zaragoza what appellant had said about the murder he admitted committing. (1 RT 152.) After getting appellant's name from Picklesimer, Sergeant Zaragoza determined that appellant was currently on parole and contacted his parole agent, Mr. Beltran. (1 RT 152-153.) Parole Agent Beltran notified Sergeant Zaragoza that appellant was a "parolee-at-large" who had a warrant out for not reporting and should be taken into custody upon sight. (1 RT 153.) Sergeant Zaragoza got the license plate number of the Jeep from Picklesimer, located the name of the registered owner of the vehicle, and gave that information to the San Jose Police Department so they could be make a visit to the address of the registered owner. (1 RT 153-154.) San Jose Police identified the stolen Jeep as being associated with a missing person, Kurt Anderson. (1 RT 154.) In addition to learning from Picklesimer that appellant was armed, Sergeant

Zaragoza was advised by Parole Agent Beltran that extreme caution should be used in apprehending appellant due to his violent history. Sergeant Zaragoza requested activation of the SWAT Team because it was "a very unique arrest situation." (1 RT 154-155.)

That morning, between 10:00 and 11:00 a.m., with Picklesimer lying down in the back seat of an unmarked vehicle, Sergeant Zaragoza and another officer drove down Calabazas Boulevard to see if the stolen Jeep was still there. (1 RT 61, 1 RT 155-156.) Since he did not see the Jeep present, Sergeant Zaragoza posted an officer across the street from Picklesimer's house to observe the front of residence in case the Jeep returned. (1 RT 156.) Sergeant Zaragoza then asked all the officers involved in apprehending appellant to meet at the corner of El Camino and Calabazas. He stayed in radio contact with the Lieutenant in charge of the Patrol Division. (1 RT 156-157.) At approximately 12:30 p.m., the officer observing the front of Picklesimer's house broadcast over the police radio that the suspect had just arrived in a black Jeep. (1 RT 157.) Sergeant Zaragoza went to a location about a block and a half from the house and waited for SWAT. (1 RT 157.) Once they had arrived, he briefed them on the situation and gave them an outline of the residence, suggesting the best approach to apprehend appellant. (1 RT 157-158.) From his location, Sergeant Zaragoza was able to observe the SWAT unit arrest appellant. (1 RT 158-159.) While he did not see appellant reach for the blue nylon duffel bag located at the left rear fender of the Jeep at the time, Sergeant Zaragoza was eventually told about that bag by appellant when they arrived back at his office. (1 RT 159.)

Sergeant Henry supervised the Special Response Unit (SRU), part of the SWAT that apprehended appellant. (1 RT 170.) He had been notified that appellant was armed and dangerous. In a canal across from the house at 2147 Calabazas, a member of the SRU observed appellant adding more

spray paint to the Jeep in the driveway. A "diversionary device" was tossed under a boat trailer to distract appellant as members of the SRU converged on appellant to arrest him. (1 RT 170-172.) Appellant was standing at the right rear end of the Jeep. Sergeant Henry and the SRU team approached appellant with their weapons drawn and ordered him to freeze. Appellant started to make a move. At first the officers thought appellant was heading toward the residence, but members of the SRU were blocking his way. After appellant was apprehended they realized that appellant was actually moving toward a blue gym back at the left rear end of the Jeep. (1 RT 172-173.) The bag contained a loaded AMT Brand .45-caliber semiautomatic hand gun with a full magazine. (1 RT 210-211.)

Santa Clara Police Officer Thomas Martini was on patrol that morning and was initially called to block streets in the proximity of the Calabazas house. (1 RT 141-142.) When he arrived at the scene of appellant's arrest, Officer Martini was instructed to transport appellant to the Santa Clara Police Department, where he conducted a search of appellant. (1 RT 143-144.) While searching appellant's upper-left pocket, Officer Martini found a Security Pacific Ready Banking Card with Kurt Anderson's name on it. (1 RT 144.) Officer Martini also found a black wallet, a handkerchief and miscellaneous change. He did not recall taking any keys from appellant. (1 RT 144-145.) The items Officer Martini collected were given to Sergeant Derek Edwards of the San Jose Police Department. (1 RT 146.)

While Office Martini was in the booking area with appellant, another officer stepped into the room and asked if he had seen the gun. The officer asked Officer Martini to step outside where he described a gun that Officer Martini had not seen. (1 RT 146-147.) From appellant's position in the booking area it was possible for him to overhear their conversation. (1 RT 147.) When Officer Martini reentered the booking area, appellant said it

was "A nice gun, .45." (1 RT 147.) During the booking process appellant also asked about a .357. (1 RT 150.) While appellant was in the booking cell he asked Officer Martini what he was being arrested for. Officer Martini said, as far as he knew, it was for a parole violation. Appellant questioned whether it was for something as simple as a parole violation, given the fact that he was arrested by the SRU Team of SWAT. He said it had to be for a "187". (1 RT 148.) Appellant then asked for the "Mexican" detective, and soon Sergeant Zaragoza walked into the room. (1 RT 148-149.) Officer Martini heard appellant tell Sergeant Zaragoza that for "certain considerations" he would talk to him about the murder of Anderson and several other murders he committed in Oregon. (1 RT 149.) When appellant said he could take them to Anderson's body, he was taken to an interview room. (1 RT 149-150.)

At the beginning of his interview, Sergeant Zaragoza told appellant that he wanted to interview him about being an ex-convict with a gun, a parole violation. Quoting appellant, Sergeant Zaragoza testified that appellant's response was that he was going to talk about, "[E]verything to include a gang-land style 187." (1 RT 160.) Sergeant Zaragoza said that they would talk about anything and everything appellant wanted to talk about, as well as what he had to discuss with appellant about this case. Appellant told Zaragoza, "I'll deal with you in any way I can. I'll tell you about a 187 that I did yesterday and I'll also give you two more that occurred in Oregon,...." (1 RT 160-161.) Zaragoza told appellant he wanted to learn about how he came into possession of the Jeep. But before Zaragoza could pose any questions, appellant "spontaneously replied, the Jeep belong to the guy he had, ..., 'been with Sunday night. In fact I had the guy's ATM in my pocket....'" (1 RT 161.)

Sergeant Sterner from the San Jose Homicide Unit and Zaragoza discussed the best approach to interviewing appellant. Zaragoza felt he had

established a "rapport" with appellant and felt that appellant would be willing to continue to talk with him. (1 RT 161-162.) After signing a form waiving his *Miranda* rights, appellant agreed to be interviewed. The interview was videotaped. (1 RT 162-163.) Learning from appellant that Anderson's remains were still on Mount Hamilton, Zaragoza went to locate and recover the body. (1 RT 165.) Zaragoza followed in his car as appellant was driven to the location by Sergeant Sterner and his partner. (1 RT 165.) As appellant was being placed in a police car to be transported to the crime scene, he asked Zaragoza if he know what was wrong with society. "This society is so f**ked up. Here I killed a guy in cold blood, shot him in the head, tied him up and shot him, and you know what's going to happen when they convict me? .... [¶] They're not even going to give me the death penalty. Now that's f**ked." (1 RT 167.) When Zaragoza said that he agreed with appellant and that some people should be put on Death Row, appellant replied, "Yeah, Man, I'm one of those people. But you know what? That's not going to happen." (1 RT 168.)

At approximately 5:15 p.m., the body of Kurt Anderson was discovered near Alum Rock Avenue and Mount Hamilton Road. The body was 100 to 150 feet off the road and partially covered with dried leaves. (1 RT 168.) After leading detectives to Anderson's body, appellant was driven to the San Jose Police Department Homicide Unit where he was interviewed by Sergeant Sterner. (1 RT 168.) Sergeant Zaragoza turned over the audio and videotapes from his interview with appellant to Sergeant Sterner and gave the ATM card with Anderson's name on it to other San Jose Police Department detectives. Appellant's personal effects went with him to the Santa Clara County Jail. (1 RT 168-169.)

Sergeant Sterner's partner, Sergeant Edwards, was initially contacted by the Menlo Park Police Department about an individual (Picklesimer) who was reporting a possible homicide. They did not have a name for the

victim, but they did have the license plate number of a vehicle which was mentioned in the missing person report for Anderson. (1 RT 190-191.) Sergeant Sterner was told by Menlo Park Police how they advised Picklesimer to contact the Santa Clara Police Department since appellant had told him about the homicide and stolen vehicle at Picklesimer's home, which was under their jurisdiction. (1 RT 191-192.) Sterner learned from Sergeant Zaragosa that Picklesimer's residence was under surveillance. He was relayed information during the morning as the surveillance team waited for appellant to arrive. Sterner was about a block away from the residence when appellant retuned in the stolen Jeep and was apprehended. (1 RT 192.) Sterner and Edwards later responded to the area of Mount Hamilton Road, east of Alum Rock Avenue, where Anderson's body was recovered. (1 RT 193, 195.) Appellant had lead them to the exact spot where he had killed Anderson. (1 RT 195.) Anderson's body was in a prone position, face down with his head facing uphill and the body was partially covered with branches, leaves and debris, just as appellant had described it. (1 RT 198.)

Sterner was also present when appellant's personal property was booked and secured by Edwards. (1 RT 193-194.) The items included Anderson's Security Pacific ATM card. (1 RT 194.)

An evidence technical crew was sent to both the area where Anderson's body was recovered and Picklesimer's home to collect evidence. (1 RT 196-197.) San Jose Police Officer Steve Gracie was one of the evidence technicians who conducted the search. (1 RT 204-205.) At Picklesimer's Calabazas home, Gracie found a zippered blue nylon bag at the rear fender of the painted Jeep on the driver's side that was open about an inch or two. (1 RT 206-207.) In the bag was a loaded AMT Brand, .45-caliber semiautomatic with a full magazine inserted in it. (1 RT 210-211.) Ammunition was in the chamber and the gun was in the half-

cocked position with the safety off, allowing the gun to be fired by just pulling the hammer back. (1 RT 212-213.) The two fully loaded magazines in the blue bag had been rubber-banded together. (1 RT 213.) Inside the home, on the dining room table, Gracie found the watch that appellant had taken from Anderson and offered to Picklesimer. (1 RT 214-215.) In the garage Officer Gracie found freshly laundered clothing on top of the washer. The laundry included a pair of size 11 Reebok tennis shoes and an extra-large shirt that appeared to be recently washed. (1 RT 216-217, 220-221.) On the back wall of the garage was the convertible top to the Jeep. The floor of the garage showed overspray from gray and red spray painting. (1 RT 217.) Parts of the Jeep were taped off to keep paint from over spraying. There were cans of spray paint in and outside the Jeep. The seats were red in color and felt tacky to the touch like they had not quite dried. (1 RT 217-218.) Inside a waste basket in the hall bathroom was a pair of white socks, a pair of size 11 Nike tennis shoes, and cut-off shirt sleeves, which were collected for blood and fluid analysis. (1 RT 219-220.) An eel-skin wallet was also collected from the wastebasket. (1 RT 220.)

The police found two loaded firearms in holsters in appellant's bedroom. A fully-loaded .38-caliber Smith & Wesson revolver was found in a black nylon bag along with 34 rounds of .38-caliber ammunition inside a plastic baggie that had red spray paint on it. (1 RT 222-224.) Also found in the bedroom was a receipt dated October 19, 1992, from Orchard Supply Hardware (OSH) showing the purchase of paint primer and silver cloth duct tape at 11:18 am. (1 RT 224-225, 227.) Along with the receipt was a handwritten return voucher imprinted with the date October 19, 1992 and time of 12:46. (1 RT 227.) A three-and-a-half-inch folding knife was found inside the couch in the bedroom. (1 RT 228.) A blue nylon bag was found in the bedroom closet which contained a holster that could fit the .45-

caliber firearm found in the Jeep. (1 RT 228-229.) Inside a brown suitcase in the bedroom were four condoms and toiletries. (1 RT 229-230.) The bag had a baggage label with appellant's mother's address and telephone number, along with maps of San Jose, San Francisco and Sacramento Valley. (1 RT 230-231.) A 50-round box of .45-caliber ammunition with 10 rounds missing was also found in the suitcase. (1 RT 231-232.) There was also a plastic container with .38-caliber ammunition. (1 RT 232.) In a garbage can outside the residence police found a receipt from the Arena Hotel for room number 319-A, for the dates of October 17th and 18th with appellant's name, and an indication the room bill was paid in cash. (1 RT 233-234.) Also found in the garbage can was an ammunition box that was empty except for the plastic holder for the rounds marked to indicate purchase in Oregon. (1 RT 234-235.) Police found a receipt in the garbage can from OSH dated October 19, 1992 at 12:47 pm. The items shown on the receipt are OSH Spray Primer and Spray Enamel. (1 RT 235.) Also collected from the garbage can were two key rings attached together with a total of five keys. (1 RT 235.) Correspondence addressed to appellant was found in the mailbox. (1 RT 236.)

After leaving the residence on Calabazas and securing the evidence recovered, Office Gracie went to the Mount Hamilton Road area, arriving just around dusk. (1 RT 237.) Anderson's body was on a hillside covered with leaves and grass debris. (1 RT 241.) One .45-caliber casing was located a few feet from the victim's head. (1 RT 242.) Another .45-caliber cartridge casing was found nearby. (1 RT 243-244.) When personnel from the Coroner's Office arrived, Anderson's body was rolled over allowing a view of the front of his body. His shirt was not arranged normally. His arms were not through the sleeves. The sleeves were pulled down over his shoulders with his hands tied behind his back. (1 RT 244-245.) Anderson was not wearing any underwear or socks. (1 RT 250.) Gracie left Mount

Hamilton and conducted a search of the room appellant stayed in at the Arena Hotel. (1 RT 246.) No significant evidence was found in the room because it had been cleaned. But there were two lamp shades on the ceiling fan which had been tilted out of place. (1 RT 247.)

No slugs were found during the autopsy of Anderson's body, so a return trip to Mount Hamilton was made to recover them. (1 RT 101, 238.) Using a metal detector, the evidence team was able to find slug in a pool of blood that had been left by Anderson's head wound. (1 RT 245.) The parties stipulated that a comparison was made by the People's expert between a .45-caliber bullet and cartridge casings fired from the pistol (People's Exhibit 6) recovered from the back of the Jeep after appellant's arrest and the cartridge casings found near Anderson's body and the bullet slug that was later recovered from the pool of blood near his head. (1 RT 248-249.) The comparison conclusively identified the casings as having been fired from the same weapon, People's Exhibit 6. (1 RT 249.) The weight, diameter and design of the bullet slug was consistent with a .45-caliber Winchester Black Talon bullet and the rifling was consistent with being fired from People's Exhibit 6. (1 RT 249.)

E. The Forensic Evidence Supports Appellant's Confession

On October 21, 1992, an autopsy was conducted on Kurt Anderson's body. The coroner removed a black t-shirt from the decedent that said "Folsom Street Fair, the whole nine yards, San Francisco, September 20, 1992," a pair of blues jeans with no belt and a pair of light-brown, ankle-high boots. (1 RT 79-80.) The t-shirt had blood on it and the jacket was covered in blood. The decedent was not wearing any underwear or socks. When the coroner first observed Anderson's body, his arms were not through the sleeves of the t-shirt. Andersons hands were tied in front of his body on top of his stomach with beige-colored material wrapped around his

wrists several times, inhibiting his ability to separate his hands and his ability to defend himself. (1 RT 80-81.) Anderson was 5-feet, 6-inches and weighed 130 pounds (appellant by contrast was 6-feet, 1-inch and weighed approximately 205 pounds). Anderson's estimated age was 28 years old. (1 RT 81.) The degree of rigor mortis allowed the coroner to crudely estimate that death occurred within 12 hours. But cold weather could have prolonged the process. (1 RT 81-82.) By the time the autopsy was conducted rigor mortis had already begun to disappear. (1 RT 82-83.) Livor mortis was found on the right side of the face, right upper and lower limbs and on the right anterior lateral area of the chest and abdominal wall, as well as the medial aspect, or inner extremity of the lower left limb. (1 RT 83.) This implies that Anderson was left on his right side to die, due to the pooling and fixation of blood in those parts of the body. This fixation of lividity usually takes around 12 hours to occur. (1 RT 83-84.)

The whites of Anderson's eyes were congested. There was discoloration in the right eye due to a black eye and the left eye was depressed. (1 RT 84.) Anderson had a ring attached to his left nipple. There was some insect activity on the surfaces with larvae mostly on the clothing. (1 RT 84-85.) Anderson's wrists were tied snugly in front of his chest with a brownish cloth that was wound around each wrist and knotted, with a final knot on the back of his right wrist. (1 RT 85.) There were also some superficial cuts on Anderson's body. One on the left breast and one on the back of the left elbow. The cut on the left part of Anderson's chest could have been caused by a sharp instrument, like a knife blade. (1 RT 85-86.) The coroner opined the postmortem redness in the previous cut and a second superficial wound that was also brownish, was probably due to postmortem abrasion. (1 RT 86-87.) There were bruise marks over the external genitalia, and bruising that was barely visible on the other side of the right thigh. (1 RT 87-88.) On the shaft of Anderson's penis, on the

scrotum and part of the glans there was linear bruising. On the penis there was circular bruising. On the right side of the shaft and scrotum a line extends from the base of the penis from the pubic area to the outer surface of the scrotum that looked like bruising which occurred prior to death. (1 RT 88-89.) The abrasions on Anderson's genitals imply that the skin surface had been eroded and damaged, the bruising was beneath the skin and not correlated with the abrasions. (1 RT 89.) The medical examiner opined that pressure from a ligature wound around the genitals is what probably caused the bruising, although he had no formal opinion since the degree of bruising would depend on the pressure being applied. Whatever caused the bruising would have been painful for Anderson. (1 RT 89-90.) While the medical examiner did not want to give an opinion based on what he imagined may have caused the bruising, he could say the type of bruising seen could be due to a moderate amount of pressure being applied to the area. But he had no idea if the bruising seen on the external genitalia was caused by some external pressure. (1 RT 90-91.) Both anal and oral swabs were taken of Anderson's mouth and anus. The medical examiner found no injuries to either, but noted that homosexuals tend to have relaxation of the sphincter, so that trauma does not always result from forcible anal intercourse. (1 RT 91-93.) A lubricant may have been used during intercourse. (1 RT 93.)

The medical examiner found extensive wounds to Anderson's cranial area. There was an entrance wound in the back of the left ear which appeared to be inflicted by a high caliber projectile similar to .45-caliber bullet. (1 RT 93-94.) While there was some abrasion around this entrance wound, there was no stippling or deposit of gun powder. (1 RT 94.) The exit wound was located at the right temple. (1 RT 95.) There was "massive destruction" due to the bullet passing through Anderson's cranium. The medical examiner confirmed this shot alone would have

caused death. (1 RT 95-96.) There was a second gunshot to the head, with the projectile trajectory entering and exciting Anderson's skull. (1 RT 96.) The second entrance wound had a heavy deposit of soot and powder around it, implying that the barrel of the gun was a fraction of an inch away from the skin. The powder had no chance of burning entirely before depositing on the skin surface. (1 RT 97.) "[Y]ou might refer to [the second shot] as coup de grace, ..." (1 RT 98.) The exit wound went through the left cheek, just below the temple. (1 RT 98-99.) Fractured bones from the base of the skull caused extensive bleeding around the ears and hemorrhaging behind the eyes, causing discoloration and displacement of the eyes. (1 RT 99.) Either wound would have caused death, not necessarily instantly, but Anderson would have been unconscious. (1 RT 99-100.) Anderson would not have felt anything during the 10-20 minutes before he died due to brain swelling which caused him to stop breathing. (1 RT 100-101.) No projectiles were recovered from the cranial cavity. (1 RT 101.) Due to the bullet injury Anderson sustained to his head, blood gathered in the lungs and trachea making them heavier, causing aspiration of blood into the airways. (1 RT 102.) Anderson had a blood alcohol level of 0.3 and was under the influence of methamphetamine at the time of his death. No other drugs were found in his body. (1 RT 103.) The cause of Anderson's death was multiple gunshot wounds to his head. (1 RT 104.)

F. Appellant's Testimony Provides Additional Details

Advised of his right not to testify, appellant took the stand and asked the trial court if he could be questioned by the prosecution. (2 RT 268-269.) The trial court explained to appellant that the prosecution could only cross-examine him. The trial court then asked the prosecution if it waived the question and answer format. The prosecutor stated he did, then added, "I'd like to state for the record that [appellant] discussed with me yesterday whether he wanted to testify. I indicated it was up to him to testify. I can't

advise him of it. But if he did testify, there are certain areas I would like to cover concerning the torture aspects of the case with him and various factors about the crime itself I would ask him questions about. But his testifying is up to him…." (2 RT 269.) Appellant affirmed that it was his decision to testify. (2 RT 269.) The trial court then explained to appellant that the prosecution could only cross-examine him on areas covered in his direct testimony. The trial court told appellant that if he wanted give a narrative of his crime that would be fine. (1 RT 269.) Appellant began his narrative by filling in the gaps he perceived to remain after the others had testified:

> [APPELLANT]: Well, one point that I don't think was thoroughly discussed was the torture of Mr. Anderson.
>
> It was stated that I put ligatures on Mr. Anderson around his neck and around his scrotum, and the reason for doing this was stated that, that I was to keep the victim from escape (sic).
>
> Another reason for this was to, was to inflict a certain amount of fear and was done out of anger. I wasn't able to receive any funds from his ATM machine, from his car, so in order to pay him back, so to speak, I inflicted great bodily pain, and I wanted to make sure I hurt him and that he knew I was very serious.
>
> And taking Mr. Anderson up to Mount Hamilton, I did have the intent to kill him. I told him otherwise. I took him up and had him [sic] told that I was going to release him inasmuch as leaving him, abandoning him up there although tied. And I wanted him to know before I executed him that I was going to execute him. And I perceived that as an act of torture that this victim would know shortly before, shortly before his death that he was going to die.
>
> And another point that I think needed to be addressed was sexual assaults. I stated in a confession to detectives that the victim [consented] to having sex with me, and in a sense that was the case, but it really wasn't true. I had him bound and he did ask me many times to let him go, and I wouldn't do it. I already was conceiving in my mind many different ways of disposing of him.

> And I essentially raped him and while his hands were bound and without his consent.
>
> Also struggling with him to tie him, I was really upset, and I used extreme force, …, excessive force, twisting his arm, punching him, choking him, things of that nature, to subdue him or take the fight out of him.
>
> Then to pacify him so he wouldn't scream - - I figured if he screamed, I would have to either stab him to death or choke him to death. I didn't want to shoot him because I didn't want to bring attention to myself, because I still had other pressing matters."

(2 RT 269-271.)

The trial court asked appellant if his testimony was that, while at the Arena Hotel, he sexually assaulted Anderson against Anderson's will. Appellant replied he had. (2 RT 271.) The trial court then asked appellant if he had anything else say on direct:

> [APPELLANT]: My intent with this victim was to get monies owed to me, and transportation and whatever other things I could possibly attain to help me achieve …, my other goals."

(2 RT 271.)

When asked by the trial court what his intent was when he took Anderson from Renegades to the Arena Hotel, appellant replied, "[b]oth rob and kill [Anderson]." "As I showed him my guns, he was going to die." (2 RT 271.)

Appellant also responded to questions on cross-examination:

> [PROSECUTOR]: You indicated that Mr. Anderson asked you many times to let [him] go, correct?
>
> [APPELLANT]: Let him go, yes.
>
> [PROSECUTOR]: Did he try to persuade you in some way and if so, how?
>
> [APPELLANT]: His only means of persuasion would have been through talk, being he was bound, hog-tied and most of the time

gagged, part of the time blindfolded. He tried using emotional tactics with me about his family and he's doing good at work, ..., he's got this life, ..., things are going good, ..., he'll make things right, ..., things of that nature.

[PROSECUTION]: What effect did that have on you?

[APPELLANT]: None.

[PROSECUTION]: Why not?

[APPELLANT]: Because he was going to die.

(2 RT 272-273)

Appellant agreed with the characterization that from the time he first saw Anderson he was thinking about getting money and transportation from him, and had thought of doing the same to the DJ he saw at Tinker's Dam. (2 RT 273.) Appellant explained his intent was to obtain money so he could commit the murders he had returned to California to commit, those of Jaime Cota and Harold Terry. (2 RT 273-274.) When asked why he wanted to kill Terry, appellant replied: "At this point, ..., I don't really remember now. It's been like three years. But I still have the desire in me. If I was set free to [sic] kill him. But I don't know why." When asked why he wanted to kill Cota, appellant replied: "Jaime Cota is another story. I didn't really want to kill Jaime Cota. What I wanted to do with him was a little more sinister. Maybe, I was thinking death was a little too good for him." Asked what he wanted to do with Cota, appellant answered: "I wanted to let him live, but I wanted to do something where he would be maybe crippled with -- beyond repair." (2 RT 273-274.) Appellant then went into more graphic detail concerning the pain he desired to inflict on Cota. (2 RT 274.)

During cross-examination appellant explained that from the time Picklesimer dropped him off at Renegades the day before the murder, his intent was to obtain the money and transportation he needed to commit the

murders of the two men on his list. Appellant was armed with two handguns: a .45 in the front of his pants and a .38 in the back, but while at the movies with Picklesimer and his friend, he had them in a small blue bag. (2 RT 275-276.) Asked why he was carrying weapons at the air show, appellant stated, "[i]n case I was questioned by police and pulled over by police, or anything like that." (2 RT 276.) Asked what he was going to do if he were pulled over, appellant replied, "I'd have another murder under my belt." (2 RT 276.) Appellant agreed he meant he would shoot it out with the police. (2 RT 276.) Appellant stated that he was not concerned about having a firearm while being on parole, even though he knew it was illegal for him to have weapons in his possession. (2 RT 276.)

After Picklesimer dropped appellant back at the Arena Hotel after the air show and movie, appellant showered and put on clothing he did not mind getting blood on, in case there was a struggle and he had to stab someone. (2 RT 276-277.) Appellant's intention when he left the Arena Hotel that evening was to find somebody to rob. Although he was not necessarily planning to bring his victim back to his hotel room to rob them, "but to take them somewhere and kill them after I received money and transportation, and if the opportunity presented itself, have sex." (2 RT 277.) He wanted to kill his victim to prevent being caught. (2 RT 277.) That's why the night before at Renegades he did not try to grab the person he showed his gun to because there were witnesses around and his ride was there. Appellant explained, "[m]y whole objective was not to do anything to get caught. My objective was to keep on committing murders until I finished, you know, my list." (2 RT 278.)

Appellant explained how he was able to lure Anderson through a private walkway behind Renegades by telling him he wanted to show him something. When he had Anderson in an enclosed area, he brandished his guns and told Anderson, "Let's go." (2 RT 278.) Anderson, "sobered up a

little, and he was, I guess he was pacifying me, letting me have my way because he probably knew if he didn't he'd get blown away right then." (2 RT 279.) As they left the bar appellant instructed Anderson not to look left or right, but to go straight ahead and Anderson complied. When Anderson began leading appellant to three of four different places looking for his vehicle, appellant thought Anderson was looking for an opportunity to escape. Appellant grabbed Anderson because he thought Anderson was playing around about not knowing exactly where his vehicle was. (2 RT 279-280.) Appellant intended to get as much money out of Anderson as he could, even though Anderson didn't owe him more than $40. (2 RT 280.) By the time Anderson finally led appellant to the his car appellant had his .38 out of its holster, unbuckled and concealed because, "I was thinking this guy was bullshitting me again, and I wasn't sure at that time what to do until I think he seen my, my state of mind, and he took me directly to his Jeep." (2 RT 280.) Appellant had Anderson drive with Anderson knowing that he had his weapon out and could use it "instantaneously." (2 RT 281.) Anderson was scared and may have been begging and pleading with appellant, but that did not matter to appellant. As long as Anderson was not yelling, he could "[c]ry all he wants." (2 RT 281.) Appellant did not recall having feelings of exhilaration, but he may have been excited and "turned on" by the fact Anderson was under his power. Appellant stated, "I think I was more anxious to get his money and kill him and proceed to my other victims." (2 RT 281-282.)

When they arrived at the Arena Hotel appellant directed Anderson to park in the back, took his keys and had a gun at Anderson's back as they walked to the room appellant was renting. (2 RT 282-283.) Once in the room, appellant pulled out all the weapons he had on him. He placed them on a table and instructed Anderson to disrobe. (2 RT 283.) Appellant searched Anderson's wallet after Anderson was tied and his hands were

secure behind him. Appellant found some crank in the wallet. Appellant gagged Anderson with one of the hotel towels and started using the crank he had gotten from Anderson's wallet. (2 RT 283-284.) Asked how he felt once he had Anderson tied up and gagged, appellant stated he felt "a little more comfortable" because "he was under my control completely." (2 RT 284.) Appellant did not put the gag all the way through Anderson's mouth because he was testing Anderson to see what he was going to do and, in appellant's mind, he was taunting Anderson. (2 RT 285.) Appellant stated, "I was upset I had to kill him in order to get the money he owed me." (2 RT 285-286.) And, while appellant did not have to search out Anderson, "he owed me money and I wanted the money and I had to go look for my money instead of having him bring it to me." (2 RT 286.)

After he had Anderson tied up, "I questioned him, thoroughly questioned him. I beat him up a little bit and tortured him a little bit to let him know that I'm serious." (2 RT 286.) He wanted Anderson to know he was in control and wanted Anderson's ATM pin number, "and I wanted him to realize that if he gives me the wrong number that it's going to go very bad with him." (2 RT 286.)

"I ran a knife along his throat and along his mouth and his eye lids, sensitive areas, around his testicles. I ran a knife across his chest and I dug in a little bit slightly on his chest and I pricked him with the knife. I didn't want to get blood going through the mattress, because it was under my name and I didn't want the police to become suspicious or anything until I was through with my murders." (2 RT 286-287.)

Appellant looked through Anderson's wallet for receipts and bank cards. He checked the receipts and saw that a deposit of $1300 had been made the past Friday. (2 RT 287.) When appellant got the pin number from Anderson, his first thought was that since Anderson "did the trick" about looking for the Jeep in different areas, appellant did not want

Anderson misleading him again, and wanted to make sure he had the correct pin number. Appellant thought Anderson was trying to get him out of the room so he could escape. (2 RT 288.) Appellant turned on the radio and told Anderson, who was "only gagged and hog-tied at the time" that he was leaving. (2 RT 288.) But he did not leave. Instead he sexually assaulted Anderson:

> [PROSECUTOR]: So the sexual activity was sodomy, penetrated his anus correct?
>
> [APPELLANT]: Yes.
>
> [PROSECUTION]: And oral copulation?
>
> [APPELLANT]: Yes.
>
> [PROSECUTION]: You on him?
>
> [APPELLANT]: Both. I made him oral copulate me and I might have even had my knife drawn. I believe I would have. I'm very sure I had a knife drawn maybe even up against him somewhere, you know, some part of his face or something, in case he tried to assault me.

(2 RT 289.)

The sexual assault on Anderson lasted approximately 45 minutes. (2 RT 290.) Anderson was speaking to him during the sexual assault in hopes appellant would let him go, "[A]nd I told him to shut up." (2 RT 290.) Appellant kept Anderson's hands tied behind his back during the sexual assault. (2 RT 291.) Afterwards, appellant showered with Anderson alongside him in the bathtub where he rinsed Anderson off with water and then took him out and dried him off. (2 RT 292.) Appellant agreed it was possible that he found the sexual assault more arousing because he was in power. (2 RT 292-293.) Since his incarceration, he said, he has not been thinking about his sexual assault on Anderson but he has been thinking about the two people he still wanted to kill, Jaime Cota and Harold Terry.

(2 RT 293.) While appellant admits he likes being the "dominant" partner, for him it is not necessarily about a person submitting to him, "but respect my request." (2 RT 294.) Appellant believed Anderson had been disrespectful when Anderson had not paid the money he owed him. (2 RT 294.) Appellant took Anderson's watch as soon as he had him disrobe, and he switched wallets with Anderson while still in the hotel room. (2 RT 294-295.) After the shower, appellant slept for a few hours keeping Anderson hog-tied as they both lay down. (2 RT 295.)

Up to that point, appellant had hog-tied Anderson by using strips of a t-shirt. In order to secure Anderson while he went to use the ATM card, appellant tore some sheets into strips and used those and articles of clothing to connect Anderson's neck to where his feet and hands were bound together. (2 RT 295-296.) Appellant placed a strip of cloth around Anderson's neck and tied it snugly to his feet so in case Anderson got himself loose from being hog-tied he would still choke. "Then I got another piece of sheet and I believe I tied it around his neck again, and I tied that piece to a ceiling fan real snug." (2 RT 296.) Anderson was lying on his side on the bed. If he struggled and fell off the bed he would hang himself. (2 RT 296-297.) Anderson was gagged and blindfolded. (2 RT 297.)

Appellant tied a piece of cloth around Anderson's testicles to inflict pain when he was making sure he was getting the correct ATM PIN number. (2 RT 297-298.) Appellant's intent was to inflict extreme pain so Anderson would give him the correct number. (2 RT 298.) Asked about Anderson's response to having a ligature tightened around his testicles appellant stated, "[h]e may have gave some type of whine. He didn't cry or beg or anything like that, but he might have let out some type of eek, you know, or noise." (2 RT 298.) Appellant tied Anderson's testicles up to the ceiling, "[V]ery tight. They had to hurt." (2 RT 298.) Appellant's purpose

was to inflict pain so Anderson would not move. (2 RT 298.) Appellant described this in further detail,

> [APPELLANT]: I put the music on. I questioned him about whether anybody else had use of the card, you know, when his last deposit, last transaction occurred, to verify, you know, he had adequate funds and to make sure he wasn't lying.
>
> When I was tying his testicles to the ceiling [fan], I made sure they were very tight, and I told him if this in fact was not the number and I'm sent on a wild goose chase, this is the beginning.
>
> [PROSECUTOR]: I didn't catch that last. What?
>
> [APPELLANT]: That this was just the beginning. That I would – I was trying to convey to him that if he didn't give me the right number, that he was really going to be in pain. He was in pain already, but I mean it was going to be excruciating, excruciating pain, enough to make him pass out.
>
> [PROSECUTION]: This was to make sure you got the number so you could steal – take the money out of the ATM?
>
> [APPELLANT]: Yes.

(2 RT 299.)

Appellant played a trick on Anderson to see if he would try to escape. Appellant turned on the music and pretended to leave the room. He waited about five minutes to see if Anderson would try to escape. Appellant was expecting Anderson to try and wriggle free, but he did not. Appellant let Anderson know he was still in the room by either running a knife across or slapping him in the face. (2 RT 302-303.)

Appellant went to a nearby ATM but, when he accessed Anderson's bank accounts, he discovered both the checking and savings accounts had low balances. One had less than $2 and the other $33 or $34. (2 RT 300-301.) Asked if he could have taken $20 out of the account that had over $30, appellant said he did not want to waste his time on $20 when he had been focused on hundreds.

[APPELLANT]: Twenty dollars ain't going to pay for another evening in that motel room.

[PROSECUTION]: So how did you feel when you found out that he didn't have any money?

[APPELLANT]: Angry.

[PROSECUTION]: How angry?

[APPELLANT]: I was extremely upset.

[PROSECUTION]: Well, were you cussing to yourself?

[APPELLANT]: I probably said this mother fuck, or fuck, something along that line.

[PROSECUTION]: What did you do when you found out there was not enough money for you to withdraw several hundred on?

[APPELLANT]: Couldn't wait to get back.

[PROSECUTION]: Why is that?

[APPELLANT]: So I could beat him up.

(2 RT 301-302.)

Upon re-entering the room, appellant made a sure that Anderson was still restrained and then slapped him hard in the face. (2 RT 303.) Appellant took the blindfold and gag off Anderson and started questioning him while punching him and yanking on the bindings around his neck and testicles, "to get his attention, you know, to let him now that I'm pissed, you know. Make him hurt a little." (2 RT 303-304.) Appellant asked Anderson why his bank accounts were virtually empty and why he did not say that because he had to have known. Anderson answered that his roommate must have taken it out or transferred the funds to pay the rent. (2 RT 304.)

Appellant was ready to commit the murder "almost immediately. I'm through with him now." (2 RT 304.) Appellant released Anderson from

the bindings around his neck, legs and testicles, but kept Anderson's hands tied behind his back. (2 RT 305.) Appellant stood Anderson up, put a pair of jeans on him, pulled a t-shirt over his arms, put a jacket over him and placed a pack of cigarettes and lighter in one of his jacket pockets. It was around 4:00 a.m. when appellant walked Anderson out of an emergency exit from the hotel and down to the Jeep. Appellant's intent was to kill Anderson so he would not contact the police. (2 RT 305.) As appellant drove Anderson away from the hotel, he had all three weapons and extra ammunition in case he was pulled over, "[Y]ou know, had to hide out and shoot it out or something." (2 RT 305-306.)

Although appellant did not know the exact spot he was going to take Anderson, "[f]rom the time I seen him and he seen my gun, I knew he was going up in the hills somewhere." (2 RT 306.) Appellant took Alum Rock Avenue to Mount Hamilton. He had picked the approximate spot out on an earlier drive through the area. (2 RT 306.) Anderson was not gagged during the trip, and a few words may have been exchanged, but appellant was not focused on talking with Anderson because he was looking out for the police. When appellant saw some police, he told Anderson, "if he made any type of gesture towards the police to tip them off, I would have killed him on the spot." (2 RT 307.) Anderson "went along with the program":

> [APPELLANT]: I didn't want to have to knock him off in the Jeep along the side of the road. What my plan was to have him willfully go over this fence and walk to where I thought was a good place to execute him.
>
> [PROSECUTOR]: And to do so you told him you were just going to tie him to a tree and leave him right?
>
> [APPELLANT]: Yeah, I told him, oh, that one looks good, let's go over this way.
>
> [PROSECUTOR]: That way you could get away with the Jeep and have transportation at least?

> [APPELLANT]: Yes.
>
> [PROSECUTOR]: When you found the spot you felt was appropriate, is that when you told him you weren't going to tie him up to a tree? Tell us what you did once you got over to the fence?
>
> [APPELLANT]: Once we got over the fence I surveyed the area. Primarily I was looking for a bushy camouflaged area so he wouldn't be noticed from any of the roads.... It would be more or less bushes and trees and stuff to obscure the body.
>
> . . .
>
> [APPELLANT]: My reasoning was if they found the body, investigation would start real quick and they're going to find a missing person, probably put two and two together, and it wouldn't give me much time to commit these other acts I was waiting to commit.

(2 RT 308.)

Appellant explained that he did not think the Jeep would be reported stolen right away. Someone would call Anderson in as a missing person within the next couple of days, so he figured he had at least two days to disguise the Jeep by changing the plates, which is "what I subsequently tried." (2 RT 308-309.) After appellant found a spot he felt was appropriate, he directed Anderson towards a tree and led him directly where he wanted him to go:

> [APELLANT]: At that moment he got to where I wanted him to be, I told him stop. And I explained to him casually I'm not going to tie him to a tree. I wanted him to believe that he was going to be set free or left to wander up on this hill or think I might just, you know, knock him out and leave him there.
>
> [PROSECUTION]: Why did you want to do that?
>
> [APPELLANT]: I wanted to, I guess the proper word would be torture him in a way, by letting him think he's going free and then know he's going to die in seconds.

(2 RT 309.)

Appellant had his gun out, cocked and aimed towards Anderson. Within seconds of explaining his intention, he shot Anderson in the head. (2 RT 310.) Appellant was standing about a foot away and was hoping shooting Anderson in the head would kill him instantly, but "[h]e didn't' die." (2 RT 310.)

Appellant was concerned that if he shot Anderson a second time, someone might hear it.

> [APPELLANT]: Should I just slice his throat, or you know, stab him in the heart, what should I do? I was thinking about it. Then I was thinking, well, since the Jeep is down there, it's started – you know, it is still running, the emergency brakes are on and lights are out, and it is on the side of the road, I figured I might as well shoot him again and get the fuck out of there. [¶] I put the gun almost directly against the back side of his ear, and I planned to shoot him through the brain, but it didn't happen like that.
>
> [PROSECUTION]: What happened?
>
> [APPELLANT]: The bullet came underneath the brain and he was still living. So I just left him, fuck it, he'll die eventually, because I had to get off the hill.

(2 RT 310-311.)

Appellant stopped by his sister's house before he went back to the Arena Hotel to change his clothes, "[b]ecause once I activated in motion my hit list, I was cutting all communication with my family." (2 RT 312.) Asked how he felt about killing Anderson, appellant said he did not remember any exact feelings, because he was more or less thinking of how he was now "pressed to kill Jaime," since he had not allowed for extra time to disguise the Jeep. "So it kind of upset me, …, my schedule, my time period, whatever." (2 RT 312.) Appellant said the murder proved to his victim that, "if he lived he wouldn't have lied to me." Asked if it made him

feel more "masculine" or "macho", appellant said, "that fits into me gaining my dignity from this victim, so to speak, by having him not play with me and follow my orders and things like that. I guess you could say it made me feel somewhat in control, a man and that kind of thing,..." (2 RT 313.) Appellant acknowledged having a book with the list of names of people he wanted to kill because they had crossed him. (2 RT 313.) Asked if he felt any remorse or reluctance about killing Anderson, appellant's reply was "No." Queried as to why he would kill Anderson over $20 or $30 owed to him, appellant replied, "[p]eople died for a lot less than that." (2 RT 314.) Appellant agreed he "basically" took Anderson's life for $40 and to cover his tracks. (2 RT 314.)

Appellant went back to the Arena Hotel, showered, and called Picklesimer so he could have a place to work on the Jeep. When he arrived at Picklesimer's house, appellant first cleaned out the garage to make sure the Jeep fit. Appellant did not see any air paint tools and only had $50, so he decided to buy some spray paint and tape. (2 RT 314-315.) When Picklesimer arrived home appellant told him about the murder and showed him the watch he took from Anderson. (2 RT 315.)

Appellant described his arrest:

> [PROSECUTION]: When the officers arrived at the scene, threw the grenade, were you attempting to go for the gun?
>
> [APPELLANT]: Yes, I was.
>
> [PROSECUTION]: Would you have shot it out with the officers if you had a chance?
>
> [APPELLANT]: Yes, I would have.

(2 RT 316.)

Appellant identified the two prior offenses for which he was convicted and sentenced to prison in 1988. He was convicted of the

robbery and burglary, enhanced for the great bodily injury he inflicted on John Epling in 1988. Appellant was released in June of 1991. (2 RT 316.)

PENALTY PHASE EVIDENCE

G. The People's Penalty Phase Case

John Epling meet appellant one night while partying with friends at a night club in San Jose. (2 RT 330.) He and appellant spent some time talking the first night they met. They eventually entered into a relationship, but not right way, it took a couple of days before they started to get involved. At the time Epling was living in a trailer in his grandmother's backyard. Appellant moved in with Epling and lived there for a couple of months. (2 RT 331-332.) Epling recalled those two months were "all right", kind of rocky, but "it was a normal relationship." (2 RT 332.) There were no occasions during that time that appellant ever got violent with Epling. (2 RT 332.) On March 9, 1988, Epling discovered that appellant had been seeing someone else who was incarcerated and, when that person was released, appellant wanted that person to come live with them. (2 RT 333.) When Epling told appellant over the phone that was not going to happen, appellant became very violent on the phone, using foul language and making threats. (2 RT 333-334.) During a later phone conversation when appellant again told Epling this person was going to come live with them, Epling repeated that was not going to happen and told appellant to come get his things. After their phone conversation, Epling packed up all of appellant's belongings and set them out on the porch of the trailer. (2 RT 334.) Epling then packed up some of his personal belongings and valuables and went over to his friend Jeff Schurman's house. Appellant knew where Schurman lived. (2 RT 335.)

Epling and Schurman went out that evening and, when they returned to Schurman's house at around 11:30 pm, appellant showed up. (2 RT 336.) At first appellant was knocking, but then he began banging with his fist

until he eventually punched his way through the door. (2 RT 336-337.) Epling was asleep on the living room floor of the apartment and woke up when he heard the knocking. (2 RT 337.) Appellant came into the apartment saying, "that we were fucking little punks and we didn't know who we were dealing with, and he was going to show us that he's not someone to mess with." (2 RT 338.) Appellant hit Epling with the heel of his hands in the upper lip and nose. Appellant did not break Epling's nose, but he inflicted enough damage to the upper lip that Epling required hundreds of stiches and it took him months to heal. (2 RT 338-339.) Epling also required stiches to an injury he sustained to his left eye. (2 RT 339-340.) Epling was running around the apartment trying to get away when he ran into Schurman's room. (2 RT 341.) Epling watched appellant pick Schurman up and throw him back down on the bed. Appellant threatened Epling that he would send someone to kill him if Epling went to the police, just before stealing both Epling's and Schurman's wallets, and taking Epling's color TV. (2 RT 341-342.) After seeking medical attention, Epling reported appellant to the police the following day. (2 RT 343-344.) Fearing that appellant would make good on his threat to kill him, Epling moved to Pennsylvania where he lived for three years. (2 RT 344-345.)

On November 29, 1991, Thomas Salas (no relation to Michelle Salas) was released on parole from Soledad State Prison and went to his brother's home. His brother was incarcerated at Pelican Bay and wanted him to inform appellant of his brother's request to leave his brother's home because appellant was having a homosexual relationship with Salas' nephew, Harold Terry. (2 RT 348-350.) While telling appellant his brother's request, Salas (who admittedly was drunk) told appellant just because he was big that did not scare him. Appellant then struck Salas in the head with a baseball bat causing a concussion and numerous lacerations

that required stitches. (2 RT 350-351.) Salas did not report the incident to the police because he was on parole. (2 RT 354.)

District Attorney Investigator Jose Navarro testified about serving a subpoena on Jaime Cota, who verbally agreed to be on telephone standby to appear as a witness, but did not sign the subpoena and failed to appear in court to testify. (2 RT 358-359.)

In October of 1992, Timothy Felker was in the Navy stationed on the USS Abraham Lincoln, moored at Alameda. Felker was asked by an acquaintance to drive up to Grant's Pass in Oregon and that is where he met appellant. (2 RT 359-361.) They stayed around the house and talked for about 20 minutes before they went out to the nearby bars. Felker never met appellant's mother but, apparently, she was asleep somewhere in the house. (2 RT 361.) About 10 minutes after arriving at the house, appellant asked Felker to come to his bedroom where he pulled out three guns. (2 RT 362.) Felker suspected the guns were loaded at the time, but did not know. (2 RT 362-363.) They then went out to a small bar nearby. Felker did not recall if appellant had his guns with him, but does not believe so. (2 RT 364.) After leaving a second bar, appellant told Felker he was gay. Appellant told Felker how he had just gotten out of Folsom Prison a year ago and had plans to kill someone because he had been screwed out of a deal. (2 RT 365-368.) After leaving the bars, Felker drove and appellant was in the passenger seat when appellant rolled down the window and fired some gunshots as they were driving down the highway. Felker was upset that appellant had brought a gun and was shooting rounds off out of his car. (2 RT 368.) When they arrived back at the house, appellant showed Felker to a room that was "semi-close" to his. Felker had undressed to his underwear and gotten into bed when appellant, still dressed, walked into the room. (2 RT 369-370.) Felker guessed appellant wanted to talk about being gay but knew that appellant was going to confront him sooner or later. (2 RT 370.)

Appellant was playing sexual "guessing games" when he told Felker he wanted to orally copulate him. (2 RT 371.) Felker told appellant he was straight, but appellant kept trying. Appellant pulled out a knife when Felker turned down his offer of oral copulation. (2 RT 371-372.) Although Felker never saw her, appellant told him that his mother was asleep somewhere in the house. (2 RT 372.) Appellant held the knife in his hand, turning it over and over trying to intimidate and threaten Felker. He told Felker that he had raped guys before and would do it again. Felker replied that, if appellant was going to do that, he would have to kill him first. After that exchange appellant put the knife away. (2 RT 373.) Felker was scared because appellant was a lot bigger and had been in Folsom Prison. Felker had never been to prison. (2 RT 374.) Appellant put away the knife and told Felker, "don't run off, don't be scared, we will go shooting tomorrow and everything will be fine." (2 RT 374.) After appellant left the room, Felker thought for a moment about what he was going do, if he was going to leave the friend he came there with or if he was going shooting with appellant. Felker was intoxicated and not thinking clearly, "but I made the right choice and I split." (2 RT 374-375.) Felker did not tell his friend he was leaving. He just got dressed and left. (2 RT 375.)

During his cross-examination of Felker, appellant asked, "When I pulled the knife on you, do you believe if my mother wasn't home that I would have stabbed you?" (2 RT 377.) Felker answered he thought appellant would have. Appellant then asked, "Do you believe that if we were alone shooting that you would have been shot?" (2 RT 377.) Felker answered, "Possibly." Appellant then asked, "Do you believe you would have been raped?" Felker answered, "Yes." (2 RT 377.)

On July 7, 1977, San Jose Police Office Ralph Garner was on patrol when he answered a call of a report of a family disturbance involving a 16-year-old teenager possibly armed with a gun. (2 RT 378-379.) When

Garner and his partner arrived on the scene, they met a woman whom they believed was the teenage boy's mother in front of the house. She said her teenage son was threatening family members with a gun and had locked himself inside the garage, which had been converted into a room. The young man was appellant. (2 RT 380-381.) Garner described how he, his partner, and appellant's mother were trying to talk appellant out when shots were heard coming from the garage and a bullet pierced through the door. (2 RT 381.)

The officers took what cover they could find in the backyard and yelled at appellant to surrender. Appellant was told to put his gun down and come out. Appellant said he would be exiting the garage through a side door. When the side door was cracked open Officer Garner saw a rifle barrel sticking out, pointing directly at his partner. Both officers fired shots at appellant, knocking him down. They recovered a .22 caliber rifle from the garage. An ambulance was called because appellant had been shot in the leg and was bleeding profusely. (2 RT 382-384.)

In October of 1992, Robert Long was renting a room from appellant's mother. (2 RT 398-399.) The first time they met, appellant showed Long his .357 Magnum, .38 revolver and .45 semi-automatic. Appellant had about five or six guns and a lot of ammunition. The second time they met they went shooting in a rural area about a mile from the house. (2 RT 399-401.) Long shot appellant's .38 at some trees, stumps and the ground. They had a 12-pack of beer, but they did not drink until they got back downhill. There, appellant started a conversation about being a gay ex-convict, which spooked Long. (2 RT 402.) As they were drinking beer, appellant tried to grab Long and seduce him. Long didn't want to do anything like that with appellant, but when he tried walking away appellant slammed him on the hood of the car and sexually assaulted him. (2 RT 403-404.) Long saw appellant had the guns on the ground about three or

four feet away and that he could grab them if he wanted to. (2 RT 404.) Long has physically recovered from the sexual assault, but has never gotten over it mentally. (2 RT 405.)

At the time Long was 18 years old, 5-feet, 8- or 9-inches in height and he weighed about 140 pounds. (2 RT 405.) Appellant was physically stronger and able to hold Long down. Long tried to fight to get away, but appellant slapped him, put his hand on Long's neck and held him face down on the hood, choking him enough to scare Long. (2 RT 406.) Long testified that appellant's sexual assault lasted about 10-15 minutes, but "seemed like forever." (2 RT 406.) Long did not recall if appellant used lubricant, but he recalled appellant's sexual assault was painful. (2 RT 406.) Long thinks appellant finally let him go because he was tired of holding him down. Long had been struggling, yelling and screaming the whole time. (2 RT 407.) When they returned to appellant's house, Long went straight to his room and was scared to report what happened. The police contacted him the next day and he was later interviewed by San Jose Police Department detectives. (2 RT 407-408.) Long recalls that appellant left the next day. Long recalled appellant mentioned that he had a few people in California, "he needed to cap off." (2 RT 408.)

Harold Terry met appellant at his uncle's house in 1991. At that time, his uncle was incarcerated at Pelican Bay State Prison and Terry was living in his uncle's garage. (2 RT 410-411.) He and appellant lived there until they moved in with appellant's sister, Michelle. (2 RT 411.) They eventually left Michelle's because she was using drugs and appellant could not stand it. They moved back to Terry's uncle's house where they rented a room. (2 RT 412.) At the time, Terry's aunt was living there with her four children whose ages ranged from 13 to 17 years old. (2 RT 413.) Terry recalled the altercation between appellant and his uncle, Thomas Salas. (2 RT 413-417.) He and appellant left the next morning. (2 RT 417.) Terry

testified that while appellant never physically abused him, there was mental bullying. (2 RT 417.) Appellant started telling Terry he was thinking of killing him. (2 RT 418.) Toward the end of their relationship Terry felt threatened by appellant. (2 RT 418.) After a nasty dispute over religious mores, Terry moved out. (2 RT 419.) After moving out, Terry made efforts to conceal where he lived from appellant because he was afraid of him. (2 RT 419.)

On September 21, 1987, Kenneth Money was working as a security theft prevention officer for Lucky Stores, Incorporated, in San Jose when he observed a woman shoplifting. (2 RT 422-423.) At that point Money had not seen the male companion (appellant) with the woman do anything wrong. He was concentrating on the female. Money stopped the woman outside, identified himself as a Lucky security officer, and asked her to come with him. Money vaguely remembers appellant telling him to let the woman go and then appellant ran off. The woman began to physically resist Money as he was trying to detain her for shoplifting. (2 RT 424.) Money saw appellant run out to the parking lot to a white Camaro. Appellant got in the vehicle, put it in reverse and skidded backward, which caught Money's attention. Traveling at a high rate of speed, appellant drove the vehicle right at Money and the female suspect Money was attempting to detain. (2 RT 424-425.) Money grabbed the female and threw himself and her into a pole located a few feet away. Appellant attempted to continue to drive at a high rate of speed, but he skidded and stopped. (2 RT 425.) As a co-worker took custody of the female, Money ran around to the passenger side of the Camaro. The passenger-side window was down so Money sprayed tear duct mace at appellant. (2 RT 425-426.) Appellant yelled obscenities at Money as he took off out of the parking lot. (2 RT 426.) Money reported the incident to San Jose Police officers who took him to a location where he identified appellant. (2 RT

426-427.) Appellant was arrested on an outstanding warrant, but Money was not sure if charges were ever filed or sustained for the assault with a deadly weapon. Money did not recall testifying about the offense. (2 RT 427, 430-431.)

James Cota (aka Jaime Cota) meet appellant in 1992 when appellant was brought over by a friend, John Epling, to beat someone up. (2 RT 432-434.) When no one was around, appellant asked Cota if he would be interested in looking at a clock with Gargoyles as decoration. Cota was interested because he had a special event coming up and it sounded like a nice piece to see. Cota was a private collector who dabbled in antiques and had a partner who collected them. (2 RT 433.) They had some priceless antiques around the house. (2 RT 433-434.) Cota explained that Epling initially brought appellant over to beat up someone who owed Epling $40. (2 RT 434.) Cota made arrangements to look at the clock, which required an hour-and-a-half of social time with appellant as a guest and business client. (2 RT 434.)

Appellant asked Cota to measure some curtains and wallpaper, and Cota was planning to look at some furniture that appellant had, but appellant's main concern was the clock. Cota went to visit appellant in the bedroom appellant was renting in Picklesimer's house on Calabazas to complete the transaction for the clock. (2 RT 435, 442-443.) Once in the bedroom, appellant stripped off Cota's clothing and locked him in the room for about six hours. (2 RT 436.) Appellant threw Cota around, twisted his arm, and put his knee to his chin. Cota was unable to get out of appellant's holds. (2 RT 436.) Appellant threatened to break Cota's nose while mentioning other things he was capable of doing, like breaking Cota's arm. (2 RT 436-437.) At the time Cota was 5-feet, 7-inches tall and weighed 120 pounds. Appellant was bending Cota's arm back to the point where it hurt, "but I did everything I was told to do. I didn't fight none of it." (2 RT

437.) Appellant slowly unbuttoned his clothes and slid them off. (2 RT 438.) Cota started to cry because nothing like this had ever happened to him before. (2 RT 438.) Appellant forced Cota to engage in both anal and oral intercourse during the four to six hours he had Cota locked in his bedroom. (2 RT 439.) Appellant penetrated Cota several times, changing condoms during the sexual assault and before achieving an orgasm. (2 RT 439-440.) Appellant let Cota go the next morning. Cota took the clock with him. (2 RT 441.)

A couple of days later, appellant showed up at Cota's house demanding his clock back. (2 RT 441-442.) When Cota went to visit appellant at Picklesimer's house to complete the transaction for the clock, appellant had already taken $300 worth of items from Cota's garage, so Cota felt it was not a cash transaction, but a trade. (2 RT 442-443.) As appellant banged on the front door of Shurman's home, Cota was considering what weapons were in the home he could use against appellant when his partner slammed closed a heavy door that separated Cota from appellant. Then the police arrived. (2 RT 443-444.) Cota explained that he did not want to testify because he did not tell the police about appellant's sexual assault, although he mentioned it when he was reporting about the clock. Cota wanted to leave it all behind him. (2 RT 446-447.)

H. Appellant's Witness and Penalty Phase Testimony

Appellant only called one witness to the stand before his own penalty phase testimony, John Epling, for whom he had earlier reserved cross-examination. Appellant asked Epling about an incident that occurred between him and a person nicknamed Danger in the garage at Epling's grandmother's house. (2 RT 454-455.) Appellant and Danger had been "slap boxing" in the house when Epling told them to knock it off. Appellant then asked for access to the garage so he and Danger could continue fighting there. The next day, appellant told Epling about sexually

assaulting Danger. Appellant had said to put the outside lock on the garage and to not let anyone in or out. Appellant and Danger were alone in the garage for half an hour. (2 RT 455-456.)

Appellant sold drugs out of his room at the Arena Hotel. (2 RT 455-456.) Epling confirmed that his trailer was broken into after the incident at Jeff Schurman's house. (2 RT 455.) The day after appellant beat him up, Epling went home to find the side windows of his trailer broken and a TV missing. (2 RT 458.) Appellant would "get angry and violent" if Epling did not do everything appellant wanted. (2 RT 458-459.)

Appellant testified, providing social history details at the penalty phase. He was born August 25, 1960, and his sister Michelle was born a year later in December. Another sister (Susan) was born in 1964. (2 RT 463.) In 1970 or 1971, appellant's mother left his father due to his father's alcoholism, which came to a head when his father brandished a knife on his mother. She fled in fear for her life, leaving her children behind. She came back the next day and was able to take appellant's two sisters with her, but appellant hid so he could stay behind with his father. (2 RT 463.)

In 1971, appellant's parents divorced and his father got legal custody of appellant. When his mother remarried, appellant ran away from his father's house. In March of 1974, a stepsister (Geri) was born. In April, appellant was admitted to Juvenile Hall for running away, then was placed with his mother and stepfather. He ran away from there to his aunt's (his mother's sister's) house. In May of 1974, appellant's mother and stepfather were having marital problems at a time when appellant had returned to live with them. In June of 1974, appellant was in trouble at school for truancy and problem behavior. He ran away again in September and was living with his father in San Jose, attending high school, but only sporadically. In January of 1975, appellant was arrested for burglarizing a neighbor's home with some friends from the neighborhood. (2 RT 464.) In July, appellant

was released to his mother, who was then divorced. In August, appellant was on probation and placed with his father, who still had a problem with alcoholism. His mother's whereabouts were unknown to appellant at that time. (2 RT 464-465.) In November, appellant father's sent him to the corner liquor store to buy some alcohol. Appellant was 14 years old at the time. He was arrested and spent 32 days in Juvenile Hall before being placed back with his father. In December, he was placed in a boys' home. (2 RT 465.) In March of 1976, appellant ran away from the boys' home, but was arrested in May, and detained at Juvenile Hall. In June, he was released back to his mother. In July and August, appellant was placed with his aunt (mother's sister). Appellant ran away from there in September and went to live with his stepfather. In April of 1977, appellant turned himself in and was released to his mother pending a hearing. (2 RT 465.) In May, appellant was placed with his mother by the court and was making plans to enter the military when he got into a gunfight with the police. (2 RT 465-466.) In September, appellant was committed to the Youth Authority for that offense, and then released in January of 1979, back to his mother's custody in Sacramento. He was working at an outpatient center for mental health patients when he was detained for conning patients out of money and having sexual relations with the younger male patients. During that time, he was committing armed robberies in the Sacramento area. He was arrested on August 14, 1980, for weapon possession and sent back to the Youth Authority on that charge. He was investigated regarding the armed robberies, but never charged with those. (2 RT 466-467.) He earned a General Education Diploma while at the Youth Authority. (2 RT 466.)

In June of 1982, appellant was convicted for stabbing another youth authority committee and sent to the Department of Corrections. He was paroled on December 13, 1984. In January 1985, he was sent to Folsom State Prison for a year on a parole violation finding, where he began a

relationship with a man, but within four or five months had assaulted him and broken the man's jaw in three places. (2 RT 467.)

In the spring of 1986 (transcript says 1976), appellant was released from custody again and moved to Sacramento. Appellant's mother had moved to Oregon and appellant was working for his stepfather's roofing company, where he continued to work when his stepbrother inherited the business. While bringing one of the "kids" he supervised to San Jose, appellant beat him up and raped him on the side of the road of Highway 80 as they were coming in to San Jose. During 1985 and 1988, appellant was working various jobs through temporary agencies when he was arrested in July of 1988, for the assault on Epling. While in prison, appellant committed numerous sexual assaults on fellow inmates, using persuasion and intimidation, "and others were done through violence." He was paroled June 30, 1991. (2 RT 467-468.)

In September of 1991, appellant had been seeing Terry for approximately a half a year when he kicked him out and kept all of Terry's belongings. (2 RT 468.) Appellant burglarized a home he had been living in, with another man and, while the man was gone, appellant got his sister's boyfriend to come to the house with a truck and they stole everything from the man's home. (2 RT 468-469.)

Appellant also described his conduct while incarcerated for his current offenses:

> Here at the jail I've been relatively low key. I had a few incidents. I got hold of a mop one time. They left it in the pod while I was programmed. They forgot to take it out, and I busted everything in the dorm. They had a TV, coffee pot, clock and telephone. [¶] I talked a couple of people into various things in the pod, like I convinced one fellow to jump off a second tier. I had another guy go to the second steps on our stairs on the second tier and jump all the way down, things of that nature. [¶] The reason I haven't attempted anything - - I seen Jaime up here yesterday and I wanted to jump on him, and I

> believe the reason that I haven't done anything is for one, I want to keep my pro per status, and another, I don't really want to be charged with any more crimes and have to go through this process again."

(2 RT 470.)

The trial court confirmed some details about appellant's earlier incarcerations. (2 RT 470-471.) The prosecution then began its cross-examination of appellant by going over a letter to appellant from his former attorney, John Aaron, giving notice of the 14 incidents that the prosecution would potentially put on at the penalty phase. Appellant agreed there had been no information concerning those matters presented thus far. (2 RT 472.)

Appellant assaulted Epling because he was angry at having his "clothing and stuff" put in a garbage bag and placed at the side of the house. Epling's denial of appellant's request that another lover come live with them may also have upset him. (2 RT 472-473.) When he hit Epling with the heel of his hands, "I might have been trying to kill him, push his nose -- the cartilage up into his brain." (2 RT 473.) He learned that martial arts technique in prison, as early as his time at the Youth Authority and agreed that it could cause death. (2 RT 473-474.) When he went over to Schurman's house to confront, Epling he was not angry. But, when Epling would not open the door and he saw Epling and Schurman peeking through the curtains, he got angry, broke down the door and robbed Schurman. (2 RT 474.) As the prosecutor tried to inquire about another violent incident, appellant stated: "I've been in so many incidents, I can't recall them all." (2 RT 474-475.)

Appellant agreed to go beyond the scope of his direct testimony and discuss his assault on Joshua Reeth, while living in Grant's Pass, Oregon. (2 RT 474-475.) Appellant admitted to his established modus operandi. He lured the young man back to his mother's home where he knew they'd

be alone and pulled out a gun and tried to rape him. (2 RT 475-476.) Reeth was so frightened that appellant was afraid he would have to shoot the young man in his mother's home. Appellant tried calming the young man down, even to the point of giving Reeth a fully loaded .38, which Reeth pointed at appellant, cocking the handle. (2 RT 476.) Appellant "[b]ullshitted" Reeth into putting the weapon down. "That's where he made his mistake. So I took him in another area of the house or outside, I can't remember. It might have been a patio I took him into and beat him up, and I took him into one of the bedrooms. I think it was four bedrooms in the back part of the house and another bedroom on the far side of the house and I raped him." (2 RT 476-477.) Appellant admitted he engaged in forcible anal intercourse while armed with the .38 he conned Reeth into putting down. Reeth was "comatose" during appellant's sexual assault. (2 RT 477.) Afterwards, appellant did not have any concerns about Reeth's mental state, his only concern was not having an incident in his mother's home where he would have had to stab or shoot Reeth. "I didn't want any bullet hole or any knives brought out, blood anywhere." (2 RT 477.)

Appellant admitted hitting Thomas Salas with a baseball bat during their altercation when Salas came into the room told appellant he had to leave due to his homosexual relationship with Terry. (2 RT 478-479.) Appellant discussed the shootout he had with the police in 1977. (2 RT 479-480.) Appellant answered questions about a stabbing he committed while in the California Youth Authority where he intended to kill the victim. (2 RT 480-481.) Appellant stated that he sexually assaulted Long because "[t]he opportunity presented itself and Long put himself in a position to be raped." (2 RT 482.) Appellant admitted that he enjoyed raping people. (2 RT 482.) Appellant also went into detail about an unreported sexual assault he committed against one of his sister's friends in Oregon. He had planned to rape and rob his sister's friend in order to get the man's vehicle and bank

card to fund his return and provide transportation to San Jose to kill Jaime Cota. (2 RT 483-484.) When asked about the victim that got away, Felker, appellant stated he attempted to attack Felker at knife point in order to assault him sexually, but appellant stopped his attempt to rape Felker because his mother was home at the time. (2 RT 486-488.)

Appellant elaborated on his sexual assault of Jaime Cota and his threat to kill Cota over the clock. (2 RT 488-491.) The prosecution asked appellant about the two homicides that he told Oregon law enforcement he committed there. He was not helping with locating the bodies, in contrast to his cooperation in locating the body of Anderson. Appellant explained that he did not want be taken to Oregon to go through a legal process that would bring negative publicity to his mother's and sister's company there, since they lived in a small town. (2 RT 491-492.) Appellant killed two individuals shortly after he arrived in Oregon in 1992. Appellant committed the murders in preparation for the murders he was planning to commit in San Jose. (2 RT 492-494.) Appellant refused to provide specific details about one of the Oregon murders, saying, "[a]ctually, I don't really want to discuss them. I'd like to kind of wrap this up." (2 RT 494.) Appellant did, however, give further details about his sexual assault on Reeth. (2 RT 494-495.)

Appellant did not recall the name of the young man he sexually assaulted on Highway 80 outside of San Jose, but he did recall the incident with Money in the parking lot of the Lucky's store. (2 RT 495-496; see 2 RT 501-502.) Appellant also discussed his running away from home a lot as a child and how his alcoholic father used to beat him up. (2 RT 496.) Appellant was questioned about the sexual assaults he committed while working at an outpatient mental health facility in Sacramento while the patients were medicated, and the armed robberies he committed in the Sacramento area. (2 RT 497-502.)

Then, the prosecution and appellant had this exchange:

> [PROSECUTOR]: Would it be fair to say, [appellant], that through your life, whenever the whim has hit you, you've done whatever you wanted to do, almost?
>
> [APPELLANT]: Oh, yes.
>
> [PROSECUTOR]: You don't really care much about the injuries, psychological or physical, that you cause to other people?
>
> [APPELLANT]: Yes, that's true.

(2 RT 502.)

Appellant described the numerous sexual assaults he admitted to committing while a ward at the California Youth Authority. (2 RT 502-503.) He claimed this modus operandi, "Intimidation. First I would try to persuade them some type of way that, you know, accompany me to a room or some area where there's no supervision, and then I would use intimidation or I would use force." (2 RT 503.) Appellant stated he has no thoughts about killing Anderson, but he remains sorry he did not kill Cota and Terry. (2 RT 503-504.) Appellant stated, "I don't have any remorse or [sic] over any of my actions, no." (2 RT 504.)

> [PROSECUTOR]: Why do you think Judge Creed should give you the death penalty? Why do you think you deserve it?
>
> [APPELLANT]: Well, if I don't get the death penalty, I'll be going to another court because it's a matter of time I'll have a cellie and I'll eventually kill somebody else and then I will receive the death penalty. Killing somebody in custody, I believe it's death penalty, almost certain."
>
> [PROSECUTION]: So you would go that far?
>
> [APPELLANT]: Yes.
>
> [PROSECUTOR]: Why do you prefer the death penalty as opposed to life in prison without the possibility of parole?

> [APPELLANT]: My personal feelings are, I believe you kill, you know, the state has a right to retribution, eye for an eye, tooth for a tooth.
>
> [PROSECUTOR]: So you feel that the state should terminate your life since you terminated somebody else's life?
>
> [APPELLANT]: Yes, and am still able to terminate lives.
>
> [PROSECUTOR]: Well, did you express to the psychiatrist that you'd rather not spend forty years in custody?
>
> [APPELLANT]: Yes, yes, I planned to waive my appeal rights and get on the next available list, you know.
>
> [PROSECUTOR]: Since you brought it up, you feel so strongly that you would kill another innocent person just so that you can -- potentially get the death penalty next time if Judge Creed doesn't give it to you this time?
>
> [APPELLANT]: Yes.

(2 RT 507-509.)

Appellant explained what he was trying to accomplish with respect to the proceedings and his representation:

> I tried to have a speedy trial. The Public Defender's Office knew that I was on parole. I was given a year for the gun charges, so I was on a year parole violation while I was still in custody on this charge and the Public Defender maneuvered its way around to ask for continuances behind my protest of speedy trial [¶] I wish to plead guilty. They denied me that privilege or right. I asked to waive jury trial. They refused that. I was just that dissatisfied with some of their approaches, so I had a couple of *Marsden* hearings on Miss Fukai, and her mother passed away so she had to give up some of her higher profile cases and I was given to John Aaron.

(2 RT 509-510).

Appellant reiterated how he wanted to plead guilty and how the Attorney General stated that he could do so.[2] (2 RT 510.) Appellant explained how trial counsel would not waive proceedings and that a mental health expert wanted to drag the proceedings on for a couple of more years. Appellant decided not to call that expert during the penalty phase. (2 RT 511.)

Offered the chance to add any potential psychological or social family history he would have presented during the trial, appellant stated:

"I don't think anything that happened in my past, even though it may be a circumstance of why I commit certain crimes, I don't think it's directly related and has any real significance one way or the other. I don't think it should sway the Court's mind one way or the other. It's just a waste of time. [¶] I know what I'm doing. I made a rationale decision and I wanted to commit a bunch of murders, and that's what I did. Regardless of the psychology of it, I think is bullshit because I could get ten different psychologists and psychiatrists and they will all come up with different reasons." (2 RT 513-514.) Appellant's chilling summation, "I'll always rape all people and I will continue to kill people. That's the way I am." (2 RT 516.)

ARGUMENT

I. THE COURT WAS WITHIN ITS DISCRETION TO DENY THE MOTION FOR "ASSISTANT COUNSEL"

A criminal defendant has the right to be represented by counsel and the right to self-representation. Both are guaranteed by the Sixth Amendment. However, he "does not have a right to simultaneous self-

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[2] Appellant was referring to a Ninth Circuit opinion in which the rights of capital defendant David Edwin Mason to discharge counsel and terminate federal habeas corpus review were established. (*Mason v. Vasquez* (9th Cir. 1993) 5 F.3d 1220.)

representation and representation by counsel." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1368.) The Constitution does not, in any sense, guarantee any of the " 'hybrid' forms of representation, whether labeled 'cocounsel,' 'advisory counsel,' or 'standby counsel." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1219.)

A. Standard of Review

A defendant who elects to represent himself does not have a constitutional right to advisory counsel to assist with his defense. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 183-184.) The trial court may, in its discretion, appoint counsel to render advisory services to a self-represented defendant. It may also, in its discretion, decline to do so. (*People v. Crandell* (1988) 46 Cal.3d 833, 863.) While the denial of a request to appoint advisory counsel may be express or implied, the failure to exercise this discretion upon a request by a self-represented defendant is error. (*People v. Bigelow* (1984) 37 Cal.3d 731, 743.)[3]

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[3] If it would have been an abuse of discretion to deny the request for advisory counsel, that is, if the reasons for appointing advisory counsel are compelling, failure to exercise the discretion to appoint or deny advisory counsel may be prejudicial. (*Ibid.*) As there is no constitutional right to advisory counsel, the logical test for harm would seem to be the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, whether there is a reasonable likelihood of a more beneficial outcome had the court exercised its discretion, decided on a case by case basis. (See *People v. Crandell, supra*, 46 Cal.3d at p. 863 [applying *Watson* test]; *People v. Chavez* (1980) 26 Cal.3d 334, 347-348 [court's abuse of discretion in denying request for appointment of particular counsel without hearing defendant's circumstances nonprejudicial].) We acknowledge that in *People v. Bigelow, supra*, 37 Cal.3d at p. 745, this Court applied a per se reversibility standard, where it found it would have been an abuse of discretion to deny the motion, analogizing to deprivation of counsel under the Sixth Amendment and the failure to provide a trial transcript, because in those cases, prejudice cannot be measured. *Crandell* distinguished, and may even have impliedly overruled, *Bigelow* on the reversible per se point. (*People v. Crandell*,
(continued...)

B. Procedural Background

Appellant's motion to represent himself was granted on July 19, 1995. (2 CT 404-416.) He managed his trial preparations actively and effectively, going through channels to obtain supplies, a legal runner, and the opportunity to contact witnesses and obtaining the prompt assistance of the court when he ran into stumbling blocks. (2 CT 422, 426, 439-442.) He entered a waiver of jury and was arraigned on the amended information. (2 CT 424, 427, 443.) On December 8, 1995, he filed an application to appoint "assistant counsel," citing *Keenan v. Superior Court* (1982) 30 Cal.3d 750, the case which governs the appointment of second chair counsel in capital cases where the defendant is represented by counsel. (3 CT 479-482.) At the conclusion of a hearing on the matter on December 20, 1995, appellant withdrew his application. (2 CT 523.) Appellant focuses on the discussion during the hearing, concluding that the court failed to exercise discretion or effectively denied relief before appellant withdrew his application.

At the hearing on December 20, 1995, the court first noted that appellant had been represented by the public defender, who had no conflict and would, therefore, be the counsel the court would appoint if appellant

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(...continued)
supra, 46 Cal.3d at p. 863, "*Bigelow* . . . did not establish a 'fixed rule' that advisory counsel must be appointed for every pro se defendant in a capital case", and at pp. 864-865 ["No federal constitutional right being implicated, the consequences of the error are properly assessed by employing the *Watson* harmless error standard"]; *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 715-718 [applying *Watson* standard where appointed advisory counsel erroneously relieved].) Moreover, the cases may be harmonized when it would not have been an abuse of discretion to deny the request for appointment of advisory counsel. In that case, under either analysis, the error in failing to exercise discretion can be found non prejudicial under the *Watson* test. (*People v. Bigelow, supra,* 37 Cal.3d at p. 743; *People v. Crandell, supra,* 46 Cal.3d at pp. 864-865 .)

were seeking to be represented by counsel again. The court explained, however, that the public defender would not accept advisory counsel assignments. The court also explained that any advisory counsel would need time to become as familiar with the case as appellant and the public defender were. (RT [12/20/1995] 1-3.) Appellant stated he still wanted to represent himself, and did not really want any legal help in court, but wanted help with the mental health expert witnesses he was requesting. (RT [12/20/1995] 3-4.) The court pointed out that, if that was the case, he was asking for something different from advisory counsel. He was asking for an investigator, perhaps, or an expert witness. (RT [12/20/1995] 4.) The court said it was not precluding a hearing on precisely what appellant wanted, but urged him to reconsider representing himself and suggested a meeting with the public defender. Appellant said his trial preparations were coming along fine with the possible exception of tracking down the experts. He considered what the court was suggesting, as well as the information provided, and withdrew his application for *Keenan* counsel. (RT [12/20/1995] 5,8.) Shortly thereafter, appellant obtained funds for an investigator, resolved the access problems he was having with his legal runner, and he submitted three extant reports from mental health experts at his penalty phase. (2 CT 526, 562-564, 567-568, 602-604.)

C. Had Appellant Not Withdrawn His Application, It Would Not Have Been an Abuse of Discretion to Deny the Application for Advisory Counsel

Appellant withdrew his application for a legal copilot as soon as he realized that it would involve delay to get an attorney up to speed and threatened interference with his complete control of courtroom proceedings. Once he had articulated what he really wanted, the court was able to help him understand that he was really asking for investigative services not an advisory counsel. He had a request for mental health experts pending

before the presiding judge. With the help of an investigator, he was able to track down the mental health experts who had completed reports on him contemporaneously with the offense and he submitted those at the penalty phase.

Even if the application had not been withdrawn, it would not have been an abuse of discretion to deny it. Unlike the Canadian with a ninth grade education, unfamiliar with California law and facing first impression special circumstances, who was utterly incompetent to defend himself in *Bigelow*, appellant knew exactly what his plan was and was fully prepared to execute it. The present trial was conceptually simpler than that in *Bigelow*, as appellant did not plan to select a jury and had consistently sought to place his acts and motivations face up on the table since his first confession shortly after the crime. He filed effective motions and made lucid and detailed requests for access to materials in the jail. He was prepared for trial and up to the task. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 554-555 [no abuse of discretion in denying request for advisory counsel where defendant experienced with the justice system, made a plethora of motions, acted vigorously and effectively in court, and could have been engineering a delay by requesting advisory counsel].)

Appellant did not claim to have represented himself before, but was a savvy courtroom veteran and inmate. He obtained his GED while at the Youth Authority. He went through channels to obtain what he needed and, when that was not working as quickly as his circumstances required, he sent lucid letters to the trial court which generally either resulted in the signing of his proposed orders or the issuance of something even better the court drafted. (See 2 CT 603-604.)

Moreover, when it became clear that the public defender would not act as advisory counsel and that any other attorney acting in that capacity would require considerable time to get up to speed on the case, appellant

withdrew his motion. Appellant was interested in a prompt trial. His decision to forego advisory counsel in the interests of keeping the trial moving forward was a rational one. It also appears that advisory counsel is not exactly what he wanted. He was already prepared for trial, which was set to start in less than two weeks. He was looking for an extra pair of hands to help him track down his mental health experts. That mission was successful, even without a legal copilot, and the reports of the experts who had examined him most recently were submitted at the penalty phase.

The court never precluded further consideration of appellant's application if that was what he really wanted. "I know your application requested an in camera hearing on some of these issues and I am not denying that at this point." (RT [12/20/1995] 5.) Once he understood that his application ran counter to his efforts to achieve a speedy trial, appellant simply withdrew his motion and completed his trial preparations according to plan. There was no error in failing to rule on an application that was withdrawn once the full picture was drawn. Even if the court had been obliged to exercise discretion and rule on the motion before it was withdrawn there would have been no prejudice from failing to do so as it would not have been an abuse of discretion to deny the motion.

II. GRANTING APPELLANT THE BUNDLE OF CONSTITUTIONAL RIGHTS HE ASSERTED VIOLATED NEITHER STATE LAW NOR THE FEDERAL CONSTITUTION

The Sixth Amendment to the federal Constitution guarantees a defendant the right to conduct his or her own defense, providing he or she knowingly and intelligently waives the right to counsel. (*Faretta v. California* (1975) 422 U.S. 806, 835-836 (*Faretta*).) In a capital case, this right extends to both the guilt and penalty phases of trial. (*People v. Clark* (1990) 50 Cal.3d 583, 617-618.) "Notwithstanding the state's significant interest in a reliable penalty determination, a determination best made by a

fully informed sentencer, a defendant's fundamental constitutional right to control his defense governs. [Citation.] 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. [Citations.] It follows that the state's interest in ensuring a reliable penalty determination may not be urged as a basis for denying a capital defendant his fundamental right to control his defense by representing himself at all stages of the trial." (*Ibid.*, fn. omitted.)

The *Clark* analysis is on all fours with appellant's choice of strategy. Appellant now claims that by granting him his constitutionally guaranteed rights to self-representation, even if he presents no defense; to waive a jury, even though he did not want to introduce that element of randomness; and, to testify, even if he confesses guilt and requests imposition of the death penalty, the court violated a state law prohibition on pleading guilty to capital murder without the consent of counsel and both the Eighth Amendment guarantee against cruel and unusual punishment and the Fourteenth Amendment guarantee of due process. We disagree. Appellant's rights were scrupulously protected.

There have been many attempts on automatic appeal to create rules that would require reversal where a defendant has self-represented and elected to proceed in a manner different from how an attorney would have proceeded, but they have all failed. Yes, this was an "unusual case," and yes, the trial shared certain attributes with a "slow plea." (2 CT 583.) But it was not a slow plea submission on the preliminary hearing transcript, since the People were put to their proof and appellant actively participated. Nevertheless, even if it had been equivalent to a slow plea, no error can be shown, since the admonishments required when a plea pursuant to *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, is entered were fully covered, waived and initialed, one by one, in appellant's petition to represent himself.

(2 CT 404-413.) Moreover, the trial court relied on the seminal case of *People v. Bloom* in granting appellant's motion to represent himself. "[A] judgment of death may not be regarded as unreliable in a constitutional sense merely because a self-represented defendant chose not to present mitigating evidence at the penalty phase." (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1227, quoted by the trial court at 2 CT 583.)

Creating a rule that self-representation plus refusal to put on a mitigation case equals reversal would define a successful formula for active death penalty defense. It would not, however, preclude a volunteer from presenting a bare minimum mitigation case to assure his death judgment would survive appeal. Since an unwilling defendant cannot be forced to present an effective death penalty defense, such a rule is as unenforceable as it is unworkable. (*Bloom*, *supra*, 48 Cal.3d at pp. 1227-1228.)

As in *Bloom* and *Clark*, appellant made an informed choice and followed a plan that was within his constitutional rights. Indeed there was nothing contrived or unreliable about the judgment.

III. AN INFORMED DECISION TO SELF-REPRESENT FOLLOWED BY A CHOICE NOT TO PUT ON A SUBSTANTIAL CASE IS NOT AT ALL THE SAME AS A "COMPLETE BREAKDOWN OF THE ADVERSARIAL PROCESS"

Appellant's third issue is a restatement of his first two, relying on a slightly different line of cases. Appellant complains that justice cannot have been done if appellant was neither represented by counsel nor tried before a jury, the "two fundamental pillars of protection." (AOB 73.) Both rights, however, may be waived by a competent defendant making knowing, voluntary and informed choices. As noted above, "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." (*People v. Clark*, *supra*, 50 Cal.3d at p. 617 and cases there cited.)

Following through on the two pillars theme, appellant bases a due process argument on ineffective assistance of counsel cases, which are patently inapposite when counsel has been waived, and biased jury cases, which are patently inapposite when a jury has been waived. The one right appellant refuses to recognize in this proceeding is the absolute right of a competent defendant to control his case and dispense with both the lack of control that accepting appointment of counsel implies and the randomness that a jury sometimes introduces. Appellant completely avoided the potential of ineffective assistance of counsel at issue in *Strickland v. Washington* (1984) 466 U.S. 668 (ineffective assistance of counsel for failure to investigate) and *U.S. v. Cronic* (1984) 466 U.S. 648 (ineffective assistance of counsel for waiving a right to an impartial jury).

Of course adversarial testing is a positive social good, as is reliability in death penalty determinations. But appellant fails to demonstrate how those principles are endangered when a defendant who actually is guilty and deserving of the death penalty elects to testify and explain the motives that would otherwise have to be inferred by the fact-finder from circumstantial evidence. A predator defendant who knows he will keep committing rape as long as people put themselves "in a position to be raped" and will kill whenever presented with the opportunity is not jeopardizing the adversarial system by candidly revealing those motivations to the trier of fact. If appellant's present assertions are found true then it is inappropriate in any case, not just a capital case, to allow a defendant the right to self-representation and to plead guilty. All that has happened is that one defendant has put a higher priority on the right to control his or her trial destiny, as is his or her right, than on the waivable rights to counsel and a jury. The Constitution affords him the right to set his priorities in this way.

Appellant asserts that defense counsel poked some holes in the prosecution case at the preliminary hearing and could have been of

assistance at trial. He points to questions on cross-examination directed to whether the robbery and sexual assaults were incidental to the murder and whether there was sufficient evidence of torture. (AOB 81.) The questions were not particularly successful, depending as they did on taking snippets of appellant's confessions out of context. (See 2 CT 253-255 [debating the meaning of, "You owe me money, motherfucker. If you don't do what I tell you, I am going to shoot you]; and 2 CT 273-275 [uncovering appellant's fairly typical rapist fantasy that secretly his victims are glad to be chosen].) More importantly, appellant, who did not testify at the preliminary hearing, had the right to testify even over counsel's objection, at trial. (*Harris v. New York* (1971) 401 U.S. 222, 225.) Even if counsel had been forced upon appellant in violation of his Sixth Amendment right to just say no, we cannot assume away his determination to testify. Whatever doubts that may have remained after appellant's multiple taped and video-taped confessions of concurrent robbery, sexual assault, and malice motives and the confirming forensic evidence of infliction of extreme pain would still have been erased when appellant testified.

Appellant also blames the court and the prosecutor for indulging his persistent efforts to have himself found guilty. He argues that the prosecutor's vigorous cross-examination of him was overreaching and that the courtfailed both to remain neutral and to bend over backwards to protect a self-representing defendant from himself. (AOB 76-80.) However, it is not overreaching to ask a defendant who has candidly revealed the "what" to also address the "why" of a crime. (2 RT 269 et seq.) Nor is it biased to apply the rules of evidence equally to the prosecution and the defense, so that when an evidentiary door is opened, either side may enter. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035 [ordinarily application of the rules of evidence does not infringe upon the constitutional rights of even a capital defendant].)

A prosecutor and a self-representing defendant are no more prohibited from discussing a case than are a prosecutor and defense counsel. Appellant makes much of the prosecutor's participation in the colloquy that informed appellant that cross-examination is limited to subject matter opened on direct examination. (AOB 85-86; 2 RT 268-269.) Appellant understood that he would proceed by narrative and that it was his right to cover whatever he wanted to cover. Interested in a speedy but thorough trial, appellant was not honing in on gaps in the People's case so much as limiting his narrative to those salient parts of his well-documented story that he felt had not yet received due attention at trial. The prosecutor did not elicit anything from appellant that was not touched upon in his taped confessions and at the preliminary hearing. The damaging testimony that appellant robbed, assaulted, tortured and killed for pleasure was a matter of record within days of the murder of Kurt Anderson. Appellant confessed to his roommate, his sister and the police forces of three jurisdictions. Appellant's narrative was neither elicited nor manipulated by the prosecution; it flowed freely from appellant's mouth at every opportunity.

Appellant's present assertion that he changed his story from his early confessions to the trial to fill in gaps in the prosecution case compares a selective set of snippets from the pretrial statements to the trial testimony in a way that does not advance the truth-finding function of trial or appeal. The audio tapes of the confessions and video of the trip to Mount Hamilton to reveal the location of Anderson's body were played for the court and not transcribed in the reporter's transcript. They go on for hours. Like any response to questions, appellant's answers were shaped by the questions he was asked, by the responses he had already given, by the things about himself he was not yet ready to admit, and by his developing analysis and understanding of his own motives. To tease out the four or five snippets defense counsel at the preliminary hearing found worthy of clarification

and ignore both the clarification and the other consistent statements in the confession record paints an unfair picture. Early in the taped interview process, for example, appellant briefly indulged a fantasy that he did not rape Anderson, or indeed several of his assault victims, because he perceived they gave some indication they were enjoying his assault, such as a grunt, a groan, or an erection. (Ex. 12BB, 2 SCT 166-167, 170.) These early fanciful assertions did not withstand scrutiny as it developed that appellant had engaged in threats, torture, knife work, and ligature manipulation of Anderson's genitals. But appellant presently grasps at the early delusions to suggest that the later more truthful recognition that he is a rapist and a torturer was arrived at at the behest of the prosecution for evidentiary purposes. Indeed, appellant now suggests these perfectly natural developments in his testimony occurred to "suit the needs of the prosecution." (AOB 88.) Here, he goes too far. The prosecution had precious few "needs" in this case once appellant had confessed and the autopsy had revealed evidence of torture. His story did not need to get better. Clearly all that happened was that appellant became a little more honest with himself and realized that his physical torture was accompanied by a bullying psychological torture as well, and that he was simply imagining that any part of the experience of being raped by him was pleasurable for the victims he raped at gun- and knife-point.

Nor is the learning process limited to defendants. Appellant asserts the prosecutor presented misleading testimony because, at the preliminary hearing, Dr. Pakdaman testified that Anderson's genitals showed evidence of both bruising and lividity, that is blood pooling before and after death. That the questions at trial focused on the bruising relevant to the torture finding, rather than the irrelevant, but simultaneously present lividity, does not mean the prosecutor was trying to trick a gullible trier of fact. To the contrary, in a bench trial, the focus on the characteristic that was most

relevant to the issues in the case, without dwelling on additional characteristics that are not inconsistent with the relevant ones, rendered the trial more efficient, not less reliable. Had the characterization at trial been unfair, Dr. Pakdaman would have given different responses.

The trial court complied with the rules of evidence, when it permitted appellant to testify by narrative, followed by cross-examination by the People. Moreover, the People could have called appellant as their own witness in rebuttal. (*People v. Barnum* (2003) 29 Cal.4th 1210, 1227 & fn. 3 [defendant's narrative and rebuttal].) Appellant's narrative set a broad field of topics open for cross-examination or rebuttal, but that was his choice. When questioned by the prosecution, appellant was being cross-examined, and the leading questions appellant now condemns were permissible. The fact that appellant provided testimony that proved useful to the prosecution does not change a criminal defendant who had entered a plea of not guilty into a non-adverse party to whom leading questions cannot be posed. (See Evid. Code, § 773, subd. (b).) If that were the case, courts would have to go question by question through the testimony of every witness to determine when they are providing evidence the questioning party can make use of and when they are testifying "adversely." The very purpose of leading questions on cross-examination is to probe into weaknesses in the adverse party's position, the uncovering of which may prove useful to the questioning party. Followed to its logical conclusion, appellant's argument would prevent any cross-examination by leading questions, not just that of a self-representing defendant.

Appellant's assertion that he should have been provided counsel, despite his demand to self-represent, to prevent him from committing state-assisted suicide (AOB 69), does not withstand scrutiny and has been rejected many times by this Court. A strategic decision to self-represent, to assist the prosecution, and even to ask for the death penalty does not

guarantee a death judgment: "Faced with a defendant arguing a preference for the death penalty after conviction of death-eligible offenses, a jury might well conclude that death was 'too good' for the defendant and that life imprisonment with no hope of parole would be the more severe and more appropriate punishment." (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1223.) A court or jury could conclude that the death penalty is not the appropriate punishment, whether it is what the defendant wants or not. Appellant's death eligibility is based on his committing deliberate and premeditated murder under special circumstances deemed by society to distinguish ordinary murders from those meriting the death penalty. "[T]he judgment cannot reasonably be regarded as the defendant's doing (other than by his commission of the capital crimes) or its execution as suicide." (*Ibid.*)

Neither the likelihood of achieving the desired death verdict, nor the prospect of a poor defense performance defeats the defendant's Sixth Amendment right to control his own defense destiny. For the state to "force a lawyer on a defendant" impinges on "that respect for the individual which is the lifeblood of the law." (*Faretta v. California* (1975) 422 U.S. 806, 834.) That principle obtains at the penalty phase as well as at the guilt phase, whether the defendant's strategy is aimed toward a life sentence or a death sentence, and whether his or her performance as counsel is apt or inept. (*People v. Taylor* (2009) 47 Cal.4th 850, 865-866.)

On appeal, distaste for the result is causing represented appellant to ascribe undeserved motives to the officers of the court who supported his exercise of the right to represent himself at trial. Neither the prosecutor nor the court was obliged to conduct his defense or force him to perform in a more defense-lawyerly manner. Appellant's confessions were a matter of preserved record, the testimony of the key witnesses was regularly elicited in compliance with the rules of evidence and remained virtually unchanged

from the thorough preliminary hearing to the trial, and the forensic evidence confirmed the testimony. To the extent appellant provided evidence at the penalty phase that could be considered exaggerated or uncorroborated, the court expressly limited itself to consideration of evidence presented by the victim witnesses. (2 RT 540.) There is simply no evidence of a breakdown in the adversarial process.

IV. THE TRIAL SATISFIED EIGHTH AMENDMENT STANDARDS

Assuming the existence of all the statutory and constitutional violations alleged in the previous arguments, appellant asserts that the trial was so unreliable that reversal is required. This Court has explained that:

> " 'the required reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. A judgment of death entered in conformity with these rigorous standards does not violate the Eighth Amendment reliability requirements.' "

(*People v. Clark*, *supra*, 3 Cal.4th at p. 109.) Appellant argues that the trial court abdicated its responsibility to protect appellant's Eighth Amendment rights, but the court clearly had *People v. Bloom*, *supra*, 48 Cal.3d 1194, and *Clark* open before it. (2 RT 553 [Court sought "guidance" from *Bloom*].) Appellant's trial was neither unfair nor unreliable.

In *People v. Bloom*, *supra*, this Court analyzed a case very similar to the present one. The defendant, who had murdered his father, his stepmother, and his eight-year-old stepsister, requested that he be allowed to represent himself at the penalty phase because he wanted to help the prosecution obtain a death verdict from the jury. (48 Cal.3d at pp. 1214-1215.) He had been 18 years old at the time of the offenses in 1982, and

the trial took place the following year. He made it clear that he intended to call only witnesses who would help the prosecution obtain the death penalty and, when he was granted the right to represent himself, that is exactly what he did. He provided evidence of prior crimes in addition to the ones the People could prove. He also elicited additional incriminating and violent details from witnesses the People called. (*Id.* at pp. 1215-1216.) After the prosecutor argued for the death penalty on the basis of the charged offenses, the aggravating circumstances, the defendant's lack of remorse, and the lack of mitigating evidence, defendant urged the jury to vote for the death penalty because he deserved it and wanted to die. He agreed there were no mitigating circumstances, but noted that his father had abused him, as the guilt phase evidenced had shown, and suggested that any jurors finding themselves in his situation would also have killed his father. (*Id.* at pp. 1217-1218.)

As relevant here, the defendant in *Bloom* claimed that the constitutional standards for the reliability of capital verdicts had not been satisfied and that society's interests in the proper administration of justice could not have been served if he was unrepresented and urging the death penalty. This Court noted that the fair administration of justice is preserved when the defendant has the opportunity to present evidence, when the sentencer is required to find that aggravating factors outweigh mitigating ones, and when the sentence is reviewed by an appellate court. (*Id.* at p. 1224, quoting *People v. Silagy* (1984) 101 Ill.2d 147, 77 Ill.Dec. 792, 808 [461 N.E.2d 415, 431], cert. den. 469 U.S. 873.) The Court rejected the argument that permitting a defendant to withhold substantial mitigating evidence renders the judgment unreliable. A defendant representing himself cannot be forced to put on a mitigation case. (48 Cal.3d at p. 1227.) Nor can he be forced to accept an attorney he does not want just so that attorney can put on a mitigation case. (*Id.* at pp. 1223-1224.)

> [T]he required reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. A judgment of death entered in conformity with these rigorous standards does not violate the Eighth Amendment reliability requirements.

(*Id.* at pp. 1228, fn omitted.)

Appellant asserts that his penalty trial was unreliable because of a failure to adhere to the rules of evidence. But with *Bloom* as its guide, the court adhered. Appellant now views his penalty phase testimony as a free-for-all, at which constraints were not put on the admissibility of damaging other crimes evidence. "[B]ut the Eighth Amendment's aim of ensuring the reliability of penalty determinations is furthered, not frustrated, by the admission of his prior violent activity. (See *People v. Douglas* [(1990)] 50 Cal.3d 468, 529-530.)" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1244.) Truth is not the enemy when making the penalty determination. There was a penalty phase jury in *Bloom*, which heard, because defendant elicited the evidence, that defendant had been arrested for, but not convicted of an earlier armed robbery. This Court noted that the evidence was "clearly insufficient to establish that defendant in fact committed the offense for which he had been arrested. [Citation.]" (*Id.* at p. 1230.) This Court also noted that no reasonable juror would vote for the death penalty merely because defendant had been arrested for, but not charged with, attempted robbery since the jury had been instructed that it could not consider such evidence unless the offense (not merely the arrest) was proved beyond a reasonable doubt. (*Id.* at p. 1231.) Making an assessment of reliability of the evidence, the present court elected not to consider any criminal acts which were not the subject of witness testimony beyond that presented by

the defendant himself. By waiving a jury, appellant achieved reliability, because the court disregarded any evidence that was not produced or fully corroborated by the witnesses who were examined and cross-examined, if appellant so chose, under the rules of evidence. The *Bloom* standard for a reliable death penalty judgment was met, because the trial court insisted the prior offenses constituting the aggravating evidence be proved beyond a reasonable doubt according to the rules of evidence. The court did not consider prior offenses appellant claimed to have committed that could not be proved independently. (2 RT 540.) Appellant's testimony was not a "free for all," since it was refereed by a court committed to the concept of proof beyond a reasonable doubt.

V. THE TRIAL COURT PROPERLY RESPECTED APPELLANT'S EXERCISE OF HIS SIXTH AMENDMENT RIGHT TO REPRESENT HIMSELF AT BOTH THE GUILT AND PENALTY PHASES

Faretta v. California, *supra*, 422 U.S. 806, recognizes the right of any competent and non-obstructionist defendant to waive counsel and conduct his own defense. (*Id.* at pp. 819, 836.) Appellant seeks to limit *Faretta* to non-capital cases or, at least, preclude self-representation at the penalty phase of a capital trial. (AOB 121.) Finally, he asserts that even if *Faretta* rights may be recognized in some capital cases, self-representation should not have been permitted in this particular case. The weight of authority supports honoring self-representation in capital cases and the finding of the trial court that this was an appropriate case to grant that right upon appellant's motion.

A. *Faretta* Applies in Capital Cases

This Court had occasion to summarize the rules of self-representation in *People v. Welch* (1999) 20 Cal.4th 701:

> A criminal defendant has a right to represent himself at trial under the Sixth Amendment to the United States Constitution. (*Faretta v. California* (1975) 422 U.S. 806, 95 S.Ct. 2525, 45

> L.Ed.2d 562 (*Faretta*); *People v. Marshall* (1997) 15 Cal.4th 1, 20, 61 Cal.Rptr.2d 84, 931 P.2d 262 (*Marshall*).) A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. (*Faretta, supra*, at p. 835, 95 S.Ct. 2525; *People v. Gallego* (1990) 52 Cal.3d 115, 161, 276 Cal.Rptr. 679, 802 P.2d 169; *People v. Bloom* (1989) 48 Cal.3d 1194, 1224–1225, 259 Cal.Rptr. 669, 774 P.2d 698.) Second, he must make his request unequivocally. (*Faretta, supra*, at p. 835, 95 S.Ct. 2525; *People v. Clark* (1992) 3 Cal.4th 41, 98, 10 Cal.Rptr.2d 554, 833 P.2d 561 (*Clark*).) Third, he must make his request within a reasonable time before trial. (*Marshall, supra*, at pp. 20–21, 61 Cal.Rptr.2d 84, 931 P.2d 262; *Clark, supra*, at p. 98, 10 Cal.Rptr.2d 554, 833 P.2d 561; *People v. Windham* (1977) 19 Cal.3d 121, 128, 137 Cal.Rptr. 8, 560 P.2d 1187.) *Faretta* error is reversible per se. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (*McKaskle*); *People v. Joseph* (1983) 34 Cal.3d 936, 948, 196 Cal.Rptr. 339, 671 P.2d 843.)

(*Id.* at p. 730.)

The reasons for recognizing the right to self-represent, once these three conditions are met, apply equally to capital trials. There is nothing about the seriousness of the charges or the potential penalty which diminishes the "respect for the individual which is the lifeblood of the law." (*Faretta, supra*, 422 U.S. at p. 834.) So "of course, *Faretta* applies in a capital case." (*People v. Lynch* (2010) 50 Cal. 4th 693, 725; see *People v. Blair* (2005) 36 Cal.4th 686, 738 [Sixth Amendment rights to counsel and to eschew counsel apply at penalty and guilt phases].) This is true whether the self-representation occurs at the first, or guilt, phase of the trial, the second, or penalty, phase of the trial or the entire trial. (*People v. Blair*, *supra*, 36 Cal.4th at 738 [penalty phase is merely a stage in a single capital trial]; *People v. Taylor* (2009) 47 Cal.4th 850, 865.)

Appellant recognizes this Court has consistently held that *Faretta* applies to capital cases, citing *People v. Joseph* (1983) 34 Cal.3d 936, 945, and *People v. Dent* (2003) 30 Cal.4th 213, 218, and only makes the argument in order to raise it in the United States Supreme Court. (AOB 122.)

B. Recent *Faretta* Refinements Provide No Basis to Distinguish Between Capital Sixth Amendment Rights and Noncapital Sixth Amendment Rights

Appellant focuses on cases restricting *Faretta* rights in the case of defendants suffering severe mental illness, for defendants who refuse or are unable to control their courtroom behavior, and on appeal, but not one of these developments requires a rethinking of the basic applicability of *Faretta* rights to capital defendants.

It is not an abuse of discretion to deny self-representation to an incompetent defendant. Although he is clearly as "literate, competent, and understanding" as Faretta himself (*Faretta*, *supra*, 422 U.S. at p. 835), if not more so, appellant focuses on the recent attention to the interplay between competence and self-representation as an indication that there are natural limits on the right to self-represent which should preclude exercise of that right at a capital trial, particularly the penalty phase. While the right to self-represent is not unlimited, appellant exhibits none of the characteristics which would prevent him from exercising it in a capital or noncapital context.

In *Indiana v. Edwards* (2008) 554 U.S. 164, the Supreme Court held that while the federal Constitution requires no greater showing of competence to waive counsel than competence to stand trial, the states can set a higher standard of competence to waive the assistance of counsel. Appellant sees in this development the seeds of the undoing or severe limitation of the *Faretta* right to those in whose best interests it would be to

conduct their own trials. But *Edwards* is focused only on competence and respects the individual rights of competent defendants to decide where their interests lie by repeated reference to *Faretta*. "[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky*[4] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Indiana v.Edwards, supra*, 554 U.S. at p. 178.) As appellant did not suffer from severe mental illness when making the decision to represent himself, and as *Edwards* does not infringe on the rights of the competent to make such decisions, it provides no basis for revisiting here the rights of capital defendants generally to represent themselves.

This Court recognized the rule in *Edwards* in *People v. Johnson* (2008) 53 Cal.4th 519, 530, "the states may deny self-representation to those competent to stand trial, but who 'suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.' ([*Edwards*, *supra*,] 554 U.S. at p. 178.)" Narrowly protecting the ability of any and every trial to proceed enhances the reliability of all proceedings. (See Edwards, supra, 554 U.S. at pp. 178-179.) It provides no basis for concluding that capital trials or penalty phases of capital trials cannot be reliable when so protected

It is also not an abuse of discretion to deny self-representation to those "so disruptive, obstreperous, disobedient, disrespectful or obstructionist" that an orderly trial could not be achieved. Obviously, when the defendant and counsel are one, neither of them can conduct business from a holding cell, and the proceedings grind to a halt. (*People v. Welch*, *supra*, 20 Cal.4th at p. 735.) Any trial may be prevented, delayed, or rendered unworkable by a defendant determined to manipulate or misbehave. A trial

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[4] *Dusky v. United States* (1960) 362 U.S. 402,

that cannot continue is not fair or unfair, it has simply been derailed. The fundamental judicial power to control the courtroom underlies every case regardless of penalty.

In addition, since *Faretta* addresses Sixth Amendment rights, it is inapplicable to appeals, where there is no right to self-representation. (*Martinez v. Court of Appeal* (2000) 528 U.S. 152, 163.) *Martinez*, on which appellant relies (AOB 82), in no way suggests a limitation on self-representation in situations where the Sixth Amendment obtains.

Appellant cites to *McKaskle v. Wiggins* (1984) 465 U.S. 168, as permitting standby counsel to participate in the trial even over the objections of the otherwise self-representing defendant. McKaskle v. Wiggins does not so hold. It holds that standby counsel can participate over a defendant's objections only so long as that participation does not result in defendant losing control of his case or give the impression to the jury that defendant is not in control of his case. A.defendant has the right to self-represent and the right to be represented by counsel, but not both at the same time, so that in hybrid situations, the defendant is ultimately responsible for defining the roles, as only one can be in charge. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1368.) If appellant's point is that if there are any limits on self-representational autonomy, then a prohibition on self-representation at the penalty phase should be one of them, the argument is not supported by his authority and is otherwise not sustainable. The restrictions placed on self-representation are limited to controlling the factors that threaten the ability to proceed with the fair trial at all. Absent a threat to the proceedings, there is no reason to treat the second aspect of a capital trial any differently from the first or a capital trial any differently from a noncapital one.

Not one of these recent developments provides a basis to reconsider the rights of capital defendants to self-represent. (*People v. Taylor*, *supra*, 47 Cal.4th at p. 865.) The Sixth Amendment protects the right of the accused to make decisions about the defense, even if the decision is to forego a defense, to establish guilt, or to seek the death penalty. (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1228.)

VI. THAT APPELLANT HAS A RIGHT TO COUNSEL AT ALL STAGES OF A CAPITAL TRIAL BY STATUTE DOES NOT MEAN THAT HIS SIXTH AMENDMENT RIGHT TO REPRESENT HIMSELF IS MEANINGLESS

Appellant also notes that Penal Code section 686.1 provides for counsel in capital cases. He suggests that the statutory provision for counsel in capital cases trumps the constitutional recognition of the right to waive counsel and proceed pro se. He is incorrect for reasons recently identified by this Court in *People v. Johnson*, *supra*, 53 Cal.4th 519.

In *Johnson*, this Court reviewed the interplay between California law and federal precedent, particularly between *Faretta* and section 686.1:

> In *Faretta*, *supra*, 422 U.S. 806, 95 S.Ct. 2525, the United States Supreme Court held that the Sixth Amendment to the United States Constitution gives criminal defendants the right to represent themselves. When *Faretta* was decided, the law in California had been that a criminal defendant had no constitutional or statutory right to self-representation, although in noncapital cases the trial court had discretion to grant a defendant's request for self-representation. (*People v. Sharp* (1972) 7 Cal.3d 448, 459, 461, 463–464, 103 Cal.Rptr. 233, 499 P.2d 489 [no right to self-representation]; *People v. Floyd* (1970) 1 Cal.3d 694, 702–703, 83 Cal.Rptr. 608, 464 P.2d 64 [discretion to grant self-representation]; see *People v. Taylor* (2009) 47 Cal.4th 850, 871–872, 102 Cal.Rptr.3d 852, 220 P.3d 872 (*Taylor*).) The California Constitution gives criminal defendants only the right to "the assistance of counsel" and "to be personally present with counsel." (Cal. Const., art. I, § 15.) Still today, Penal Code section 686.1 provides that "the defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings."

> (See *Taylor*, *supra*, at p. 872, fn. 8, 102 Cal.Rptr.3d 852, 220 P.3d 872.)
>
> When the Legislature enacted Penal Code section 686.1, it made this finding: "The Legislature finds that persons representing themselves cause unnecessary delays in the trials of charges against them; that trials are extended by such persons representing themselves; and that orderly trial procedures are disrupted. Self-representation places a heavy burden upon the administration of criminal justice without any advantages accruing to those persons who desire to represent themselves." (Stats.1971, ch. 1800, § 6, p. 3898; see *People v. Sharp*, *supra*, 7 Cal.3d at p. 463, 103 Cal.Rptr. 233, 499 P.2d 489 [quoting this policy statement].)
>
> Obviously, California law is subject to the United States Constitution, including the Sixth Amendment right to self-representation as established in *Faretta*, *supra*, 422 U.S. 806, 95 S.Ct. 2525, and its progeny. Penal Code section 686.1, for example, cannot be given effect. But *People v. Sharp*, *supra*, 7 Cal.3d 448, 103 Cal.Rptr. 233, 499 P.2d 489, "remains good law as to the California Constitution and Penal Code." (*Taylor*, *supra,* 47 Cal.4th at p. 872, fn. 8, 102 Cal.Rptr.3d 852, 220 P.3d 872.) California courts should give effect to this California law when it can.

(*Johnson*, *supra*, 53 Cal.4th at pp. 525-526.)

Having so recently reviewed this issue in depth and determined that effect cannot be given to section 686.1 when it conflicts with *Faretta*, this Court need not accept appellant's invitation to reopen the debate.

VII. THE TRIAL COURT'S DETAILED FINDINGS PERMIT MEANINGFUL REVIEW OF THE PENALTY DETERMINATION

Appellant next observes that, when a capital penalty phase is tried to the bench, there is no 13th juror, as yet uninvolved in the determination, to conduct an independent consideration of the defendant's automatic motion for modification of the death judgment. This Court has recognized that the underlying purpose of the automatic motion for modification is served in a bench trial when the trial court provides a written and reviewable basis for

appellate review of the penalty determination. As the court provided such an explanation of the factors it considered in reaching the penalty determination, this Court has what it needs to conduct the meaningful review underway in these proceedings.

A. The Proceedings Below

The trial court presented its analysis of the factors in aggravation and mitigation and announced its verdict of death, then set a date for any motion for new trial or motion to reconsider the death verdict. (2 RT 533-541.) Appellant did not object to this procedure. When the date arrived, appellant declined the opportunity to have the court reconsider its weighing of the factors in aggravation and mitigation and requested that the court move on to sentencing, which it did. (2 RT 545-551.)

B. California Law, as Guided by the Federal Constitution, Provides for Independent Review of Death Penalty Determinations Made by a Jury and Reviewable Analysis of the Aggravating and Mitigating Factors When the Penalty Determination is Made by the Court

Appellant asserts that he could not waive his right to a trial level review of the penalty determination, either by waiving a jury trial or by declining the trial court's offer to entertain a motion to reconsider. This Court recently addressed and rejected similar issues in *People v. Weaver* (2012) 53 Cal.4th 1056, and need not reach a different conclusion here.

Section 190.4, subdivision (e) states that,

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the *judg*e shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, 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. The *judge* shall state on the record the reasons for his findings. [¶] The *judge* shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the *death penalty verdict* pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's *automatic appeal pursuant to subdivision (b) of Section 1239*. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

(Pen. Code, § 190.4, subd. (e), italics added.)

Appellant argues that both this Court and the United States Supreme Court have recognized a trial court's independent review of a death verdict rendered by a trier of fact as being a constitutionally required element of California's death penalty scheme. (AOB 148.) Appellant then argues that, "[a]lthough the California Legislature failed to provide a precise mechanism for the independent review of a trial judge's death verdict, the universal right to an independent review of the verdict at the trial level is both constitutionally mandated and embedded in the California statute." (AOB 147-148.) But appellant cites no case or statute that entitles a defendant to a "universal right" to an independent review of a death verdict rendered by a court after valid waiver of a jury at the penalty phase.

Appellant argues that this Court must take one of two approaches. Either this Court should "read into" section 190.4(e), a mechanism to require an independent review of a trial court's death penalty verdict and remand his case in order that such a review can be conducted at the trial court level or, this Court should declare the statute "unconstitutional as applied to cases in which a jury trial has been waived." (AOB 148.) He is wrong for the reasons that follow.

It is apparent from the legislative history, and supported by case law that, while the California Legislature understood there was a constitutional requirement for a trial court to independently review a jury's death verdict,

it saw no similar requirement that a court's determination that death is the appropriate penalty be similarly independently reviewed at the trial level. Appellant was offered the opportunity to make a new trial motion and to have the trial court reconsider the penalty determination. He waived both opportunities. His concern on appeal is not that the trial judge was prevented from modifying the judgment, but that another trial judge should have "independently" reviewed the judgment. Absent a specific requirement that a defendant who waives his right to jury for the penalty phase have the judgment independently reviewed at the trial level, there can be no actionable denial of an automatic application for modification. The denial of an automatic application for modification of sentence of death is automatically reviewed by this Court pursuant to subdivision (b) of Penal Code section 1239. Appellant's rights are protected by this Court's review, whether it is reviewing the trial court's ruling on an application for modification of a jury determination or the trial court's statement on the record of its reasons for making the penalty determination entered in the record in the absence of a jury.

We note, first, that appellant posed no objection to the procedure of having the court make a determination of penalty and set it forth on the record as the principle review instrument on this issue. This renders appellant's argument VII non-cognizable on appeal. (*People* v. *Weaver*, *supra*, 53 Cal.4th at pp. 1090-1091.)

In contrast to *People* v. *Weaver*, appellant argues that regardless of whether the trier of fact is a court or jury, section 190.4, subdivision (e) requires an independent review of the death penalty verdict. In *Weaver*, after executing a two-page written waiver of his right to a jury, "[d]efendant and his counsel signed a one-page waiver of his right to a jury trial at the penalty phase which stated, in part '"If, at the guilt phase, [defendant] is found guilty of first degree murder and a special circumstance is found true

… he does desire to waive and give up his right to a trial by jury and that he does desire to have this court sitting without a jury determine whether he will be sentenced to life without the possibility of parole or death …." (*Id.* at p. 1070.) Following the court trial guilt phase verdict, appellant signed another written jury waiver that stated, in part:

> "It is also the intention and reaffirmation that the defense and prosecution furthermore separately recognize their right to a jury trial on the special circumstances finding and also fully waive their right to jury trial on the special circumstances finding." The court noted on the record that when defendant had waived his right to a jury prior to trial, it "very carefully pointed out that the defendant was waiving a jury for all purposes and all findings in front of the court. … Nonetheless, the court feels that it is worthy of reaffirmation that that's exactly what everyone intended to do ….,"
>
> The court also explained it would permit either side to withdraw its waiver of a jury penalty trial. It called a recess to permit the parties, including defendant personally, to reconsider whether to waive a jury for the penalty trial. After the recess, defendant personally reiterated that he had waived a jury for all purposes, including the special circumstances, and said he still wished to waive a jury for the penalty phase.

(*Ibid.*)

Ruling on *Weaver's* contention that the trial court did not conduct a proper hearing on his automatic application to modify the death verdict pursuant to section 190.4(e), this Court observed that:

> Before accepting defendant's waiver of a jury trial, the trial court advised him that it would not "conduct a separate, independent review of the evidence" under section 190.4 "because the judge has made the decision." The court explained that "the automatic, independent review of the evidence and the way the law was applied by the court will not take place in a jury waiver because there is no jury performance for [the trial judge] to review." Defendant stated he understood, and both defense counsel stated they agreed.

> At the end of the penalty phase, before it rendered its verdict, the trial court stated that because it could not conduct an independent review of the evidence under section 190.4, subdivision (e), it would "make a detailed statement of the factors in mitigation and the factors in aggravation that the court considered" in reaching its verdict. It explained its verdict in great detail. Then, about two months later, "in an abundance of caution," the court did conduct a hearing under section 190.4, subdivision (e). Once more it reviewed in detail the mitigating and aggravating evidence. After that review, it found "that the judgment that was rendered in this case was rendered pursuant to the evidence, the weight was supported by it, and that it was a legal judgment." Accordingly, it denied the automatic motion to modify the verdict.

(*Id.* at pp. 1090-1091.)

Weaver found that appellant's claim he did not receive a proper hearing on his automatic motion for reconsideration was not cognizable on appeal because he did not object at trial. This Court also found his claim lacked merit because it had never held that a defendant who waives his right to a jury on penalty is entitled to a modification hearing pursuant to 190.4, subdivision (e). (*Id.* at p. 1091, citing *People* v. *Horning* (2004) 34 Cal.4th 912, quoting *People v. Diaz* (1992) 3 Cal.4th 495.) This Court explained:

> We noted in *Horning* that such a hearing after a penalty phase court trial would not be entirely futile because the requirement that the trial court state on the record the reasons for its findings "'enables us to review the propriety of the penalty determination made by the trial court sitting without a jury.'" (*People* v. *Horning, supra*, at p. 912, quoting *People* v. *Diaz, supra*, at p. 575, fn. 35.) In *Horning*, the trial court had given a detailed statement of reasons for its penalty phase verdict, and we observed that "[n]othing in section 190.4 suggests the court must state its reasons twice." (*People* v. *Horning, supra*, at p. 912.) In this case, the trial court did state its reasons twice—once when it imposed the death penalty and a second time when it denied the automatic motion to modify the verdict. No error occurred.

(*People v. Weaver*, *supra*, at p. 1091.)

The defendant's argument in *Weaver* was that because 190.4(e) does not logically apply to a court trial, California's death penalty scheme is unconstitutional because it fails to provide a mechanism for independent review of the trial court's penalty phase verdict. Rejecting that notion, *Weaver* explains that what is required is a reviewable statement of reasons. A second statement of reasons is redundant, but does no harm.

This Court noted that, as here, "[the defendant in *Weaver*] contends that statute should require 'another judge to review the sentencing judge's verdict.' " He cites no authority holding that a defendant who waives his jury trial has a constitutional right to an independent review of the court's verdict, and we decline to do so." (*Ibid.*) Appellant urges reconsideration of this holding, but cites to no statute or case that supports his view. In fact, he urges this Court to reconsider its requirement to supply such authority.

Appellant supports his request to reconsider *Weaver* by arguing that since the language in 190.4, subdivision (e), states a defendant's application for modification is automatic it must apply to court trial death verdicts as well as those reached by a jury, but he cites no authority for the proposition the right cannot be waived when a jury is waived. *Weaver* found, "[i]t did not violate defendant's constitutional rights to allow him to waive a jury, expressly acknowledging that he would therefore not receive independent review under Penal Code section 190.4(e)." (*People* v. *Weaver*, *supra*, 53 Cal. 4th at p. 1056.) The analysis is the same when, as here, the defendant knowingly waives a jury, aware that the court will make the factual determinations, and further waives a later opportunity for reconsideration.

The case law preceding *Weaver* shows there was no ambiguity in the language. A capital defendant is deemed to have filed an application for modification of a capital sentence rendered by a jury acting as trier of fact

and not a trial court acting in that capacity. Although the application is "automatic," the law as to whom the application applies is settled. (See *People* v. *Frierson* (1979) 25 Cal.3d 142, 193 [in ruling on the automatic application for modification of verdict (former Pen. Code, § 190.4, subd. (e)), the trial court must review the evidence, consider the aggravating and mitigating circumstances, make its own independent determination as to the weight of the evidence supporting the jury's findings and verdict]; *People* v. *Mayfield* (1993) 5 Cal.4th 220, [the trial court must independently reweigh the evidence of mitigating and aggravating circumstances and decide whether, in the court's independent judgment, the weight of the evidence supports the verdict].) In *People* v. *Lang* (1989) 49 Cal.3d 991, this Court found "that in ruling on the automatic motion to modify a death verdict, the trial judge's function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict. (See *People* v. *Allison* [1989] 48 Cal. 3d 879, 913-916 (conc. opn. of Kaufman, J); *People* v. *Heishman* [(1988)], 45 Cal.3d 147, 200; see also, *People* v. *Frierson* [*supra*] 25 Cal. 3d 142, 193, fn. 7 [158 Cal. Rptr. 281, 599 P.2d 587] (conc. opn. of Mosk, J.) [construing similar provision of 1977 death penalty law].)" (*Lang, supra*, 49 Cal.3d at p. 1044.) The provisions have been slightly redrafted over time, but are interpreted as identical on this point. (*People v. Frierson* (1991) 52 Cal.3d 730, 751.)

In *People* v. *Scott* (1997) 15 Cal. 4th 1188, the defendant, like appellant, waived a jury for both the guilt phase and the penalty phase. But, unlike appellant, the defendant in *Scott* was represented by counsel. This Court held that, "a judge sitting as the trier of fact must make a specific finding of the truth of each alleged special circumstance, and at the

time of the automatic motion for modification, the court must state the reasons for its findings." (*Scott*, at p. 1221, quoting *People v. Diaz* (1992) 3 Cal.4th 495, 571 [the statement of reasons permits careful appellate review].) In rendering the death verdict in appellant's case, the trial court here stated in detail for the record the reasons for its findings, as respondent discusses below. In *People v. Diaz*, this Court found that, "[a]s with a jury, a judge sitting as a trier of fact must make a specific finding of the truth of each alleged special circumstance, and at the time of the automatic motion for modification, the court must state the reasons for its findings." (3 Cal. 4th at p. 571.) The trial court here made such findings as required, thus providing the protections to ensure an adequate appellate review. (See *People v. Memro* (1995) 11 Cal.4th 768, 883-884; *People v. Frierson, supra,* 53 Cal.3d at p. 751; *People v. Arias* (1996) 13 Cal.4th 92, 191-192 [the court is required only to provide a ruling adequate to assure thoughtful and effective appellate review].) Thus, in a situation where the defendant waives his right to a penalty jury, review of the death verdict by this Court on appeal is sufficient to satisfy any constitutional concerns.

The trial court in appellant's case was very diligent in ensuring that appellant understood why the trial court was unable to conduct an independent review upon an application for modification of sentence. The court demonstrated it understood its responsibilities under section 190.4, subdivision (e), to set forth the reasons for the death judgment and did so.

Consideration of the possible remedies further demonstrates the fallacy of appellant's assertion of error. Requiring two judges to hear the trial so that one of them could sit in review of the other's penalty determination would run afoul of the prescription against courts of equal stature revisiting each other's rulings. (*Williams v. Superior Court* (1939) 14 Cal.2d 656, 662.) Our Constitution vests appellate jurisdiction to review, revise, or reverse the decisions of the superior courts only in this

Court and the courts of appeal. (Cal. Const., art. VI, § 11.) If an appellate court or this Court were tasked with the independent review, it would duplicate the automatic review already provided and underway here. That there is no logical remedy reinforces the conclusion that there can have been no error.

C. The Trial Court's Penalty Determination was Well Documented and Lends Itself to Effective Review

At the close of the prosecution's penalty phase argument, the trial court asked appellant if he wanted to add anything further. Appellant asked the trial court "for an immediate transfer after a speedy sentence, …." (2 RT 532.) The trial court explained, "this is a case where the fact you have asked that the court impose the death penalty, the court has to review all the evidence, look at the entire record and render a decision that is based on the facts, the evidence and the record in this case." (2 RT 532.) After announcing its findings on guilt and the special circumstance allegations, the trial court stated:

> This is an unusual case because the defendant has wished to plead guilty since the proceedings began and has wanted to admit the special circumstances. Defendant stated he believes the appropriate penalty for his crimes is death. [¶] We have gone through a court trial which the court would characterize as a slow plea. [¶] Court was kind of troubled by the procedure, but the court will note at this time the court sought guidance from the California Supreme Court in the case of People versus Bloom.... [(1989) 48 Cal.3d 1194]. [¶] [Appellant] has offered no defense to the charges. He has offered no mitigation in the penalty phase of the trial. In fact, the defendant has exercised his constitutional right to testify and has taken the stand and under oath admitted his crimes, admitted the enhancement, the special circumstances, and he has given testimony to justify the finding for the court to impose the death penalty. [¶] Under this background, the court will analyze the enumerated factors in order to decide the appropriate penalty."

(2 RT 533.)

The trial court listed in great detail its findings as to the enumerated factors of section 190.2, subdivisions (a)-(k). (2 RT 533-539.) The trial court found the People's witnesses credible and reasonable, referenced both video and audio taped confessions, and found the evidence in the case overwhelming and sufficient "beyond any reasonable doubt." (2 RT 539.) Appellant had represented that if he did not receive the death penalty he intended to kill again, and that he had regrets he did not kill Cota and Terry before being apprehended. (*Ibid.*) The trial court explained that, in making its analysis of the aggravating and mitigating factors, it chose to exclude the incidents which were not presented through the victims. (2 RT 540.) Thus any crimes claimed by appellant, but not the subject of victim testimony, were disregarded. In pronouncing its sentencing decision, the trial court stated:

> Based on the above factors, the court finds that the facts in aggravation substantially outweigh the factors in mitigation. The court finds that the appropriate penalty based upon the totality of the evidence, the facts as presented, the testimony of witnesses, for the first degree murder plus personal use of a firearm and the three special circumstances, is to be death. [¶] The court orders that a transcript of these findings be made and that the transcript be entered in the clerk's minutes as part of the record.

(2 RT 540.)

The court met section 190.4, subdivision (e)'s requirement that a trial court state its reasons on the record to permit appropriate appellate review. (*People v. Frierson*, *supra*, 25 Cal.3d 142, 176; *People v. Davenport* (1995) 11 Cal.4th 1171, 1232; *Bonin v. Vasquez* (1992) 807 F.Supp 589.) While referring appellant to the Adult Probation Department for a report and recommendation, the trial court explained to appellant, "[i]f this were a jury trial, after the jury returns a verdict of death, the court independently would have reviewed like what I did here, the factors in aggravation versus the

factors in mitigation to render the decision. So before I can render judgment, you have the opportunity to, as I read the law, if you so desire, you can make a motion for new trial. You can make a motion for me to modify judgment... ." (2 RT 541.) After reviewing appellant's motions, and the Probation Report, the trial court would then render its judgment regarding sentencing. (2 RT 541-542.)

On February 21, 1996, after reiterating the procedural history of the case and its findings in both the guilt and penalty phases, the trial court asked appellant if there was any legal cause why it should not impose sentence. Appellant replied there were no reasons not to impose sentence. The trial court then asked appellant if he would like to file a motion for new trial. Appellant declined. The trial court then asked appellant if he wished the trial court to reconsider the weighing of the factors in aggravation against the factors in mitigation. Again appellant declined. (2 RT 545.) The trial court explained that before this hearing it could not read the probation report. (2 RT 546.) After recessing to read the Probation Report, and hearing appellant's requests on matters to be resolved before the trial court lost jurisdiction, the trial court imposed the death sentence. (2 RT 547-548.)

Given that the trial court stated for the record in great detail its findings on the relative weight of the factors in aggravation versus those in mitigation, explained why it felt that independent review of the death verdict was not applicable in this case, and offered appellant the opportunity to request sentence modification or a new trial, it is clear the trial court knew the law and its responsibilities pursuant to section 190.4, subdivision (e) and complied with the statute. (2 RT 548.)

D. The Legislature Did Not Provide for Independent Review of a Trial Court's Penalty Determination Because There is no Need for Such Review

Appellant's argument VII, part D, asserts that a capital defendant who waives a jury cannot waive independent review of the fact-finder's determination, suggesting that when a trial is to the court, a second judge must either sit and hear the penalty phase evidence so as to be able to substitute for the "13th juror" review provided for in section 190.4, subdivision (e), or that a second trial judge must review the evidence, then provide an "independent review" of the case, prior to appeal. (AOB 150-158.) In support of the argument that all capital defendants, whether sentenced by a judge or by a jury, are "entitled to a trial-level independent review of the death verdict," appellant relies on a legislative history package relating to Senate Bill (SB) 155, which added section 190.4 to the Penal Code, created by the California Appellate Project.

In *Joyce v. Ford Motor Co.* (2011) 198 Cal.App.4th 1478, 1491, the appellate court explained:

> Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. [Citations.]

(See *Walton v. Arizona* (1990) 497 U.S. 639 [trial judges are presumed to know the law and to apply it in making their decisions].)

First, the heart of section 190.4, subdivision (e) is quite clearly written, requiring no interpretation to show that the contemplated automatic review is of a jury's verdict: "In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, 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." Even reading "independent" into the statute, what is required is an independent determination concerning the jury's findings. The clear statute makes no mention of an independent determination of a judge's findings. The inquiry, if it has begun despite the forfeiture, need go no further.

We nevertheless address the legislative history in an abundance of caution.

In 1977, California and several other states were trying to develop a constitutionally sound capital punishment scheme in the wake of the "76 Cases." (*Gregg v. Georgia* (1976) 428 U.S. 153; *Proffitt v. Florida* (1976) 428 U.S. 242; *Jurek v. Texas* (1976) 428 U.S. 262; *Woodson v. North Carolina* (1976) 428 U.S. 280; and *Roberts v. Louisiana* (1976) 428 U.S. 325.) This Court's contemporary decision in *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, concluded "that section 1181, subdivision 7, presently does not, and cannot reasonably be interpreted to, permit a trial court to conduct an evidentiary hearing on the existence of mitigating circumstances, and does not authorize a trial judge to reduce to life imprisonment the penalty of death which section 190.1 provides a defendant shall suffer if the trier of fact finds any one or more special circumstances as charged to be true." (*Id.* at p. 440-441.) This Court explained how,

> A fortiori, the power granted this court by section 1181, subdivision 7, to modify a verdict by imposing a lesser punishment, if applicable to a sentence of death imposed pursuant to section 190.2, cannot assure the requisite individualized consideration which the United States Supreme Court held necessary to satisfy the Eighth and Fourteenth Amendments. The automatic appeal from a judgment imposing death (§ 1239) does offer the prompt review by a court of statewide jurisdiction which the court found to be an additional "check against the random or arbitrary imposition of the death penalty" in *Gregg v. Georgia, supra*, 428 U.S. 153, 206 [49 L.Ed.2d 859, 893], but the California procedures leading to the decision to impose the death penalty do not permit the same "meaningful review" of that decision as do those of Georgia. Inasmuch as neither section 190.1 nor subdivision 7 of section 1181 provides an opportunity for a defendant to present evidence of mitigating circumstances, and no guidelines have been provided by the Legislature upon which to weigh mitigating circumstances against the aggravating factors which permit imposition of the death penalty, the record affords no basis upon which a reviewing court can assess whether, in a particular case, death is an excessive punishment, is disproportionate to penalties imposed in similar cases, or is the product of "passion, prejudice, or any other arbitrary factor." [Citation].

(*Id.* at p. 441.)

In response to the "'76 Cases" and the *Rockwell* decision, the California Legislature began working on death penalty legislation that would offer a constitutional alternative to a cumbersome proportionality review scheme which is not constitutionally required so long as there are other safeguards to assure that sentences of death will not be wantonly or freakishly imposed. (*Pulley v. Harris* (1984) 465 U.S. 37, 45, 48-49 [other safeguards include narrowing the offenses for which the penalty is imposed, providing guidance to the sentencer, and creating the opportunity for the defendant to present mitigating evidence].) In January 1977, Former Governor Deukmejian (a state senator at the time), along with Assembly Criminal Justice Committee Chairman Kenneth Maddy,

introduced bills in their respective legislative bodies to establish a death penalty scheme. (Senate Bill 155; Assembly Bill 256) These urgency measures were the statutory framework which would become California's death penalty law until rescinded and replaced in 1978 by Proposition 7. The statutory law enacted after the 1978 voter initiative passed became California's Death Penalty scheme. In the 1978 version of the statute, the word "independent" was omitted from the language of section 190.4(e), although it has been read back into it by subsequent authority. (*People v. Rodriguez* (1986) 42 Cal.3d 730,793-794.)

That one of the checks on wanton application of the death penalty is to have judges, who are presumed to know the law, review the penalty determinations of juries, which are newly instructed on the law, indicates that the intent of the Legislature in enacting the penalty scheme was to provide a check on juries that would not be required if a court were making the sentencing determination in the first instance. Moreover, if independent review were truly required to be "universal," a word applied by appellant with no citation to authority for that proposition, statutory provisions would have been included to provide for the judicial fact-finder situation. As there is no provision for review or remand for review of judge-rendered penalty determinations, it is clear that the Legislature concluded that only jury-rendered penalty determinations required such review.

Appellant makes only limited reference to the judicial notice materials as a whole, and none to the final summary. (AOB 153-157.) We note that pages 273-275 of exhibit A to the motion for judicial notice consists of a summary with the caption "Comparative summary of SB 155, AB 538, and AB 23 (as amended for hearing on May 2, 1977)" and indicating in the top right corner of page 272 that it was either prepared for or by the "Assembly Committee on Criminal Justice (M.S.U)." What is interesting about the summary is that, although it addresses the fact that proportionality review is

not included in SB 155, it does not address the automatic motion for sentencing review at all. The summary undermines appellant's argument that it was an important element of the Legislature's intent in enacting a new death penalty scheme to require independent trial level review of not only jury verdicts, but bench determinations.

The statute clearly provides for review of jury determinations. The Legislative history does not compel the conclusion that trial level review of bench determinations was even contemplated. What mattered, in terms of obviating the need for proportionality review, was providing a record of a judicial weighing of the aggravating and mitigating factors. In a jury trial, that record is the ruling on the automatic motion. In a bench trial, that record is the trial judge's statement of reasons. Either statement provides the basis for thorough and effective review by this Court which renders the statute constitutional.

E. Neither Due Process Nor Equal Protection Principles Are Offended By Reviewing Penalty Judgments on the Basis of the Court's Statement of Reasons

Appellant asserts that because the defendant in *Weaver* failed to preserve the issue of failure to conduct a trial level review of the bench determination of penalty (53 Cal.4th at p. 1091), the rest of the discussion in *Weaver* is dictum. (AOB 158.) If so, and if the issue has not also be forfeited here, the dictum in *Weaver* addressing the merits of the claim, should be considered persuasive authority, at least, for the constitutionality of section 190.4 (e) and the procedure followed here of the court providing for review a detailed statement of its reasons. (*People v. Weaver*, *supra*, 53 Cal.4th at pp. 1091-1093.)

Equal protection analysis recognizes that "persons who are similarly situated with respect to a law's legitimate purposes must be treated equally." (*People v. Brown* (2012) 54 Cal.4th 314, 328, citing *Cooley v.*

Superior Court (2002) 29 Cal.4th 228, 253.) The question "is not whether persons are similarly situation for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" (*Ibid.*) Capital defendants who have proceeded to trial by jury are not similarly situated to capital defendants who have waived a jury and submitted to a bench trial at the penalty phase, for the purposes of section 190.4 (e) which provides for a particular procedure to review jury verdicts on penalty. The two groups are ultimately treated equally, however, because this Court reviews the trial court's detailed reasons supporting the judgment, whether they are penned upon automatic review per section 190.4(e) or at the conclusion of a bench trial on penalty.

Due Process is not implicated because defendants who elect a bench trial are accorded all the process they are due when this Court reviews the penalty determination by reference to the detailed findings of the trial court. The conclusions drawn by this Court in *Weaver* on the merits remain persuasive.

VIII. APPELLANT'S GENERIC CHALLENGES TO THE DEATH PENALTY STATUTE ARE WITHOUT MERIT

Appellant contends for federal exhaustion purposes that California's Death Penalty Statute is unconstitutional as written and as applied. (See *Vasquez v. Hillery* (1986) 474 U.S. 254, 257 [federal habeas corpus petitioner must have "fairly presented" each claim to the state courts].) Petitioner urges the Court to reconsider its capital case precedent. This Court has rejected each of these claims before and should do so again here. (*People v. Schmeck* (2005) 37 Cal.4th 240, 303-306, abrogated on another point in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.).) Appellant's issues are preserved but meritless.

A. Section 190.2 Is Not Impermissibly Broad

This Court has repeatedly rejected the claim that Section 190.2 fails to perform the narrowing function required by the Eighth Amendment. (*People v. Sakarias* (2000) 22 Cal.4th 596, 632.)

B. Section 190.3, Factor (a), Was Not Applied in Violation of Appellant's Constitutional Rights

This Court has also repeatedly rejected the claim that section 190.3, factor (a), as applied, fails to minimize the risk of wholly arbitrary and capricious action in violation of the Eighth Amendment. (*People v. Crittenden* (1994) 9 Cal.4th 83, 156.) The sentencing body properly considers "circumstances of the crime," such as the particular location, method, and motive, to determine whether the death penalty should be imposed. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641.)

C. The Moral Decisions Made at the Penalty Phase are not Susceptible to Burden-of-Proof Quantification

Appellant urges the Court to overrule *People v. Prieto* (2003) 30 Cal.4th 226, 263 [reasonable doubt standard does not apply to penalty phase weighing process] and *People v. Blair* (2005) 36 Cal.4th 686, 753 [because death is a prescribed penalty once the defendant is found guilty of first degree murder and one or more special circumstances is found true beyond a reasonable doubt, finding relevant an aggravating factor during the penalty phase does not increase the penalty beyond that prescribed, so no additional Sixth Amendment requirements apply to the weighing of aggravating and mitigating factors]. Although evidence of prior criminal activity could only be considered if established beyond a reasonable doubt, the sentencer weighs the section 190.3 factors and determines whether the penalty-eligible defendant should receive the penalty. (*People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) *Prieto* and *Blair* thoughtfully assess and reject any need to instruct or impose upon the sentencer a beyond a

reasonable doubt standard of weighing the relevant factors. Appellant offers no reason to revisit these decisions.

D. No Intercase Proportionality Review is Required

Neither the state nor the federal Constitution requires intercase proportionality review. (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51; *People v. Montes* (2014) 56 Cal.4th 809, 899; *People v. Crittenden, supra*, 9 Cal.4th at pp. 156-157.)

E. California's Capital Sentencing Framework Does Not Violate the Equal Protection Clause

Appellant asserts that California's capital sentencing scheme violates equal protection guarantees because those facing a non-capital sentence are afforded certain procedural protections that are not available to capital defendants. Specifically, appellant argues that in a noncapital case an enhancement allegation must be established by a preponderance of the evidence. By contrast, aggravating and mitigating circumstances are weighed without a burden of proof. Initially, an equal protection analysis requires two identifiable groups similarly situated, but treated differently. Defendants eligible for the death penalty are not similarly situated to noncapital defendants. (*People v. Williams* (2013) 58 Cal.4th 197, 294; *People v. Jennings* (2010) 50 Cal.4th 616, 690.) The capital defendants have already been found guilty of first degree murder and one or more special circumstance allegations have been found true beyond a reasonable doubt. The capital defendants have already had a level of procedural protection that does not apply to the noncapital defendants. Moreover, in the noncapital context, the fact that a prior conviction exists enhances sentence statutorily, and that existence is proven beyond a reasonable doubt. By contrast in the capital sphere, what is relevant to the moral determination is the aggravating and mitigating considerations surrounding

the facts of the offense underlying the conviction. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243.)

F. Neither International Law, Nor the Eighth and Fourteenth Amendments to the Constitution Preclude California's Capital Penalty

Appellant's final generic contention is that California "regularly" uses the death penalty in violation of international law, the Eighth Amendment, and the Fourteenth Amendment. (AOB 176.) "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Friend* (2009) 47 Cal.4th 1, 90.) The United States Supreme Court has found "international law" relevant to its recognition that the imposition of capital punishment upon those who were juveniles when their crime or crimes were committed is unconstitutional (*Roper v. Simmons* (2005) 543 U.S. 551, 575-576 [no country other than U.S. sanctioned juvenile death penalty]),but this development does not require reconsideration of the cases recognizing the constitutionality of the penalty when it is rendered in accordance with state and federal law. (*People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1058.)

IX. The Reliably Determined Conviction, Death Eligibility Findings, and Death Verdict Must Be Upheld

Appellant's final argument takes a cumulative error approach, summing the concerns of earlier arguments to assert general "unreliability" of the trial as a whole. (AOB 177.) Appellant does not suggest that he is not guilty, that the facts do not support his special circumstances, or that a torture killing for sexual and sadistic pleasure and in the course of a robbery, that caps a lifetime of unrepentant criminal activity, could not reasonably be found to warrant the death penalty. Appellant's essential claim is that because even he realized he was caught dead to rights and had to be stopped, the trial cannot have been fair.

A. Society's Interest in the Fairness and Accuracy of Criminal Proceedings and the Reliability of Death Judgments has been Served

The need, not only for fairness, but for the appearance of fairness in capital proceedings, as in all criminal proceedings, is beyond dispute. (*Indiana v. Edwards* (2008) 554 U.S. 164, 177, 180.) But the constitutional rights that support that fairness are sometimes at odds. Appellant asserts they may be at odds with the personal desires of the defendant (AOB 179), but when those desires are themselves protected by the Constitution, a balance must be struck between conflicting fundamental rights. Nobody was railroaded here. Having insisted on self-representation, forum-shopped for a court which would permit a bench trial on the guilt and penalty phases, and testified honestly about the salient details of his gruesome crimes, appellant has shown that he put primary emphasis on his Sixth Amendment right not to be represented by counsel, his Fifth Amendment right not to have a jury hear his trial, and his personal right to testify, rather than remain silent. The knowing, thoughtful and justice-serving exercise of the right of waiver must also be respected, even when it results in a death judgment.

The balance may be struck at another point in another case, but what matters is where it was struck in this case. Appellant came to these proceedings wanting to plead guilty and seek a death judgment. He was granted, first, a preliminary hearing, at which he was represented by counsel and held to answer. He was granted, second, a trial before the court at which evidence was presented and tested and he was found guilty as charged and eligible for the death penalty on the basis of three special circumstances. He was granted, third, a penalty phase, also before the court, at which evidence was presented and tested and the death penalty found appropriate. Presently, he is before the court on an automatic appeal, a

right he is unable to waive. All this process protected his rights, reduced the risk of mistaken judgment, and assured the determinations were fairly arrived at, without unduly infringing on the rights he legitimately put first.

In *Indiana v. Edwards*, 554 U.S. at p. 177, the balance was struck at a different point. The Supreme Court recognized the rights of states to set a higher competency standard for the right to self-representation than for competency to stand trial. Under *Indiana v. Edwards*, a defendant desirous of self-representation and meeting the definition of competent to stand trial might have counsel forced upon him if he could not also meet the state's higher standard of competence to self-represent. Similarly this Court in *People v. Welch* (1999) 20 Cal.4th 701, 735, although bound by *Godinez v. Moran* (1993) 509 U.S. 389, 400-401, hence precluded from making the *Indiana v. Edwards* holding before the United States Supreme Court had done so, found that a trial-competent defendant could nevertheless be prevented from representing himself if he was unable to control his behavior, that is, too "disruptive, obstreperous, disobedient, disrespectful or obstructionist" to conduct his own defense (and far too likely to be conducting it from a holding cell).

Appellant, who speaks in terms of wishes and desires, is presently a little vague about which of his rights should have yielded to California's interest in preserving fairness and the appearance of fairness. Should he have been prevented from representing himself, from waiving a jury, or from testifying? Had he been prevented from the exercise of any of those rights, he would still be guilty of capital murder; the difference is, he would have a legitimate issue on appeal. (*Faretta v. California*, *supra*, 422 U.S. at p. 835 [the focus of a waiver inquiry is to determine whether the defendant understands the significance and consequences of a particular decision and whether the decision is uncoerced]; Cal. Const. , art. I, § 16; *People v. Ernst* (1994) 8 Cal.4th 441 [in criminal trials, the defendant has a state

constitutional right to a jury trial that can only be expressly and personally waived]; *People v. Robles* (1970) 2 Cal.3d 205, 214-215 [defendant has right to testify even over his attorney's objection so long as he asserts the right in a timely and adequate manner]).

Had appellant been obstreperous or unable to pass a heightened state test for competence to self-represent, we would have a different situation. If appellant had been coerced we would have a different situation. But appellant is intelligent, articulate, focused, and entitled to make decisions about the conduct of his trial. Appellant's competence to stand trial is in no doubt. His competence to represent himself is in no doubt. His ability to behave appropriately in court is proven.[5] That self-representation was his uncoerced choice is not in doubt. There is no recognized legal basis for depriving appellant of the self-representation right guaranteed him by the Sixth Amendment. And, once that right is recognized, his exercise of that right to control his trial is fair, it gives the appearance of fairness, and it serves the state's interest in reducing the risk of mistaken judgments. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1300.)

B. A Competent Self-Representing Capital Defendant's Choice of a Bench Trial for the Guilt and Penalty Phases and Decision to Testify is not a Guilty Plea Requiring the Consent of a Counsel Validly Waived by Defendant

We end where we started, with the enduring observation of *People v. Clark, supra*, 50 Cal.3d at p. 617, that competent defendants have a fundamental constitutional right to control their own defense, even if others would decry the wisdom of that decision. If they waive counsel, they free themselves from the possibility of ineffective assistance and the need to

[5] Appellant testified that his comparatively good behavior in the jail could be attributed to his desire to retain his pro per status for the duration of trial. (2 RT 470.)

obtain the consent of counsel at any step along the way. California law prohibits the entry of a plea of guilty without the consent of counsel, but appellant did not enter a guilty plea. He entered a not guilty plea and denied every allegation. He put the prosecution to its proof. That he also exercised his right to testify, and did so in a way that provided a motive context for a well documented set of physical facts was his right and in no way rendered the result unreliable.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment be affirmed.

Dated: June 23, 2014

Respectfully submitted,

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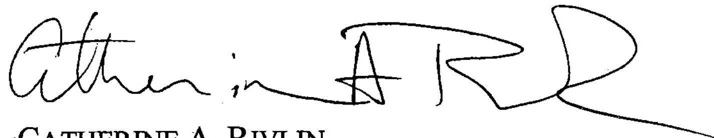

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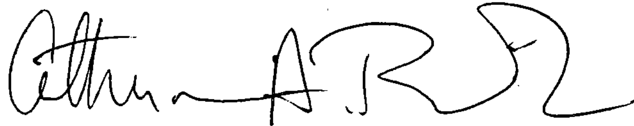
[6] The Attorney General acknowledges the substantial contribution of Senior Legal Analyst Gregory Hebert to the preparation of this brief.

CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Brief** uses a 13 point Times New Roman font and contains 35,954 words.

Dated: June 23, 2014

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Morelos***

No.: **S051968**

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 June 23, 2014, 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, 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 June 23, 2014, at San Francisco, California.

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Signature

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