In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DAVID SCOTT DANIELS,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S095868

Sacramento County Superior Court, Case No. 99F10432
The Honorable James L. Long, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

In Sacramento County, from November 26, 1999, to January 2, 2000, appellant, David Scott Daniels, a five-time convicted felon, went on a crime spree, admittedly robbing every bank and store in sight and vowing not to be taken alive by law enforcement. When his violent crime spree finally ended, appellant had murdered LeWayne Carolina and LaTanya McCoy, attempted to murder Tamarra Hillian and Sergeant Steven Weinrich, committed nearly one dozen armed robberies, and evaded arrest. His considerable violence was not limited to Sacramento County; however. As established at the penalty phase, during the same period, appellant had robbed a bank and a market in Stockton, carjacked a Camaro, stole a car, and evaded arrest on two occasions. The second evading arrest incident finished with a collision and a shootout with the Turlock Police Department, during which appellant shot at officers at least seven times. While he had some remorse for killing Carolina and McCoy, appellant expressed that he wished he "would have killed every last one" of the "punk ass police" he had shot.

The Sacramento County District Attorney charged appellant and sought the death penalty. After receiving representation from the Public Defender's Office for nearly one year, appellant exercised his rights under *Faretta v. California* (1975) 422 U.S. 806. He knowingly and voluntarily waived his right to a jury for both the guilt and penalty phases. Appellant also entered a guilty plea to each charge unrelated to the capital offense. Thereafter, he chose to defend his case by nonparticipation. Appellant was convicted of first degree murder with the special circumstances of robbery, burglary, and multiple murder. The trial court sentenced him to death. Appellant challenges the conviction and sentence in this automatic appeal.

STATEMENT OF THE CASE

On December 30, 1999, the Sacramento County District Attorney requested an arrest warrant and filed a complaint charging appellant with special circumstance murder of LeWayne Carolina (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17)),[1] attempted murder of Tamarra Hillian (§§ 664/187, subd. (a)), and attempted robbery of Carolina and Ray Jedkins (§§ 664/211), offenses alleged to have occurred on December 28, 1999. (1CT 23-28.)[2] The complaint also alleged that appellant personally used and discharged a firearm causing great bodily injury to Carolina and Hillian (§ 12022.53, subds. (b) & (d)). (1CT 23-25.)

On January 2, 2000, following a pursuit and shootout with the police and a traffic collision that caused the death of LaTanya McCoy, appellant was arrested. On January 11, 2000, the court arraigned appellant on the complaint and appointed the Public Defender's Office.[3] (1CT 1; 1RTL 1-9.)

On December 20, 2000, after receiving representation from the Public Defender's Office for nearly one year, appellant sought to represent himself pursuant to *Faretta*.[4] (1CT 6; 1RTS 12-15.) The court (Judge Ransom)

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[1] All further statutory references are to the California Penal Code, unless otherwise indicated.

[2] "CT" refers to the Clerk's Transcript on Appeal; "CAT" refers to the Clerk's Augmented Transcript on Appeal; "RTL" refers to the Reporter's Transcript in the Lower Court; "RTS" refers to the Reporter's Transcript in the Superior Court; the numerals preceding "CT," "RTL," and "RTS" denote volume number; "AOB" refers to Appellant's Opening Brief.

[3] On March 3, 2000, the Sacramento County District Attorney filed an amended complaint charging appellant with crimes relating to the December 28, 1999, murder, attempted murder, and robbery (counts XIV through XVIII), the January 2, 2000, murder and attempted murder (counts XXII through XXIV), and a string of armed robberies, vehicle theft, and a carjacking that occurred between November 26, 1999 and January 1, 2000 (counts I through XIII and counts XIX through XXI). (1CT 64-75.)

[4] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

granted appellant's *Faretta* motion. (1CT 6; 1RTS 15.) Appellant declined the court's offer to appoint advisory counsel. (1CT 6; 1RTS 15-16.)

On January 5, 2001, the Sacramento County District Attorney filed an amended information charging appellant in counts I through XI and counts XIV and XVII with robbery (§ 211), in count XII with special circumstance murder of LeWayne Carolina (§§ 187, subd. (a), 190.2, subds. (a)(17)), in count XIII with attempted robbery (§§ 664/211), in count XV with attempted murder of Tamarra Hillian (§ 664/187, subd. (a)), in count XVI with residential burglary (§ 459), in count XVIII with carjacking (§ 215, subd. (a)), in count XIX with vehicle theft (Veh. Code, § 10851, subd. (a)), in count XX with evading arrest causing serious bodily injury (Veh. Code, § 2800.3), in count XXI with special circumstance murder of LaTanya McCoy (§§ 187, subd. (a), 190.2, subd. (a)(3)), and in count XXII with deliberate and premeditated attempted murder of Sergeant Steven Weinrich (§§ 664/187).[5] (1CT 194-204.) With regard to counts II through XVIII and count XXII, the amended information alleged that appellant personally used a firearm within the meaning of section 12022.53, subdivision (b). (*Ibid.*) The amended information further alleged, with regard to counts XII, XIII, XV, XVI, and XXII, that appellant personally discharged a firearm resulting in great bodily injury (§ 12022.53, subds. (c) & (d)). (1CT 198-204.) Also, with regard to counts XV and XXII, the amended information alleged that appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)). (1CT 200, 204.) Finally, the amended information alleged that appellant had suffered two prior strike convictions within the meaning of California's Three Strikes Law (§§ 667, subds. (b)-(i), 1170.12), and that one of the prior strike convictions also qualified for the habitual offender sentencing enhancement (§ 667, subd. (a)). (1CT 204-205.)

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[5] The information was filed on August 24, 2000. (1CT 5, 164-165.)

The same day, following arraignment on the amended information, the court (Judge Long) obtained another *Faretta* waiver from appellant. (1CT 11; 1RTS 34-43.) Appellant declined the court's offer to appoint advisory counsel or a defense investigator. (1CT 11; 1RTS 41, 47.) Then, appellant waived his right to a jury trial for the guilt and penalty phases of trial. (1CT 11; 1RTS 43-46.) He also expressed a desire to plead guilty to all counts unrelated to the special circumstance murder charges. (1RTS 48-51.) The parties agreed that the court could review the preliminary hearing transcript to determine whether a factual basis existed for appellant's desired pleas. (1CT 11; 1RTS 60-61.)

On January 8, 2001, appellant pleaded guilty to 11 counts of robbery (§ 211; counts I through XI). (1CT 10, 12; 1RTS 68-74.) With regard to each count, appellant admitted that he had personally used a firearm (§ 12022.53, subd. (b)). (*Ibid.*) Appellant also pleaded guilty to carjacking (§ 215, subd. (a); count XVIII), and vehicle theft (Veh. Code, § 10851, subd. (a); count XIX). (1CT 10, 12; 1RTS 74-75.) He admitted that he had personally used a firearm (§ 12022.53, subd. (b)) during the commission of the carjacking. (1CT 10, 12; 1RTS 74.) Finally, appellant admitted that he had suffered two prior strike convictions within the meaning of the Three Strikes Law (§§ 667, subds. (b)-(i), 1170.12). (1CT 10, 12; 1RTS 75-76.) The court granted the People's motion to dismiss count XVII, robbery (§ 211), which was made after the court indicated that the preliminary hearing transcript did not contain a sufficient factual basis for that charge. (1CT 12; 1RTS 65-66.)

On January 16, 2001, a court trial began on the remaining charges. (1CT 286; 1RTS 79-86.) Appellant again rejected the court's offer to appoint defense counsel, a defense investigator, or advisory counsel. (1CT 286; 1RTS 87-88.) He also reaffirmed his waiver of the right to a jury trial for the guilt and penalty phases of trial. (1CT 286; 1RTS 88-89.)

The trial concluded on January 19, 2001. Regarding the December 28, 1999 incident, the court found appellant guilty of count XII, murder (§ 187), and found true the special circumstance allegation that the murder occurred while appellant was engaged in the commission of robbery and burglary (§ 190.2, subd. (a)(17)). (1CT 13; 2CT 310; 2RTS 307-308.) The court also found appellant guilty of count XIII, attempted robbery (§§ 664/211), count XIV, first degree robbery (§ 211), count XV, attempted murder (§§ 664/187), and count XVI, residential burglary (§ 459). The court found true the allegations that appellant personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)) as alleged in counts XIII and XV, personally used a firearm (§ 12022.53, subd. (b)) during the robbery charged in count XIV, and personally inflicted great bodily injury (§ 12022.7, subd. (a)) as alleged in count XV. (1CT 13; 2CT 310-311; 2RTS 309-310, 313.) With regard to the January 2, 2000 incident, the court found appellant guilty of count XXI, second degree murder (§ 187), and found true the multiple murder special circumstance allegation (§ 190.2, subd. (a)(3)). (1CT 13; 2CT 311; 2RTS 312-313.) The court also found appellant guilty of count XX, evading arrest causing serious bodily injury (Veh. Code, § 2800.3), and count XXII, deliberate and premeditated attempted murder (§§ 664/187).[6] (1CT 13; 2CT 310-311; 2RTS 307-314.) The court found true the allegations that appellant personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)) as alleged in count XXII. (1CT 13; 2CT 311; 2RTS 310, 313.)

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[6] On January 18, 2001, the court granted the People's motion to dismiss the personal discharge of a firearm causing great bodily injury enhancement (§ 12022.53, subd. (d)) associated with count XVI, residential burglary (§ 459). (2CT 307; 2RTS 297-298.)

On January 23, 2001, the penalty phase trial began. (1CT 13; 2CT 315.) Appellant again rejected the court's offer to appoint defense counsel, a defense investigator, or advisory counsel and reaffirmed his waiver of the right to a jury trial for the penalty phase. (2RTS 316-317.) The penalty phase concluded on January 31, 2001, when the court determined that the punishment shall be death. (1CT 14; 2CT 335-337, 338-340; 2RTS 462.)

On February 14, 2001, the court denied the automatic motion to modify the death verdict and motion for new trial. (1CT 14; 2CT 353-357; 2RTS 469.)

On February 28, 2001, the court sentenced appellant to the penalty of death plus a consecutive indeterminate term of 45 years to life, to be served consecutive to an indeterminate term of 445 years to life, to be served consecutive to a determinate term of 125 years. (2CT 444; 2RTS 513.) The sentence consisted of the following: on counts XII and XXI, special circumstance murder (§§ 187, 190.2, subds. (a)(3) & (a)(17)), death plus a consecutive indeterminate term of 25 years to life for the personal discharge of a firearm allegation (§ 12022.53, subd. (d)) associated with count XII; on counts I through XI and count XIV, robbery (§ 211), a consecutive indeterminate term of 25 years to life for each count pursuant to the Three Strikes Law, plus an additional consecutive determinate term of 10 years for each personal use of a firearm allegation (§ 12022.53, subd. (b)); on count XV, attempted murder (§§ 664/187), a consecutive indeterminate term of 39 years to life pursuant to the Three Strikes Law, plus a consecutive term of 25 years to life for the personal discharge of a firearm allegation (§ 12022.53, subd. (d)); on count XVIII, carjacking (§ 215, subd. (a)), a consecutive indeterminate term of 27 years to life pursuant to the Three Strikes Law, plus a consecutive determinate term of 10 years for the personal use of a firearm allegation (§ 12022.53, subd. (b)); and on count XXII, deliberate and premeditated attempted murder (§§ 664/187), a

consecutive indeterminate term of 45 years to life pursuant to the Three Strikes Law, plus an additional indeterminate term of 25 years to life for the personal discharge of a firearm allegation (§ 12022.53, subd. (d)). (1CT 15-20; 2RTS 510-512.) The court stayed imposition of the great bodily injury enhancement (§ 12022.7, subd. (a)) associated with count XXII. (1CT 15; 2CT 442-444; 2RTS 510-511.) The court further imposed and stayed sentence pursuant to section 654 on the remaining counts and allegations. (1CT 16-17; 2CT 442-444; 2RTS 510-513.) Finally, the court imposed fines and fees and awarded appellant credit for time served of 424 days. (1CT 18, 22; 2CT 444-445, 514; 2RTS 513-516, 518.)

STATEMENT OF FACTS

I. GUILT PHASE TRIAL

A. Armed Robberies And Carjacking

After the case had been assigned to Judge Long for all purposes, appellant pleaded guilty to each count in the amended information that was unrelated to the capital murder offenses. The preliminary hearing transcript, which the court reviewed in consideration of the factual basis, revealed the following factual basis for the guilty pleas:

1. Count I: November 26, 1999, Bank of America robbery

On November 26, 1999, around 2:00 p.m., Juan Velasquez was working at Bank of America on Stockton Boulevard in Sacramento. (1RTL 177.) He called the next customer, appellant, to his teller window. (1RTL 177, 179.) Appellant "seemed disoriented" and "didn't know how to go about making a withdrawal." (1RTL 177.) Velasquez offered to help. (1RTL 178.) Appellant retrieved a note from his wallet and gave it to Velasquez. (1RTL 178, 181.) The note indicated that appellant wanted "all the hundreds." (1RTL 178.) Velasquez told appellant that he was out of

hundred dollar bills. (*Ibid.*) He gave appellant the money that remained in the cash register, no more than $700 or $800. (*Ibid.*) While reaching under his jacket, appellant said, "I'm not playing with you, I will blast you." (*Ibid.*) Velasquez did not actually see a firearm. (*Ibid.*) Appellant took the money and left the bank. (*Ibid.*)

2. Count II: November 29, 1999, Circle K robbery

Bonnie Welch, an officer with the Sacramento Police Department, interviewed Raynette Martin regarding a robbery that occurred at Circle K on P Street in Sacramento. (1RTL 94.) According to Officer Welch, Martin explained that on November 29, 1999, around 6:00 p.m., she was working the cash register when she noticed appellant and a female in the candy aisle. (1RTL 94-95, 219.) Martin saw the female put a bag of M&Ms in her pocket and appellant kept touching a Snickers candy bar. (1RTL 95.) The female then approached the counter and placed a different bag of M&Ms on the counter. (*Ibid.*) When appellant asked her if that was all she wanted, the female grabbed a pair of sunglasses from a display and placed them on the counter. (1RTL 95-96.) The female tried to pay with a food stamp, and Martin explained that Circle K did not accept food stamps. (1RTL 96.) At that point, appellant removed a .22 caliber firearm from his jacket and pointed it at Martin. (*Ibid.*) He demanded that Martin put money in the bag. (*Ibid.*) Once Martin had placed all the dollar bills and about four handfuls of quarters in the bag, appellant said, "That's enough." (*Ibid.*) Martin gave the bag to appellant, and he and the female calmly left the store. (*Ibid.*)

3. Count III: November 30, 1999, Rite Aid robbery

Jeffrey Gardner, a detective with the Sacramento Police Department, investigated an armed robbery that had occurred at Ride Aid Pharmacy on Freeport Boulevard in Sacramento. (1RTL 188.) He obtained a statement

from Madeline Thompson, who explained that on November 30, 1999, around 7:30 p.m., appellant asked her for some lotion. (1RTL 189, 190, 192.) He left and returned a few minutes later to purchase chips. (1RTL 189.) When Thompson opened the register, appellant pointed a silver revolver at her and said, "Don't move." (1RTL 189-190.) Thompson gave appellant money from the cash register. (1RTL 190.)

4. Count IV: December 1, 1999, Subway Sandwiches robbery

Rod Guerra, a detective with the Sacramento Police Department, interviewed Paul Catlett regarding a robbery. (2RTL 380.) According to Detective Guerra, Catlett explained that on December 1, 1999, he was working at Subway Sandwiches on Mack Road in Sacramento. (*Ibid.*) Between 7:30 and 8:00 p.m., appellant ordered a sandwich. (2RTL 381, 382-383.) Catlett made the sandwich and told appellant how much it cost. (2RTL 381.) Appellant gave Catlett money. (*Ibid.*) Catlett opened the register to make change and, when he looked up, appellant was pointing a firearm at him. (*Ibid.*) Appellant said, "Back away from the cash register." (*Ibid.*) Catlett complied. (*Ibid.*) Appellant reached into the register and took the money. (*Ibid.*) He then walked out of the store. (*Ibid.*)

5. Count V: December 3, 1999, Anderson Pharmacy robbery

Detective Gardner investigated a robbery that occurred at Anderson Pharmacy on Florin Road in Sacramento. (1RTL 192.) He spoke with Terrence Clark, who explained that on December 3 1999, he approached appellant, who looked as though he planned to make a purchase. (1RTL 193, 194-195.) Appellant pulled out a silver revolver and demanded money. (1RTL 193, 194.) Clark gave appellant money. (1RTL 193.) Because Clark was apparently moving too slow, appellant reached over the

counter and took money from underneath the cash tray. (1RTL 194.) He then took money off the counter and left the store. (*Ibid.*)

6. Count VI: December 10, 1999, Kragen Auto Parts robbery

Roy Messer, a detective with the Sacramento County Sheriff's Department, interviewed Sharon Hunter regarding a robbery. (2RTL 301.) According to Detective Messer, Hunter said that on December 10, 1999, she was working at Kragen Auto Parts on Bradshaw Road in Sacramento. (*Ibid.*) Appellant approached the counter to purchase a candy bar. (2RTL 302-304, 310.) He produced a small gray firearm and demanded money. (2RTL 310.) After he obtained the money, appellant told Hunter not to push any buttons. (*Ibid.*) Thereafter, appellant left the store. (*Ibid.*)

7. Count VII: December 10, 1999, Baskin Robbins robbery

On December 10, 1999, around 5:30 p.m., Sherri Allen was working at Baskin Robbins on Watt Avenue in Sacramento. (1RTL 253.) Appellant entered and asked for a coffee drink, though he referred to the drink as a banana split. (1RTL 253, 255, 263, 268.) Allen made the drink and then told appellant that he owed $2.75. (1RTL 254.) Appellant gave her a $5 bill. (*Ibid.*) As Allen was putting the money in the cash register, appellant said something to her. (*Ibid.*) Allen did not hear him, so she asked for clarification. (*Ibid.*) Appellant said, "Give me all your money." (*Ibid.*) He pointed a firearm at her. (*Ibid.*) Allen froze, and appellant reached over and grabbed all the money from the register, including the money that sounds the alarm. (*Ibid.*) He also yelled, "Open the safe, open the safe." (1RTL 267.) Allen thought appellant was high or on drugs because his eyes were "real beadie" and the whites of his eyes were yellow. (1RTL 259.) His eyes were also bloodshot. (1RTL 263.)

8. Count VIII: December 21, 1999, Kragen Auto Parts robbery

Danny Minter, a detective with the Sacramento County Sheriff's Department, interviewed Daniel Ageero regarding a robbery. (2RTL 290-291.) According to Detective Minter, Ageero explained that, on December 21, 1999, he was working at the Kragen Auto Parts on Watt Avenue in Sacramento. (2RTL 291, 293.) Appellant entered the store and asked for fuses. (2RTL 293, 376.) Ageero took appellant to the fuse display and gave appellant some fuses. (2RTL 293.) Appellant indicated that he did not want the fuses because they were too expensive. (*Ibid.*) He brought a candy bar to the counter instead. (*Ibid.*) Ageero rang up the candy bar and, when he turned back to appellant, appellant was pointing a handgun at him. (*Ibid.*) Appellant demanded money. (2RTL 293-294.) Ageero gave him money and then appellant left the store. (2RTL 294.)

9. Counts IX and X: December 25, 1999, 99 Cents Plus Store and Michael Lewis robberies

On December 25, 1999, around 3:00 p.m., Shaunda Davis, an officer with the Sacramento Police Department, responded to a robbery at the 99 Cents Plus Store on Mack Road in Sacramento. (2RTL 347.) She obtained a statement from Said Hans, who explained that appellant entered the store and asked for a few items. (2RTL 347-348, 325-326.) Hans showed him where the items were located in the store. (2RTL 348.) Appellant walked to that area of the store before approaching the counter. (*Ibid.*) He then displayed a Tec-9 firearm and demanded money. (2RTL 348, 327.)

Appellant took Hans and Michael Lewis, a customer, to the back of the store. (2RTL 348, 353.) Lewis offered his wallet to appellant and said, "Please don't hurt us." (2RTL 353.) Appellant told Lewis to remove the money from the wallet. (*Ibid.*) Lewis complied and gave appellant $25. (2RTL 353-354.) Then, appellant tied up Hans and Lewis with cable wire.

(2RTL 348, 354.) He went to the front of the store. (2RTL 348.) In the meantime, Lewis freed himself and ran out the back door. (*Ibid.*)

Subsequently, appellant returned to the back of the store and asked Hans where Lewis went. (2RTL 348.) Hans told appellant that Lewis had gone out the back door. (*Ibid.*) Appellant went out the back door. (*Ibid.*) When he did, Hans called the police from the front of the store. (*Ibid.*) He noticed that $1,000 was missing. (2RTL 349.) Hans also observed that the television that contained the surveillance tape had been broken. (*Ibid.*)

10. Count XI: December 27, 1999, Kragen Auto Parts robbery

On December 27, 1999, Robert Whitehurst was working at Kragen Auto Parts on Mack Road in Sacramento. (2RTL 356.) He was getting ready to do a cash drop when appellant entered the store. (2RTL 356-357, 359.) Appellant walked to the back of the store before returning to the front with a Pepsi drink. (2RTL 357.) Once the other customers had left, appellant approached the counter and said something to the cashier, Desiree Russell. (2RTL 357, 358.) He also pulled up his jacket and displayed a firearm. (2RTL 357.) Russell picked up the cash register drawer, and appellant reached across and grabbed about $930. (2RTL 358-359.) Then, appellant left the store. (2RTL 359.)

11. Counts XVIII and XIX: January 1, 2000, Gabriel Tovar carjacking and vehicle theft

On January 1, 2000, around 9:50 p.m., Gabriel Tovar and his friend Lisa Lovado were leaving Blockbuster Video in Stockton. (1RTL 228, 230.) As Tovar was about to open the driver's door of his silver 1995 Chevrolet Camaro, appellant approached with a firearm. (1RTL 228-229, 231.) Tovar thought the firearm was a machine gun or "oozie." (1RTL 229-230.) Appellant pointed the gun at Tovar and said, "Give me the keys." (1RTL 230.) He also asked Tovar, "Do you want to die for your

car?" (1RTL 232.) Tovar backed up and gave appellant the keys. (1RTL 229.) Appellant told Lovado to get out of the car. (1RTL 230.) Then, he asked for Lovado's purse and Tovar's wallet. (*Ibid.*) Lovado and Tovar complied. (*Ibid.*) Appellant entered the Camaro and took off. (*Ibid.*) To Tovar, appellant "didn't seem like he was there." (1RTL 251.) Appellant's eyes were big, as though he may have been nervous or scared. (1RTL 252.)

B. December 28, 1999: Incidents Surrounding LeWayne Carolina Murder

1. Conduct before the shooting

Jennifer O'Neal and appellant were in a dating relationship and had known each other for about four years.[7] (1RTS 171.) Their relationship was very rocky. (*Ibid.*) Appellant had paroled to O'Neal's mother's house in late July 1999, but O'Neal's mother asked appellant to leave when he started getting into trouble again. (1RTS 171-172.) By December 1999, O'Neal had moved out of her mother's house and was living in Sacramento. (1RTS 171.) She saw appellant "on and off." (1RTS 172.) O'Neal was pregnant with appellant's child at the time, but the pregnancy did not come to full term. (1RTS 173.)

On December 28, 1999, around 5:30 p.m., O'Neal spoke with appellant. (1RTS 173.) He wanted to see O'Neal, and she told him that he would need to pick her up. (1RTS 173-174.) Appellant arrived around 6:30 p.m. (1RTS 174.) O'Neil met him on the street corner; not at the house. (*Ibid.*) They talked for a minute and then picked up O'Neal's eight-year-old daughter. (*Ibid.*) Appellant and O'Neal took O'Neal's daughter to get something to eat. (*Ibid.*)

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[7] O'Neal was given full immunity for any criminal activity that she may have been involved in on December 28, 1999. (1CT 290.)

O'Neal noticed that appellant had a Tec-9 firearm tied around his neck with a shoelace. (1RTS 177.) The firearm was under appellant's clothing. (*Ibid.*) O'Neal asked appellant why he had the firearm, and he said he needed it for protection. (1RTS 178.) Appellant explained that he was "on the run" and was not going back to prison. (*Ibid.*) He added that he was wanted for some robberies and was not going to be taken alive. (*Ibid.*) The magazine in the Tec-9 firearm held 33 bullets. (1RTS 243.)

Around 8:00 p.m. or 9:00 p.m., appellant, O'Neal, and O'Neal's daughter went to the Ramada Inn on Auburn Boulevard. (1RTS 153, 174.) O'Neal rented the room. (1RTS 174.) Appellant did not come inside; instead, he dropped off O'Neal and her daughter. (*Ibid.*)

Appellant later came back to the hotel and he and O'Neal talked awhile. (1RTS 175.) He left to make a telephone call in the lobby, but returned to the room a few minutes later. (*Ibid.*) He made a few more telephone calls from the room. (*Ibid.*) During the last conversation, O'Neal heard appellant say, "Okay, I'll be over there soon." (*Ibid.*) O'Neal did not want appellant to leave because they were supposed to spend the evening together. (1RTS 175-176.) She decided to go with appellant because she did not know when she would see him again. (*Ibid.*)

Sometime before 10:00 p.m., appellant, O'Neal, and O'Neal's daughter drove to a house in Oak Park. (1RTS 176.) Despite being high, appellant drove "okay, a little fast." (1RTS 195-196.) He left the car running and went inside the house. (1RTS 176.) About ten minutes later, appellant exited the house. (*Ibid.*) A girl named Marcie walked up and asked appellant for a ride. (*Ibid.*) O'Neal told appellant no. (*Ibid.*) Appellant initially told Marcie that he was not going to take her; however, after a discussion, she ended up in the car. (1RTS 176-177.)

After dropping by another house in Oak Park, appellant drove to Martina Daniels's house at 7912 Whitestack Way in South Sacramento.[8] (1RTS 142-143, 177.) O'Neil waited in the car with her daughter and Marcie. (1RTS 179.) About 20 or 30 minutes later, O'Neal asked Marcie to go inside and get appellant. (*Ibid.*) Marcie complied. (*Ibid.*) Appellant came out with Marcie, Martina, and Lamar (unknown last name). (*Ibid.*) O'Neil had never met Martina. (*Ibid.*) Apparently, Martina's car had broken down and appellant was going to take her to get it. (1RTS 143.) Appellant, Marcie, Martina, and Lamar all got in the car. (1RTS 144, 180.)

2. Shooting of Carolina and Hillian

O'Neal overheard appellant and Lamar talking about drugs. (1RTS 180.) Lamar said, "It's cool, I have been there before. I go there all the time. There is no problem. I know where it is." (*Ibid.*) Appellant replied, "All right, cool." (*Ibid.*) Then, he suddenly made a U-turn and drove to an apartment complex on Mack Road. (1RTS 144, 145, 180.) Martina asked where they were going. (1RTS 145.) Appellant did not respond. (*Ibid.*)

When they arrived at the apartment complex, appellant backed into a parking stall. (1RTS 146, 181.) He exited the car and indicated that he would be right back. (1RTS 182.) Lamar also got out of the car. (1RTS 146, 182.) Appellant was "very high" and acting "very hyper." (1RTS 193.) He was "very aggressive" and, to O'Neal, "he was not in a normal state of mind. He was not rationally thinking." (1RTS 195.) Martina, Marcie, O'Neal, and O'Neal's daughter waited in the car. (1RTS 146.)

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[8] Martina Daniels and appellant were friends and had known each other for less than a year. (1RTS 140-141.) Appellant dated Martina's cousin. (1RTS 140.) He had been at Martina's house earlier in the day. (1RTS 142-143.) She did not see him using any drugs during that time. (1RTS 163.) Because Martina Daniels and appellant have the same last name, respondent refers to Martina Daniels by her first name.

In the meantime, around 9:00 p.m., Tamarra Hillian, and her friend Ray Jedkins, returned to Jedkins's apartment. (1RTS 114.) Jedkins's cousin, LeWayne Carolina, was in the kitchen talking on the telephone. (1RTS 113-115.) Jedkins introduced Hillian to Carolina, and then offered Hillian a place to sit down.[9] (1RTS 115.) Hillian sat down on the couch and began watching television. (1RTS 114.) Jedkins went into the kitchen and then sat down on a block in the living room. (1RTS 115-116.)

About five minutes after Hillian and Jedkins had returned to the apartment, someone knocked on the door. (1RTS 116.) Jedkins answered the door; appellant was outside the door. (*Ibid.*) Hillian heard Jedkins ask, "how do you know me or who are you or whatnot." (*Ibid.*) Jedkins and appellant talked at the door for a while. (*Ibid.*) Then, appellant entered the apartment. (*Ibid.*) He and Jedkins walked into the kitchen and spoke with Carolina. (1RTS 116, 118.) Hillian had never seen appellant before. (1RTS 127.) She kept watching television. (1RTS 117.) Hillian could not see what they were doing in the kitchen or hear their conversation. (1RTS 117-119.) She did not know whether there was marijuana inside, or being sold from, the apartment.[10] (1RTS 127.) Hillian did not drink alcohol or use drugs. (*Ibid.*)

Next, Jedkins returned to the living room and spoke with Hillian. (1RTS 119.) Appellant started walking out the apartment door, but stopped and asked to use the bathroom. (*Ibid.*) Jedkins told appellant that he could use the bathroom, and pointed in the direction of the bathroom. (1RTS 120.) Although appellant walked in the direction of the bathroom, Hillian could not see where appellant went. (*Ibid.*)

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[9] Hillian had not met Carolina before that night. (1RTS 127-128.)

[10] Troy Woodward, a homicide detective with the Sacramento Police Department, found a baggy of marijuana behind a chair in the living room and two baggies of marijuana near the chair. (1RTS 95-96.)

When appellant returned to the living room area, he walked directly towards Jedkins and demanded money. (1RTS 121.) He had a big firearm and was pointing it in Jedkins's direction. (1RTS 121-122.) Jedkins reached into his pocket and gave appellant a "wad of money." (1RTS 122-123.) Hillian could not see Carolina at the time. (1RTS 124.) Appellant did not demand money from Hillian. (1RTS 128.)

Appellant stepped away from Jedkins and Hillian and moved towards the door. (1RTS 123.) Then, Hillian heard gunshots and covered her face. (*Ibid.*) Hillian could not estimate how many gunshots she heard, though it was more than one or two.[11] (1RTS 125.) She heard Jedkins trying to climb out a window. (1RTS 124.) After the gunshots, Hillian saw appellant run out of the apartment. (1RTS 125.) Hillian never saw appellant point the gun at her or Carolina. (1RTS 125, 128.)

After appellant ran out of the apartment, Hillian stood up. (1RTS 125.) At that point, she realized she had been shot in the hand. (*Ibid.*) She attempted to use the telephone, but her leg "crumpled" and she fell to the floor. (*Ibid.*) Hillian tried to crawl and pull the telephone to her; however, the telephone cord was stuck on Carolina, who was dead and curled up in the fetal position. (1RTS 125-126.) Hillian was eventually able to get the telephone. (1RTS 126.) As she was in the middle of dialing 9-1-1, Jedkins returned to the apartment and called 9-1-1. (*Ibid.*)

Vincent Francois, an officer with the Sacramento Police Department, was one of the first officers to enter the apartment. (1RTS 165.) Officer Francois saw Hillian lying on the floor. (*Ibid.*) Hillian told him that she had been shot. (1RTS 166.) As Officer Francois and Officer Baptista were

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[11] Angela Tia, an identification technician with the Sacramento Police Department, collected six nine-millimeter shell casings and three .380-caliber shell casings from inside the apartment. (1RTS 106-111; see also 1RTS 95-101.)

securing the apartment, Officer Francois saw Carolina lying on the kitchen floor. (*Ibid.*) Carolina had what appeared to be a gunshot wound to the head. (*Ibid.*) Officer Francois noticed blood pooling near Carolina, and observed debris on the kitchen wall. (*Ibid.*) The debris was probably brain matter and bone. (*Ibid.*)

Hillian was taken to UC Davis Medical Center for treatment. (1RTS 165, 167.) She had been shot in the left thigh about three or four inches above the knee which caused her bone to shatter. (1RTS 126-127.) The bullet exited on the right side toward her pelvic bone. (1RTS 126.) She had a steel rod placed in her leg and screws in her knee. (*Ibid.*) The bones in her hand were also shattered. (*Ibid.*) Hillian no longer had a knuckle in one of her fingers, lacked full flexibility in her wrist, and experienced arthritis pain in her hand. (*Ibid.*) Officer Francois spoke with Hillian in the emergency room at UC Davis Medical Center. (1RTS 165, 167.) As Hillian was being transferred from the stretcher to a hospital table, a nine-millimeter bullet fell out of the stretcher. (1RTS 167-168.)

Dr. Gregory Reiber, the forensic pathologist who performed an autopsy on Carolina, determined that Carolina had suffered two gunshot wounds; one to the head with an entrance wound almost on top of the head and one on the left side of his back. (1RTS 131-132.) The gunshot wound on the back was a "graze wound," meaning the bullet merely scraped the body. (1RTS 132.) The wound was about one to one and one-half inches long. (1RTS 134.)

According to Dr. Reiber, the gunshot wound to the head caused internal bleeding within and around the brain and destroyed some of the central areas of the brain that are responsible for maintaining a level of consciousness in many of the autonomic functions of the body. (1RTS 134.) Dr. Reiber expected that unconsciousness would result almost instantaneously, at least within a few seconds, given the track of the bullet

and the internal damage suffered by the brain. (*Ibid.*) This gunshot wound, fired at a range of 12 to 18 inches, caused Carolina's death. (1RTS 135.)

3. Conduct after the shooting

About ten minutes after they had arrived at the apartment complex, Lamar returned to the car without appellant. (1RTS 182.) In Martina's opinion, Lamar looked scared. (1RTS 146.) He entered the car "like he was praying about something." (1RTS 147.) Martina asked Lamar where appellant was, and Lamar did not respond. (*Ibid.*)

A few minutes later, appellant returned to the car. (*Ibid.*) O'Neal did not see appellant with any weapons at that time. (1RTS 183.) To O'Neal, appellant looked like he was hurt. (1RTS 182.) He was holding his left side and seemed to be gasping for air. (*Ibid.*) O'Neal asked appellant what happened, and he responded, "I've been shot. That guy shot me." (1RTS 183.) They drove out of the parking lot. (*Ibid.*) Appellant "started to drive real funny on the road," scaring Martina. (1RTS 148.) Martina asked appellant what was going on. (*Ibid.*) The car swerved "and it looked like [appellant] was going to nod out on the road or something." (*Ibid.*)

Appellant drove to Martina's house. (1RTS 148.) They all went inside. (1RTS 184.) Martina and Lamar tried to stop appellant's bleeding. (1RTS 149, 184.) He had bullet wounds on his left arm and left side (almost on his back). (1RTS 184.) Appellant put down his firearm so that his wounds could be taken care of. (*Ibid.*) He asked Lamar to "unjam" the firearm. (1RTS 151.) O'Neal was freaking out because of her daughter. (1RTS 185.) She wanted to leave. (*Ibid.*) Appellant asked O'Neal to grab his clothing and other belongings that were at Martina's house. (*Ibid.*) She did. (*Ibid.*) Appellant appeared upset, and said something about needing to get out of there. (1RTS 150.)

As they were walking out of the house, appellant told O'Neal to catch a cab because he planned to leave without her. (1RTS 185.) Appellant got

in the car and left. (*Ibid.*) He returned to the house between two and five minutes later. (*Ibid.*) Appellant said that he could not drive because he felt as though he was going to pass out. (1RTS 152, 185.) Martina, Marcie, and Lamar came out of the house. (1RTS 185.) O'Neal thought Martina had a small silver firearm in her hand. (1RTS 187.) Appellant told Martina that she needed to drive him back to the hotel. (1RTS 185.)

Marcie, Martina, appellant, O'Neal, and O'Neal's daughter drove to the hotel. (1RTS 186.) When they arrived, O'Neal had Marcie and Martina take her daughter to the room. (*Ibid.*) Martina encouraged appellant to go to a hospital, but he did not want to go. (1RTS 154.) O'Neal helped appellant get out of the car. (1RTS 186.) She also helped him put on his jacket so the hotel clerks would not see that he had blood all over him. (*Ibid.*) When they got to the hotel room, Marcie used a sheet to try and stop appellant's bleeding. (*Ibid.*) They all sat there and tried to figure out what to do with appellant. (*Ibid.*) The Tec-9 firearm was on the bed next to appellant. (1RTS 187.) Appellant called his brother, Marvin. (1RTS 186.) He told Marvin to come and get him because he had been shot. (*Ibid.*)

4. Appellant's statements to O'Neal and Martina in the hotel room

O'Neal remained in the hotel room for about five hours. (1RTS 187-188.) Appellant told her about the shooting. (1RTS 188.) According to O'Neal, appellant said that he entered the apartment and, after a discussion, asked to use the restroom. (*Ibid.*) When he came out of the bathroom, he told the people in the house "you mother fuckers need to break yourself." (*Ibid.*) A man in the kitchen started shooting, and appellant returned fire. (1RTS 188-189.) Appellant "blew that mother fucker's brains out because he didn't give [appellant] what he wanted." (1RTS 191.) There were two men and a woman in the living room. (1RTS 188.) One of the men jumped out of the window when the shooting started. (*Ibid.*) The female yelled

and appellant told her to shut her mouth or he would shoot her. (*Ibid.*) She kept yelling, and he shot at her. (1RTS 191.) Appellant shot the man who was sitting on the couch. (1RTS 189.) He thought he shot the man in the chest and up. (*Ibid.*) Appellant told O'Neal that he would "go back and finish them off" "if he didn't do the job right the first time." (1RTS 192.) He also said that "he would not be taken alive" by law enforcement. (1RTS 194.) "[T]here would be a shootout. There would be a fight. He was not going without a fight." (*Ibid.*)

Appellant was "actually pretty calm" when he spoke with O'Neal. (1RTS 192.) He was smoking cocaine in a cigarette, as he had been doing earlier in the day. (*Ibid.*) He removed the tobacco from the cigarette, crushed up rock cocaine and put it in the cigarette paper. (1RTS 193.) Then, he rolled up the cigarette, took out a portion of the filter and smoked. (*Ibid.*) Appellant had smoked about three of these cigarettes earlier in the day. (1RTS 193, 195.) O'Neal was not under the influence because she was pregnant. (1RTS 194.)

Martina sat on the opposite side of the bed with O'Neal's daughter. (1RTS 154.) She heard appellant talking about what happened. (1RTS 155.) Initially, Martina claimed that she could not recall whether appellant said anything about shooting a woman, committing a robbery, or his attitude about being apprehended by the police. (*Ibid.*) However, after further questioning, Martina admitted that, about one week before the shooting, appellant had said "things like he was not going to be taken alive," he was "not going out," and "he'd rather die than go back to the penitentiary." (1RTS 156.) Appellant told Martina that he knew he was wanted by police. (1RTS 157.) He specifically said, "They are going to have to kill me to take me." (*Ibid.*) Regarding the shooting, appellant said that he went to the bathroom. (1RTS 161.) When he exited the bathroom, he asked for money or weed. (*Ibid.*) Appellant told Martina that he shot a

girl. (1RTS 162.) Martina assumed that appellant shot the girl because she would not stop screaming. (1RTS 163.) To Martina, it sounded like appellant was speaking Swahili; "something wasn't there." (1RTS 161.) She had not been drinking alcohol or using drugs. (1RTS 163.)

Martina remained in the hotel room with appellant for "probably almost two hours." (1RTS 160.) She saw appellant with a smaller gun inside the hotel room. (1RTS 159.) He told Martina that he obtained the firearm from an apartment. (1RTS 160.) She thought appellant said he obtained the firearm from the male that had shot him. (*Ibid.*)

C. January 2, 2000: Incidents Surrounding LaTanya McCoy Murder

1. High speed pursuit and crash

On January 2, 2000, Michael Kaye, a detective with the Sacramento Police Department, was conducting surveillance in front of Martina's house in regard to the Carolina homicide.[12] (1RTS 142, 227-228.) Around 6:00 a.m., a silver 1995 Chevrolet Camaro approached and slowed down directly in front of the house.[13] (1RTS 228, 233.) Then, the driver of the Camaro, later identified as appellant, made a right turn and the Camaro disappeared into the fog. (1RTS 224, 228.)

Within seconds, appellant returned to the area and stopped directly in front of the house. (1RTS 228.) Less than a minute later, appellant turned on the Camaro's headlights and drove away. (1RTS 229.) Detective Kaye followed appellant for about three blocks. (*Ibid.*) When appellant turned down what appeared to be a dead end street or cul-de-sac, Detective Kaye

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[12] Detective Kaye indicated that he was conducting surveillance at 7912 Whitestag Drive. (1RTS 227.) Martina Daniels lived at 7912 Whitestack Drive. (1RTS 142.)

[13] The Camaro was registered to Gabriel Tovar. (1RTS 233.)

stopped following him. (*Ibid.*) He broadcasted appellant's direction to marked patrol units that were in the area. (*Ibid.*)

Shaunda Davis, an officer with the Sacramento Police Department who was on patrol driving a marked police car and wearing a full uniform, received a radio call to look out for the Camaro. (1RTS 198-199.) It was foggy outside and traffic was light. (1RTS 199.) Visibility was limited to about two or three car lengths on the roadway. (1RTS 199-200.) As Officer Davis was positioned on the side of the road, appellant passed by her. (1RTS 200.) He was driving without headlights, and stopped at the traffic signal at the intersection of Deer Creek and Mack Road. (*Ibid.*)

Officer Davis got behind appellant and, just as the traffic signal turned green, another patrol car pulled in behind Officer Davis. (1RTS 201.) After clearing the intersection, Officer Davis decided to conduct a felony vehicle stop. (*Ibid.*) She and the other officers activated their patrol car's overhead lights. (*Ibid.*) Appellant pulled over, but drove off at a high rate of speed before officers could get positioned for the felony vehicle stop. (1RTS 202.) Officer Davis followed appellant and turned on the patrol car's siren. (1RTS 203.) Traffic was getting heavier because people were leaving for work. (*Ibid.*) It was still foggy outside. (*Ibid.*)

Appellant reached speeds of 80, 90, and 100 miles per hour on Mack Road. (1RTS 203.) He made a U-turn near Detroit Boulevard. (1RTS 204.) He lost control of the Camaro and hit something on the side of the road. (*Ibid.*) Once appellant regained control of the Camaro, he continued eastbound on Mack Road reaching speeds as high as 80 miles per hour. (*Ibid.*) He weaved in and out of cars. (1RTS 205.) Although traffic was not heavy or moderate, traffic was not light. (*Ibid.*) It was still foggy and, while it was getting lighter outside, the fog limited the light. (1RTS 210.)

Appellant drove through the intersection at Mack Road and Franklin Boulevard at a high rate of speed.[14] (1RTS 205.) There was a car in the number one lane moving at a slow rate of speed, as though it had just exited the nearby apartment complex. (1RTS 210.) Appellant hit the car while driving at a minimum speed of 80 miles per hour. (1RTS 205, 209.) The car spun, crossed the embankment that divided the roadway, and burst into flames. (1RTS 205-206.) Officer Davis drove through the flames, and stopped once she had crossed the divider. (1RTS 206.) She attempted to remove the driver, LaTanya McCoy, from the car, but was unsuccessful because of the fire. (*Ibid.*) Officer Davis's hands burned on the driver's door and she could feel the heat. (1RTS 207.) The fire killed McCoy and burned 100 percent of McCoy's body. (1RTS 138.)

2. Shootout with police officers

Brian Ellis, an officer with the Sacramento Police Department, had also been involved in the pursuit. (1RTS 261-262.) When the pursuit ended, Officer Ellis maintained cover from a nearby apartment complex. (1RTS 262.) He turned on his patrol car's high beams, take down lights, and spotlights so that he could see inside the Camaro. (1RTS 263.) Officer Ellis thought appellant was "taking in the whole scene." (*Ibid.*) He told appellant to put his hands up and outside the Camaro. (*Ibid.*) Appellant put his left hand outside the Camaro. (*Ibid.*) He claimed that his right hand was stuck. (1RTS 263-264.) The driver's door was open. (1RTS 217.)

Steven Weinrich, a sergeant with the Sacramento Police Department, believed that appellant may have been pinned inside the Camaro based on the Camaro's extensive damage. (1RTS 213, 218.) He put together an extraction team. When Lieutenant Kane arrived with a megaphone and

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[14] Officer Davis was unsure if the traffic signal was red or green when appellant drove through the intersection. (1RTS 205.)

another body bunker, four officers approached the Camaro. (1RTS 219-220.) Sergeant Weinrich, who was wearing a full police uniform, told appellant that they planned to get him out of the car. (1RTS 213, 220.) Appellant did not respond. (1RTS 220.)

Once they were inside the open driver's side door, Sergeant Weinrich went around the body bunker and started to reach into the Camaro. (1RTS 221.) Just as Sergeant Weinrich broke the plane, appellant "jerked really fast" and shot him. (1RTS 222.) Sergeant Weinrich heard one gunshot. (*Ibid.*) He felt the muzzle blast on his face, a big thump to his chest, and a burning sensation in his leg. (*Ibid.*) Sergeant Weinrich returned fire and then went to the ground behind the car. (*Ibid.*) Lieutenant Kane told officers to stop firing, and they complied. (*Ibid.*)

Lieutenant Kane took Sergeant Weinrich's firearm and started cutting his shirt. (1RTS 223.) Lieutenant Kane discovered that a bullet had gone through Sergeant Weinrich's badge and lodged in his bullet proof vest. (1RTS 223, 247-248.) Sergeant Weinrich suffered a bruise on his chest. (1RTS 223.) Another bullet entered his upper thigh, traveled across his body, and ended up in his right hip. (*Ibid.*)

Bruce Moran, a criminalist with the Sacramento County District Attorney's Crime Lab, recovered the bullet from Sergeant Weinrich's vest. (1RTS 238, 248.) He determined that the bullet had been fired from the Tec-9 firearm. (1RTS 249.) Moran viewed an x-ray of Sergeant Weinrich's pelvic region. (*Ibid.*) He compared the general shape of the bullet to the profiles of the various bullets that were used by police officers involved in the shooting. (*Ibid.*) The nine-millimeter bullets had the same length ratio and a similar shape in terms of overall morphology as the bullet in the x-ray. (1RTS 250.) While Moran could not eliminate the ammunition used in the Tec-9 firearm, he confidently eliminated the ammunition used by officers involved in the shooting. (1RTS 250-251.)

Sergeant Weinrich was in the hospital for about nine days. (1RTS 224-225.) Once he was released from the hospital and ready to return to work, doctors discovered he "had an AV fistula and an aneurysm." (1RTS 225.) He had three more surgeries, resulting in much nerve damage. (*Ibid.*)

II. PENALTY PHASE TRIAL

A. Prosecution's Case

1. Prior convictions

The court found true beyond a reasonable doubt that appellant had suffered the following felony convictions: a January 17, 1986, conviction for attempted residential burglary (§§ 664/459); a March 16, 1988, conviction for possession of a controlled substance (Health & Saf. Code, § 11350); an October 22, 1990, conviction for cocaine sales (Health & Saf. Code, § 11352); a July 29, 1991, conviction for robbery (§ 211); and a February 19, 1998, conviction for second degree burglary (§ 459). (2CT 332; see also CAT 816-850.)

2. December 11, 1999: Washington Mutual Bank robbery

On December 11, 1999, around 9:00 a.m., Keisha Pierre was working at Washington Mutual Bank in Stockton. (2RTS 372.) When she finished helping her first customer, she called appellant to her window. (2RTS 372-373.) He was wearing a shiny wig that had braids. Pierre thought that appellant was wearing a wig because the hair looked unnatural. She noticed the wig as soon as appellant entered the bank. (2RTS 375-376.)

Appellant hesitated, but then approached the window and asked Pierre for a quarter roll. (2RTS 373.) Because he wanted the paper wrapper, instead of a roll of quarters, Pierre had to go to the back of the bank. (*Ibid.*)

As Pierre was returning to her window, appellant pointed a firearm in her direction. (2RTS 373.) Pierre noticed that the teller next to her was

giving appellant "a lot of cash," probably around $6,000, from the teller cash dispenser. (2RTS 374-375.) Appellant left the bank after he received the money. (2RTS 375.)

3. December 22, 2009: Lim's Market robbery

On December 22, 2009, Junda Chan was working with her father, Vorn Chan, at Lim's Market in Stockton. (2RTS 369.) She was behind the register when appellant entered the store.[15] (*Ibid.*) Junda thought he was going to make a purchase; instead, appellant approached the cash register and pulled out a firearm. (*Ibid.*) He told Junda that he was not going to hurt her. (*Ibid.*) Appellant said that he just needed a car. (2RTS 363, 369.)

Junda walked to the back of the store where Vorn was putting beer inside the freezer. (2RTS 361, 370.) Appellant pointed the gun at Vorn and demanded his necklace and watch. (2RTS 362-363.) Vorn was scared. (2RTS 362.) Appellant took Vorn's necklace, watch, and keys. (2RTS 363, 370.) He also took money from the cash register before leaving the store. (2RTS 363.)

Vorn followed appellant out of the store. (2RTS 365.) Appellant drove away in Vorn's son-in-law's Toyota pick up. (*Ibid.*) Vorn heard two gunshots as appellant drove away. (2RTS 365-366.)

4. December 30, 1999: Shantel Little carjacking

On December 30, 1999, Manuel Reyes was driving on Junction 14 in Merced County. (2RTS 337, 346.) He had just crossed the bridge when he noticed a car coming at him at a high rate of speed, which he estimated to be 80 or 90 miles per hour. (2RTS 338.) Reyes drove off the roadway to

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[15] Neither Vorn nor Junda identified appellant as the person who had robbed them. (2RTS 368, 370-371.) However, in a letter to his aunt, appellant admitted committing the robbery. (CAT 809; 2RTS 424.)

avoid a collision. (*Ibid.*) He looked behind him, and watched the car miss the turn, veer off the roadway, and roll into a vineyard. (2RTS 338-339.)

Reyes stopped to see if everyone was okay. (2RTS 339.) When he exited his car, Reyes noticed that the driver, later identified as appellant, was already out of the car. (2RTS 339, 340.) Appellant was in a daze. (2RTS 339.) He was acting "really loopy, like his equilibrium was off, he was not there, spaced out." (*Ibid.*) There was a female on the passenger side of the car. (*Ibid.*) She was holding something and appeared to be in pain. (*Ibid.*)

Shantel Little also stopped to see if anyone needed assistance. (2RTS 402.) She was driving her mother's white Camaro. (2RTS 401.) Appellant took out a firearm and walked over to Little. (2RTS 402.) He pointed the firearm at her head and told her to scoot over. (2RTS 403-404.) Little exited the car instead. (2RTS 403.) Appellant and the female entered the Camaro and drove off. (*Ibid.*) Appellant was driving. (2RTS 344.)

5. December 30, 1999: High speed pursuit with Merced County Sheriff's Department

On December 30, 1999, after 5:00 p.m., Mark Goddard, a deputy sheriff with the Merced County Sheriff's Department, was on patrol in a marked patrol car. (2RTS 347, 349.) Dispatch advised him of a carjacking that had occurred near the river. (2RTS 348.) As Deputy Goddard was responding to the area with lights and sirens, he saw the suspect Camaro. (*Ibid.*) Appellant pulled over, and Deputy Goddard made a U-turn to get behind the Camaro. (*Ibid.*) When Deputy Goddard pulled in behind, appellant drove off. (*Ibid.*) Deputy Goddard followed. (2RTS 348-349.)

At speeds of 70 to 80 miles per hour, appellant split traffic and drove on the shoulder. (2RTS 349.) Traffic was very congested, and the pursuit lasted for several minutes. (*Ibid.*) About half way through the pursuit, appellant turned off the Camaro's headlights and parking lights. (2RTS

349-350.) Deputy Goddard lost sight of the Camaro at Lander and Highway 99. (2RTS 349.) Subsequently, the Turlock Police Department advised that they were in pursuit of the Camaro. (2RTS 350.) Deputy Goddard saw the Camaro again after appellant crashed. (*Ibid.*)

6. December 30, 1999: Pursuit and shootout with Turlock Police Department

On December 30, 1999, around 5:00 p.m., Brandon Bertram, an officer with the Turlock Police Department, was on duty when he heard a broadcast about a stolen white Camaro. (2RTS 390.) Officer Bertram started checking the area, and found the Camaro at a gas station. (*Ibid.*) Appellant was fueling the car and Officer Bertram noticed that a female was in the passenger seat. (2RTS 390-391; CAT 810.) Officer Bertram drove past the Camaro and made eye contact with appellant. (2RTS 391.) He circled around the building and parked. (*Ibid.*)

Officer Bertram advised another officer, Craig Bothe, that he could see the Camaro. (2RTS 391.) They remained parked out of view until appellant left the gas station. (*Ibid.*) Officer Bertram and Officer Bothe had been following appellant for about six blocks when he pulled to the side of the roadway. (*Ibid.*) Though appellant slowed the Camaro to about five miles per hour, he did not actually stop. (*Ibid.*) Appellant accelerated, and Officer Bertram and Officer Bothe turned on their emergency lights and sirens and pursued the Camaro. (2RTS 392.)

Appellant reached speeds of 60 to 65 miles per hour. (2RTS 392.) Officer Bertram noticed that there was a high volume of commuter traffic and decreased his speed. (*Ibid.*) Appellant failed to stop at the stop sign at West Main, and collided with a Chevy Tahoe. (2RTS 384, 393.) He was traveling between 55 and 60 miles per hour at the time of the collision. (2RTS 393.) The impact caused the Camaro to spin around. (*Ibid.*)

Officer Bertram and Officer Bothe illuminated the Camaro with their spotlights and began to exit their patrol cars. (2RTS 393.) Seconds later, they observed muzzle flashes coming from the driver's door of the Camaro. (2RTS 386, 393-394.) Appellant was pointing a gun in the direction of Officer Bothe's patrol car. (2RTS 394-395.) Appellant fired between two and four rounds. (*Ibid.*) Officer Bothe finished exiting his patrol car and went to the ground. (2RTS 386, 395.)

When Officer Bertram exited his patrol car, appellant started shooting in his direction. (2RTS 395.) Officer Bertram heard between four and six gunshots. (*Ibid.*) He tried to return fire, but he could not get a sight on appellant due to the steam coming from the Camaro's engine. (*Ibid.*)

Officer Bertram advised that appellant was running from the scene. (2RTS 388.) Officer Bothe heard additional gunshots, and saw a female "more or less fall out of the right side" of the Camaro. (*Ibid.*) Officer Bothe approached the passenger side of the Camaro. (*Ibid.*) The female appeared to be injured. (*Ibid.*) Other officers were coming to the scene, so Officer Bothe went to look for appellant. (*Ibid.*) He did not locate appellant. (*Ibid.*) Although the female passenger complained of total body pain, she did not have any visible lacerations. (2RTS 396.)

Moran compared the shell casings that had been given to him by the Turlock Police Department with the Tec-9 firearm recovered from appellant. (2RTS 378.) He concluded that the seven casings had been fired from the Tec-9 firearm. (2RTS 380.)

7. December 30, 1999: Jose Campos vehicle theft

On December 30, 1999, Jose Campos was doing laundry inside the garage at his home in Turlock when appellant entered with a big firearm. (2RTS 352, 356-357.) Appellant asked Campos for his car keys. (2RTS 353.) The keys were inside the house, and Campos said, "I will give them to you, I will go get them." (*Ibid.*) Campos retrieved the keys and gave

them to appellant. (2RTS 353-354.) Appellant asked Campos which car belonged to him. (2RTS 354.) Campos pointed to the Buick Century, and then entered his house. (2RTS 354, 356.) Appellant did not point the gun at Campos. (2RTS 355.)

8. January 19, 2000: Threats while receiving treatment at UC Davis Medical Center

On January 19, 2000, Michael Hulsey, a deputy sheriff with the Sacramento County Sheriff's Department, was guarding appellant in the surgical intensive care unit at UC Davis Medical Center. (2RTS 320-321.) The nurse brought appellant apple juice, and appellant wanted another blanket or pillow. (2RTS 321-322.) Appellant, who was agitated, threw the apple juice across the room. (*Ibid.*) The juice splashed on Deputy Hulsey and Deputy Toyama. (2RTS 322.)

Thereafter, appellant grabbed a stand that had catheters and medical equipment hanging on it. (2RTS 322.) He knocked over the stand and held onto one of the catheter bags. (*Ibid.*) Deputy Hulsey grabbed appellant's right hand and put him into a control hold. (*Ibid.*) He also told appellant to release the catheter bag and behave himself. (*Ibid.*) Appellant complied after the third command to release the bag, but only after Deputy Hulsey had gained control of his wrist. (*Ibid.*)

Appellant said, "Fuck all you mother fuckers. You want to break my wrist, you mother fucker? Go ahead. You all mother fuckers want to get down? We can get down my way with fifty calibers mother fucking machine guns. I will finish this, mother fucker. I could have killed all of you, especially that short mother fucker on five east. We can do this my way." (2RTS 323.) With the help of nurses, Deputy Hulsey and Deputy Toyama put appellant in soft restraints so that appellant would not be able to engage in additional outbursts. (2RTS 323; see also CAT 857-860.)

9. April 19, 2000: Appellant's letter to Nikki

On April 19, 2000, Beckie Hind, a deputy sheriff with the Sacramento County Sheriff's Department, was working the subacute medical floor at the Sacramento County Main Jail. (2RTS 324-325.) After collecting the outgoing mail, Deputy Hind reviewed a six-page letter that appellant had written a female named Nikki. (2RTS 324-327.)

In the letter, appellant commented on the murder of Carolina, writing, "Yes I did kill that young black man. I drop a tear everytime I think about it. But the most High is my witness he shot me 3 times in my back! That's why he's dead right now. That young nigga just didn't know who he was fucken with." (CAT 852.)

Appellant also wrote about the murder of McCoy, stating, "An [*sic*] the lady in that car, who burned to death, the police hit her car, but being that they were chasing me, that makes it my falt [*sic*]. [¶] Deep down inside I feel responsible for her death. I wish that it could have been me instead of her." (CAT 852-853.)

With regard to his dealings with law enforcement, appellant wrote, "These people here really think they could do something to me or that I'm scared an [*sic*] I'm going to kiss ass in court because of the Death Penalty. They got D'Nice fucked up! An [*sic*] all them punk ass police I shot, I wish I would have killed every last one! I mean that, on the love of my 4 boys who I will never see again." (CAT 853.)

Appellant also wrote that he knew he would get caught, "that's why [he] robbed every bank an [*sic*] store in sight." (CAT 853.)

10. June 18, 2000: Appellant's letter to his aunt

On June 18, 2000, Tina Burow, a deputy sheriff with the Sacramento County Sheriff's Department, was working the subacute medical floor at the Sacramento County Main Jail. (2RTS 328-329.) After collecting the

outgoing mail, Deputy Burow reviewed a letter that appeared to have been written by appellant. (2RTS 330.)

The letter included an attachment labeled, "Daniels Investigation Time Line," which listed offenses committed by appellant between November 16, 1999 and January 1, 2000. (CAT 809-810.) The list of offenses included six bank robberies, 17 robberies, two carjackings, and a shoot out with the Turlock Police Department. (*Ibid.*) Appellant noted that he "hit big" during the robberies of Washington Mutual Bank and Bank of the West. (*Ibid.*)

B. Defense Case

Appellant declined to present evidence or make a closing argument during the penalty phase trial. However, appellant offered the following apology to the Carolina and McCoy families:

> Yes. At this time I am not up here to try to justify or defend myself of any of my wrong-doings. You know, I am a man, and I can admit my wrong-doings, and my crimes against Lewa[y]ne and Latanya.
>
> You know, it really hurts me. You know, I think about it every day. You know, no matter what people say, you know, I know what goes through my mind, and I think about these two all the time.
>
> And so I got up here today to apologize, you know, to the families. I know it's not much, may not mean much to you, but it means a lot to me, and I have to live with this for the rest of my life.
>
> So at this time, you know, I would like to just say I would like to apologize to the families.
>
> I'd like to say to Warren Lee, Rochelle Carolina, to Lewayne's cousin, and his sisters, and brothers, I apologize, and I am sorry. I can't give his life back. There is nothing I can do about it.

I wish there was something I could do, and I hope that you have understanding and believe that, you know, I really am sorry for what I did to him. I didn't mean it. I had no intention on doing anything to him.

I have four boys myself, and as a father, you know, I wouldn't want anybody to do that to any of my children, or harm any of my kids in any kind of way. So Warren Lee, to you especially, I apologize. I am sorry.

(2RTS 452.)

To the Anderson family, to the McCoy family, Zefre Anderson, Cynthia Anderson, and Tremel, I think about Latanya a lot, and I never saw her. I saw a picture of her.

And I am mentally - - this one really hurts also. I stare at her picture all the time, news clippings that I have, and it really hurts, because I get letters from people, you know, who tell me, you know, that it's not my fault, or whatever, but I do accept some responsibility for that accident.

And I keep her in mind all the time, and I constantly stand in prayer for both Lewayne and Latanya, but I also get a lot of negative things, letters from people, especially my own sisters because of Latanya, and that hurts.

So whatever it means to you, I just want you to know I am really sorry, and I apologize for that. There is nothing I can do about it.

And whatever time they give me, you know, it's not worth the two lives that were taken. And it really doesn't matter - - doesn't matter to me, either, or.

I sit in this courtroom knowing some of the family members who were present, always here, and I can hear you guys crying. I can hear some of the things, you know, that go on, you know, and I listen to everything.

And when I leave here and I go back to that jail, and go to my cell, I think about it all the time, and it's hard to sit up here and look at you face to face.

> First time I have ever really got a chance to get a view of all of you who are family members, and it hurts.
>
> And it took a long time for me to really prepare myself to say this to you, because there is [*sic*] no words. I can't even find words to even describe how I feel, you know, or show that I am really sorry.
>
> And I ask that you guys not hate me, and I ask that you will forgive me. Thank you.

(2RTS 453-454.)

ARGUMENT

I. APPELLANT MADE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF THE RIGHT TO COUNSEL

Appellant contends that the guilt and penalty judgments must be reversed because the record does not affirmatively reflect a knowing, intelligent, and voluntary waiver of the right to counsel. (AOB 23-49.) Specifically, appellant contends that the *Faretta* waiver he provided Judge Ransom was invalid because Judge Ransom failed to discuss the charges and complexities of a capital trial and made no inquiry into whether appellant's waiver was knowing and voluntary. (AOB 39-43.) He further contends that the *Faretta* waiver he provided Judge Long was defective because Judge Long failed to meaningfully inquire into his understanding of the elements and possible defenses, neglected to explain the nature of capital proceedings, and ignored his comment that self-representation was not disadvantageous. (AOB 43-48.) Appellant concludes that a defective *Faretta* waiver is reversible per se. As more fully set forth below, appellant's contentions are meritless. The record as a whole demonstrates that appellant was amply warned of the dangers and disadvantages of self-representation such that his choice to proceed without counsel was made with eyes open. Moreover, any error was harmless beyond a reasonable

doubt because appellant was determined to waive counsel regardless of the warnings provided. Thus, the judgment and sentence should be affirmed.

A. Background

1. Judge Gary Ransom *Faretta* proceedings

On April 28, 2000, after defense counsel requested that the matter be continued for further proceedings, appellant asked if he could speak with the court. (1RTL 20.) Judge Ransom told appellant that he had to speak through his lawyer. (*Ibid.*) Appellant expressed that he disagreed with what had occurred in court. (*Ibid.*) The proceeding ended without further discussions. (*Ibid.*)

In a letter dated December 7, 2000, appellant advised the court:

> I am Respectfully Requesting that I be allowed To withdraw my "Not Guilty" plea and enter a "Guilty Plea."
>
> I am also requesting that I Be allowed to Represent myself. My Feretta [*sic*] rights.
>
> I fully understand that I am charged with the capitol [*sic*] offense of Murder penal code section 187 with the special circumstances.

(1CT 180, underscore in original; see 1CT 181-183 [signed, undated *Faretta* motion].)

On December 20, 2000, the following colloquy occurred between appellant and Judge Ransom:

> THE COURT: Do you realize you're facing the death penalty in this ma[tt]er?
>
> [APPELLANT]: Yes, I do.
>
> THE COURT: Let me give you this advisement.
>
> Mr. Daniels, you have a right to be represented by an attorney at all stages of the case, and if you cannot afford to hire your own attorney, the Court will appoint one to represent you.

Do you understand that?

[APPELLANT]: Yes, your Honor.

THE COURT: It is generally not a wise choice to represent yourself in criminal matters.

Do you understand that?

[APPELLANT]: Yes, your Honor.

THE COURT: Do you realize if convicted and this things [*sic*] goes to the ultimate conclusion, you're facing the death penalty?

[APPELLANT]: Yes, your Honor.

THE COURT: The Court cannot and will not help you present your case or grant you any special treatment.

Do you understand that?

[APPELLANT]: Yes, I do.

THE COURT: Do you realize you will be opposed by a trained prosecutor.

[APPELLANT]: Yes, your Honor.

THE COURT: You must comply with all rules of criminal procedure and evidence just as a lawyer must.

Do you understand that?

[APPELLANT]: Yes, I do.

THE COURT: If you are convicted, you cannot appeal based upon the claim of having an incompetent lawyer, namely you?

[APPELLANT]: Yes, your Honor.

THE COURT: If you are disruptive, you will be removed from the courtroom and an attorney will be brought in to finish the case.

Do you understand that?

[APPELLANT]: I do now. Yes, I do.

THE COURT: You have a right at any time to hire your own attorney, however, the Court will not delay your case to allow an attorney to prepare to represent you.

Do you understand that?

[APPELLANT]: Yes.

THE COURT: What kind of education do you have, Mr. Daniels?

[APPELLANT]: High school.

THE COURT: Okay. You can read and write?

[APPELLANT]: Yes, I can.

THE COURT: What do you wish to do, Mr. Daniels, in regards to your right to be represented by a lawyer?

[APPELLANT]: I want to exercise my Faretta.

THE COURT: Do you want to represent yourself?

[APPELLANT]: Yes, I do.

THE COURT: I'm satisfied he's doing this knowingly and intelligently. I am going to grant the motion. There is other paperwork that has to be done. This is not it. I'm going to [sign] a sheet that explains what rights you have in regards to your access in regards to runners and to the law library.

(1RTS 12-15.) Appellant rejected Judge Ransom's offer to appoint advisory counsel. (1RTS 15.)

The same day, appellant signed a "Record of Faretta Warnings" form acknowledging that he had been personally advised of the following:

1. You have the right to be represented by an attorney at all stages of this case and if you cannot afford your own attorney the Court will appoint one to represent you.

2. It is generally not a wise choice to represent yourself in a criminal matter.

3. Penalties for offense if found guilty are _____ [left blank].

4. The Court cannot help you present your case or grant you any special treatment.

5. You will be opposed by a trained prosecutor.

6. You must comply with all the rules of Criminal Procedure and Evidence just as an attorney must.

7. If you are convicted you cannot appeal based on the claim that you were not competent to represent yourself.

8. If you are disruptive you will be removed from the courtroom and an attorney will be brought in to finish your case.

9. You have the right at anytime to hire your own attorney. However the Court will not delay your case to allow an attorney to prepare to represent you.

(1CT 186, underscore in original.)

2. Judge James Long *Faretta* proceedings

On January 5, 2001, after the case had been assigned to Judge Long for all purposes, appellant and Judge Long engaged in the following colloquy:

THE COURT: Mr. Daniels, as I understand it, you are representing yourself, sir?

[APPELLANT]: Yes, sir.

THE COURT: The file discloses that on December the 20th of last year, that Superior Court Judge Gary Ransom advised you relative to your right to represent yourself; is that true?

[APPELLANT]: Yes.

THE COURT: And he also advised you of your pitfalls in terms of representing yourself; is that not true, sir?

[APPELLANT]: Yes.

THE COURT: And do you remember, you know, what he told you about the pitfalls of representing yourself?

[APPELLANT]: Yes.

> THE COURT: And at that time despite that you agreed that you would represent yourself and not proceed by way of having a lawyer; is that true?
>
> [APPELLANT]: Yes.
>
> THE COURT: And the file discloses that you signed a waiver indicating that you basically didn't want a lawyer and that you would represent yourself. Do you remember signing such a waiver?
>
> [APPELLANT]: Yes, I did.

(1RTS 18-19.) Thereafter, Judge Long arraigned appellant on the amended information. (1RTS 19-34.) After each count, Judge Long confirmed with appellant that he understood the nature of the charges. (*Ibid.*) Judge Long also stressed to appellant the seriousness of the charges. For example, after arraigning appellant on count XII, special circumstance murder, Judge Long inquired,

> Do you understand that all the charges are serious, but this is specifically serious because they have alleged a special circumstance which means that in a guilt phase, if you were found guilty, you would proceed to a penalty phase, and it is my understanding and it has been represented that the People would be seeking the death penalty.

(1RTS 26.) Appellant indicated that he understood. (*Ibid.*) Judge Long provided a similar admonishment after arraigning appellant on count XXI, special circumstance murder. (1RTS 32.) Judge Long added that, upon a finding of a special circumstance, the sentencing options would be life in prison without the possibility of parole or death. (*Ibid.*) Appellant later indicated that he did not have any questions for Judge Long regarding the nature of the charges. (1RTS 34.) Then, the following colloquy occurred:

> THE COURT: It has been brought to my attention and I referenced earlier that late last year, sometime in December, you appeared before a judge of the Superior Court, Judge Gary Ransom, and you waived your right to have a lawyer represent

you. And you indicated that you wanted to represent yourself, and you further told me that you remember signing such documents.

Do you remember telling me that?

[APPELLANT]: Yes.

THE COURT: Now, I want to tell you that these charges are very, very serious charges, and upon convictions in terms of the guilt phase and the finding of special circumstance and going to the penalty phase, finding that the aggravating circumstances outweigh those mitigating circumstances could well result in you being put to death by the People of the State of California.

Do you understand me so far?

[APPELLANT]: Yes.

THE COURT: Is there any problem at all in terms of you understanding what I have said to you thus far?

[APPELLANT]: No, your Honor.

THE COURT: Do you understand that this prosecutor, Mr. Curry, has prosecuted a number of death penalty cases?

[APPELLANT]: Yes.

THE COURT: And that, in fact, he is probably one of the experts in this county in prosecuting such cases? I don't know if you knew that, but I'm making these representations.

Now, with that in mind, does that make any difference at all in terms of whether you wish a lawyer appointed or whether you want to continue to represent yourself?

[APPELLANT]: Continue.

THE COURT: You understand that these are very, very serious matters and that whatever your legal training is and I don't know what it is, I'm going to get into that, that you, sir, are placing yourself at a severe disadvantage? Do you understand that?

[APPELLANT]: Yes, your Honor. I don't look at it as a disadvantage.

THE COURT: You do not look at it as a disadvantage?

[APPELLANT]: No.

THE COURT: All right. Do you further understand that you are going to have to conduct yourself in these proceedings in a lawyer-like manner? Meaning, that you are going to have to come in here and function as a lawyer would function, meaning that I cannot assist you in any way by way of asking questions to you, questions for you, or suggesting any strategy at all to you and that you would have to formulate the proper questions to witnesses. And if you did not do that, then of course, the questions that you might wish to ask would be subject to an objection. And if I sustain the objection and you do not clarify or make amends where the question can be lawfully asked, then that might be a very, very big problem for you. Do you understand that?

[APPELLANT]: I understand that.

THE COURT: Do you further understand and I want to ask you again, that the consequences in this case are enormous not only for you but for the People of the State of California? Do you understand the very enormous consequences of charges that have been lodged against you and you representing yourself? Do you understand that?

[APPELLANT]: Yes, I do.

THE COURT: Do you understand it is never wise, for although you have the right to represent yourself, for a person unskilled to represent themselves? You know it is said that he who represents himself is a fool. Do you understand that? You have heard that saying, haven't you?

[APPELLANT]: Yes.

THE COURT: And despite what I have told you and what you have heard, you still want to represent yourself?

[APPELLANT]: Yes, sir.

THE COURT: Do you understand it could get so bad in here based upon your lack of skill and you may have skill, that if this were a professional [sporting] event in the legal sense, it might

be like a flag football team going up against the Tennessee Titans? You understand what I'm trying to tell you?

[APPELLANT]: I hear you.

THE COURT: You understand that?

[APPELLANT]: Yes.

THE COURT: And despite me telling you that, you still want to represent yourself; is that true?

[APPELLANT]: Yes, sir.

THE COURT: Do you further understand that any incompetence claim that you might otherwise have if a lawyer were to represent you, you will not have the right to raise the question of competency of counsel and matters such as that if, in fact, you represent yourself. Do you understand that?

[APPELLANT]: I understand.

THE COURT: Because there will be no counsel and you will have brought about your own competency by virtue of you possibly representing yourself and not knowing all the rules that go on in a court - - in a trial. Do you understand me so far?

[APPELLANT]: I understand you.

THE COURT: Let me ask you this: Do you represent to me that you are thinking clearly? Are you thinking clearly?

[APPELLANT]: Yes, I am.

THE COURT: And you know what you are doing?

[APPELLANT]: Yes, I do.

THE COURT: How old are you?

[APPELLANT]: Thirty-three.

THE COURT: Can you read and write?

[APPELLANT]: Yes.

THE COURT: Well, can you read and write?

[APPELLANT]: Yes?

THE COURT: How far did you go in school?

[APPELLANT]: High school.

THE COURT: Did you graduate?

[APPELLANT]: Yes.

THE COURT: Where did you graduate from?

[APPELLANT]: Galileo High School in San Francisco.

THE COURT: Have you had regular employment?

[APPELLANT]: Off and on.

THE COURT: When you were employed, what generally was the line of work you were involved in?

[APPELLANT]: Mailroom clerk.

THE COURT: Mailroom clerk?

[APPELLANT]: Yes.

THE COURT: That required reading and understanding of documents?

[APPELLANT]: Right.

THE COURT: Have you ever insofar as you know, have you ever had any problems in terms of mental illness?

[APPELLANT]: No.

THE COURT: Are you presently taking any form of medication?

[APPELLANT]: Yes.

THE COURT: What do you take?

[APPELLANT]: Neurontin.

THE COURT: What is it?

[APPELLANT]: Called Neurontin for nerve damage.

THE COURT: You mean nerve damage in some part of your body?

[APPELLANT]: Yeah, for my hand.

THE COURT: Let me ask you this: In terms of this decision to represent yourself, is whatever medication you are taking interfering with in any way what you feel to be a choice of yours to represent yourself? Is it clouding your mind in any way?

[APPELLANT]: No, sir.

THE COURT: So really in terms of today you are not under the influence of any drug, narcotics, or alcohol that clouds your mind in any way in terms of this colloquy we are having relative to you representing yourself? Would that be correct?

[APPELLANT]: No, sir.

THE COURT: You are not under the effect of anything like that?

[APPELLANT]: No.

THE COURT: And you understand that while you are here today, basically this case has been assigned here for trial. I have read all the charges to you. You understand the nature of the charges. I've told you what potentially could happen. You understand all those things; is that true?

[APPELLANT]: Yes, I understand.

THE COURT: And despite the admonition that you should not represent yourself, you still want to represent yourself? You understand?

[APPELLANT]: Yes, I do.

THE COURT: Now, Mr. Daniels, are you doing this freely and voluntarily?

[APPELLANT]: Yes.

THE COURT: Have any threats been made against you or any members of your family to get you to waive your right to have a lawyer represent you and proceed to represent yourself?

[APPELLANT]: No.

THE COURT: Have you been subject to any force to get you to waive your right to have a lawyer and for you to represent yourself?

[APPELLANT]: No.

THE COURT: Is there something that I am not aware of, some pressure or something that someone has put on you to make you waive your right to a lawyer and elect to represent yourself?

[APPELLANT]: No.

THE COURT: And you are satisfied that you know what you are doing?

[APPELLANT]: Yeah.

THE COURT: Could you tell me, please, if you are found guilty in the guilt phase and the special circumstances are found to be true and you proceed to the penalty phase, do you have an understanding of what could happen to you? And if you do, would you tell me what you think could happen to you?

[APPELLANT]: Yes. I could be put to death.

THE COURT: Are there other areas that you think I need to explore at this time? Oh, and further, if you did want a lawyer, do you understand that I would appoint a lawyer for you and give you what additional time you need to prepare for this trial? Do you understand that?

[APPELLANT]: Yes, I do.

THE COURT: And even with that offer, you still want to represent yourself and proceed to trial?

[APPELLANT]: Yes, your Honor.

[PROSECUTOR]: There is one thing, and I know when he first gave his waiver back in December Judge Ransom did offer him

advisory counsel, and at that time the defendant at that time turned that offer down.

THE COURT: Well, that is not - - it is kind of like discretionary. Do you understand what advisory counsel is?

[APPELLANT]: Yes, I understand what it is.

THE COURT: Basically that would be a lawyer that would assist you in terms of possibl[e] strategy, different things during the trial, but he would only be advisory, she or she [*sic*] would only be advisory, but you would, in fact, be the lawyer that would kind of like drive the ship.

Do you understand that?

[APPELLANT]: Yes, I do.

THE COURT: Do you want me to do that?

[APPELLANT]: No.

THE COURT: All right. What I think I'm going to do, I'm going to take about a ten, fifteen minute recess. I'm going to bring you back up, and then what I'm going to ask you, Mr. Daniels, is to consider what I have told you about representing yourself. And then I'm going to rule on your motion that you be allowed to represent yourself.

Do you understand what I'm saying? I want to give you fifteen minutes to think about it. Is that okay?

[APPELLANT]: All right.

THE COURT: All right. We are again on the record. Mr. Daniels, have you had an opportunity to think about, you know, the colloquy we have gone through relative to you representing yourself?

[APPELLANT]: Yes.

THE COURT: Now, let me ask you this: You have told me that you understand the nature of the all these charges and what could happen to you, right?

[APPELLANT]: Yes, I understand.

> THE COURT: And if you wish to present a defense, that is kind of like up to you, but if you wish to do that, your mind is clear and your thoughts and you understand the charges where if you wish to do that, you feel you could do that?
>
> [APPELLANT]: Yes, I do.
>
> THE COURT: You do?
>
> [APPELLANT]: Yes, I do.
>
> THE COURT: All right. Is there anything else?
>
> [PROSECUTOR]: No, your Honor, not on that issue.
>
> THE COURT: All right. The Court makes findings as follows: One, the defendant, Mr. Daniels, is competent, he understands the nature of the charges, he understands and represents that his mind is clear whereby if he wished to present a defense, he would know how to do that to these charges.
>
> The Court also finds that Mr. Daniels understands and is aware of the risk and dangers of representing himself, and I further find that he is waiving his right to a lawyer and proceeding to trial by way of self-representation. And I find that this choice for him to represent himself is done knowingly, freely, and intelligently, and without any force or coercion.
>
> The Court then will grant you your right to represent yourself. ...

(1RTS 18-19, 34-43.) Thereafter, appellant acknowledged that he had read and considered the court order regarding pro per privileges. (1RTS 47.) He also signed another "Record of Faretta Warnings" form. (1CT 207.) Appellant rejected Judge Long's offer to appoint advisory counsel or a defense investigator. (1RTS 41, 47.)

On January 8, 2001, Judge Long revisited the *Faretta* motion. (1RTS 77.) Appellant confirmed that he knew what he was doing, was thinking clearly, and wanted to continue with self-representation. (*Ibid.*) He again rejected Judge Long's offer to appoint advisory counsel or a defense investigator. (1RTS 78.)

On January 16, 2001, before receiving evidence, Judge Long revisited the *Faretta* motion. (1RTS 87.) Appellant confirmed that he wanted to continue with self-representation. (1RTS 88.) He also rejected Judge Long's offer to appoint advisory counsel or a defense investigator. (1CT 286; 1RTS 88.)

On January 19, 2001, before the penalty phase trial began, Judge Long revisited the *Faretta* motion again. (2RTS 316.) Appellant confirmed that he wanted to continue with self-representation and did not want advisory counsel or a defense investigator. (2RTS 316-317.)

B. Standard of Review

On appeal, the reviewing court examines "de novo the whole record-not merely the transcript of the hearing on the *Faretta* motion itself-to determine the validity of the defendant's waiver of the right to counsel." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070 (*Koontz*); accord *People v. Marshall* (1997) 15 Cal.4th 1, 24.) "No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation." (*Koontz, supra,* 27 Cal.4th at 1070; see *People v. Burgener* (2009) 46 Cal.4th 231, 241.) Rather, the test is "whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*People v. Lawley* (2002) 27 Cal.4th 102, 140 (*Lawley*), internal quotation marks omitted.) "[T]he information a defendant must have to waive counsel intelligently will 'depend, in each case, upon the particular facts and circumstances surrounding that case.'" (*Iowa v. Tovar* (2004) 541 U.S. 77, 92.)

C. Discussion

"A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has

the right to be represented by counsel at all critical stages of a criminal prosecution." (*Koontz, supra*, 27 Cal.4th at p. 1069.) At the same time, a defendant may waive his right to counsel and represent himself during the criminal proceedings. (*Faretta, supra,* 422 U.S. 806.) The right of self-representation "is not limited to the conduct of a defense during the guilt phase of trial, but extends to the penalty phase in a capital case." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1364; accord *People v. Clark* (1990) 50 Cal.3d 583, 618 ["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"].) This is true even when self-representation at the penalty phase permits the defendant to preclude the presentation of mitigating evidence. (*People v. Taylor* (2009) 47 Cal.4th 850, 865.)

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." (*Faretta, supra*, 422 U.S. at p. 835.) The trial court must satisfy itself that a defendant who seeks to waive counsel is competent to choose self-representation and that the waiver is knowing and voluntary. (*Godinez v. Moran* (1993) 509 U.S. 389, 400 (*Godinez*); accord *People v. Stanley* (2006) 39 Cal.4th 913, 933.) The purpose of the "knowing and voluntary" inquiry "is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." (*Godinez, supra*, 509 U.S. at p. 401 fn. 12; see *Patterson v. Illinois* (1988) 487 U.S. 285, 298 [an accused's waiver of his right to counsel is "knowing" when he is made aware of the usefulness of counsel and the dangers of proceeding without counsel.].) In contrast, "the competence that is required of a defendant seeking to waive his right to

counsel is the competence *to waive the right*, not the competence to represent himself." (*Godinez, supra,* 509 U.S. at p. 399, italics in original.)

The United States Supreme Court has made clear that a defendant's "technical legal knowledge" is not relevant to an assessment of his knowing exercise of the right to self-representation. (*Faretta*, 422 U.S. at p. 836; see *People v. Bradford, supra,* 15 Cal.4th at p. 1364.) Indeed, "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation." (*Faretta, supra,* 422 U.S. at p. 835; see *Godinez, supra*, 509 U.S. at p. 400 ["while '[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts,' a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation."].) However, a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (*Faretta,* 422 U.S. at p. 835, quoting *Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 279.)

In *People v. Lopez* (1977) 71 Cal.App.3d 568 (*Lopez*), the court enumerated a set of suggested advisements designed to ensure a clear record of a defendant's knowing and voluntary waiver of counsel, which this Court has cited with approval. (See *Koontz, supra,* 27 Cal.4th at pp. 1070-1072.) The advisements fall into three general categories:

> First, it is necessary, as *Faretta* says, that the defendant "be made aware of the dangers and disadvantages of self-representation." Under this category, we suggest that the defendant be advised:
>
> (a) That self-representation is almost always unwise and that he may conduct a defense "ultimately to his own detriment." [Citation.]

(b) That he is entitled to and will receive no special indulgence by the court, and that he must follow all the technical rules of substantive law, criminal procedure and evidence in the making of motions and objections, the presentation of evidence, voir dire and argument. ...

(c) That the prosecution will be represented by an experienced professional counsel who, in turn, will give him no quarter because he does not happen to have the same skills and experience as the professional. In other words, from the standpoint of professional skill, training, education, experience, and ability, it will definitely not be a fair fight. ...

(d) That he is going to receive no more library privileges than those available to any other pro. per., that he will receive no extra time for preparation and that he will have no staff of investigators at his beck and call.

Second, we feel it would certainly be advisable to make some inquiry into his intellectual capacity to make this so-called "intelligent decision." In this category, inquiry might be made of:

(a) His education and familiarity with legal procedures. ...

(b) If there is any question in the court's mind as to a defendant's mental capacity it would appear obvious that a rather careful inquiry into that subject should be made - probably by way of a psychiatric examination. ...

(c) In order to show that his choice is an intelligent one, he must be made aware of the alternative, i.e., the right to counsel. He should be made aware of just what that means including, of course, his right to court-appointed counsel at no cost to himself.

(d) Perhaps some exploration into the nature of the proceedings, the possible outcome, possible defenses and possible punishments might be in order. ...

(e) It should be made clear that if there is misbehavior or trial disruption, the defendant's right of self-representation will be vacated.

> Third, he should definitely be made aware that in spite of his best (or worst) efforts, he cannot afterwards claim inadequacy of representation. ...

(*Lopez, supra,* 71 Cal.App.3d at pp. 572-574.) As indicated above, the categories identified in *Lopez* are merely suggested admonitions. They are not designed to create a threshold of competency or intelligence to waive counsel. (*Koontz, supra,* 27 Cal.4th at p. 1071.)

1. Appellant was thoroughly admonished concerning the dangers of self-representation

As the record amply demonstrates, appellant was warned of the pitfalls of self-representation such that his choice to proceed without counsel was made with eyes open. In terms of the "dangers and disadvantages" identified in *Lopez, supra,* 71 Cal.App.3d at pp. 572-573, appellant was advised that it is generally unwise to proceed with self-representation; that it has been said that he who represents himself is a fool; and that he was placing himself at a severe disadvantage. (1CT 186, 207; 1RTS 13, 35-36.) He was further advised that the court would not grant him any special treatment; that he must comply with all rules of criminal procedure and evidence as a lawyer must; that he must function as a lawyer would function; and that it could be "a very, very big problem" if he did not ask questions in a lawful manner. (1CT 186, 207; 1RTS 13-14, 35-36.) Judge Ransom and Judge Long both admonished appellant that he would be opposed by a trained prosecutor. (*Ibid.*) Judge Long added that the prosecutor was "one of the experts in [Sacramento] county in prosecuting [death penalty] cases" and that "if this were a professional [sporting] event in the legal sense, it might be like a flag football team going up against the Tennessee Titans." (1RTS 35, 37.) Finally, appellant was given a form which explained his library privileges as a self-represented inmate. (1CT

185, 206; 1RTS 15, 47.) Thus, Judge Long and Judge Ransom clearly advised appellant of the "dangers and disadvantages" of self-representation.

Additionally, in terms of the factors concerning "intellectual capacity" identified in *Lopez, supra,* 71 Cal.App.3d at pp. 573-574, Judge Ransom inquired into appellant's education. (1RTS 14.) Appellant stated that he could read and write and possessed a high school education. (*Ibid.*) Appellant later told Judge Long that he was 33 years old, could read and write, had graduated from Galileo High School in San Francisco, and had been employed "off and on" as a mailroom clerk, which required that he read and understand documents. (1RTS 38.) Judge Ransom told appellant that he had the right to counsel, and appellant acknowledged that he was aware of such right. (1CT 186, 207; 1RTS 13.) In fact, appellant was offered advisory counsel multiple times, which he rejected. (1RTS 15, 41, 47, 78, 88.) Further, Judge Ransom and Judge Long both told appellant that he was facing the death penalty if convicted. (1RTS 13, 26, 32, 34-35, 40-41.) Appellant indicated that he felt as though he could present a defense and he was present during the preliminary hearing when counsel argued that the Carolina murder involved self-defense. (1RTS 42; 1RTL 400.) And, appellant was told that his right to self-representation would be terminated if he was disruptive in court. (1CT 186, 207; 1RTS 14.) Given these advisements, Judge Long and Judge Ransom clearly inquired into all areas concerning appellant's "intellectual capacity" to waive the right to counsel.

Moreover, in line with the third category of admonishments suggested in *Lopez, supra,* 71 Cal.App.3d at p. 574, appellant was told that he would not be able to raise appellate claims concerning ineffective assistance of counsel. (1CT 186, 207; 1RTS 14, 37.) What's more, before receiving guilt and penalty phase evidence, Judge Long confirmed with appellant that he wanted to continue without counsel, and appellant rejected Judge Long's

offers to appoint advisory counsel. (1RTS 87-88; 2RTS 316-317.) Thus, the record as a whole sufficiently demonstrates that appellant was clearly and repeatedly warned of the dangers and disadvantages of self-representation such that his choice to waive counsel was voluntarily made with eyes open. Accordingly, appellant's *Faretta* claim is wholly meritless.

2. None of appellant's claims regarding Judge Ransom show that the *Faretta* advisements were defective

Appellant contends that Judge Ransom's *Faretta* advisements were deficient because he failed to explore the nature of the proceedings, potential defenses, and potential punishments, except to confirm that appellant knew he faced the death penalty if convicted. (AOB 39-40.) His contention fails for several reasons. Initially, these particular advisements are not required by *Faretta* (*Koontz, supra*, 27 Cal.4th at 1070), and the failure to inquire into appellant's awareness of potential defenses or the precise nature of the proceedings does not automatically invalidate a waiver (*People v. Blair* (2005) 36 Cal.4th 686, 709, fn. 7 (*Blair*) [failure to explore potential defenses]; *Lawley, supra,* 27 Cal.4th at p. 142 [waiver of counsel found to be knowing and intelligent even though the court did not advise him of the possibility of a penalty phase].). Further, at least one case relied on by appellant for the assertion that a defendant must understand "the nature of the offense, the available pleas and defenses and the possible punishments" (see *People v. Floyd* (1970) 1 Cal.3d 694, 703) is a pre-*Faretta* case, which seems to be of limited significance given the United States Supreme Court's finding that a defendant's "technical legal knowledge" is irrelevant to an assessment of his knowing exercise of the right to self-representation.[16] (*Faretta, supra,* 422 U.S. at p. 836.) Finally,

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[16] Another case that appellant cites, *Von Moltke v. Gilllies* (1948) 332 U.S. 708, 723-724, is a pre-*Faretta* plurality opinion wherein, contrary (continued...)

appellant's contention ignores that the reviewing court considers the record as a whole, "not merely the transcript of the hearing on the *Faretta* motion itself." (*Koontz, supra,* 27 Cal.4th at p. 1070.) By focusing on Judge Ransom's advisement in isolation, appellant misses, among other things, the thorough advisements given by Judge Long and the fact that he was present at the preliminary hearing when counsel suggested the Carolina murder involved self-defense and he alluded to self-defense in a letter to Nikki. (CAT 852.)

Appellant further contends that Judge Ransom's *Faretta* advisements were defective because he did not ask whether appellant was competent to waive counsel. (AOB 40-41.) His contention is unpersuasive. As an initial matter, although Judge Ransom did not ask appellant questions related to mental capacity, nothing occurred during the proceedings that would have caused concern about appellant's competency. (*People v. Teron* (1979) 23 Cal.3d 103, 114; *Lopez, supra,* 71 Cal.App.3d at p. 573 [if there is any question in the court's mind, a rather careful inquiry into mental capacity should be made].) Indeed, defense counsel had not declared a doubt (see § 1368) and appellant did not engage in incomprehensible outbursts and groundless diatribes or otherwise manifest an inability to understand the nature and object of the proceedings against him. Also, Judge Long asked appellant about his mental health. (1RTS 37-39.) Appellant responded that he was thinking clearly, knew what he was doing, and had never suffered from mental illness. (1RTS 37-38.) And, during later proceedings, Judge

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(...continued)
to his suggestion (AOB 34), a majority of the justices did *not hold* that a valid waiver must "be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses to the charges and circumstances in mitigation thereof and all other facts essential to a broad consideration of the whole matter." (See *Von Moltke v. Gillies, supra,* 332 U.S. at p. 724.)

Long confirmed with appellant that he was "okay" and "thinking clearly." (1RTS 76-77.) The record as a whole supports appellant's representation that he was mentally competent and able to validly waive his right to counsel. By focusing on Judge Ransom's advisement in isolation, appellant again misses the relevant standard of review which requires the reviewing court to consider the record as a whole, rather than a single advisement in isolation. (*Koontz, supra,* 27 Cal.4th at p. 1070.)

Again viewing Judge Ransom's advisements in isolation, appellant contends that Judge Ransom's *Faretta* advisement was defective because he failed to ask whether the waiver was voluntary. (AOB 40-41.) His contention is meritless. While Judge Ransom may not have inquired into voluntariness, nothing suggested that appellant's waiver was involuntary. Moreover, appellant told Judge Long that he was freely and voluntarily waiving his right to counsel. (1RTS 40.) Appellant denied that he had been subjected to threats, force, or pressure to get him to waive counsel. (*Ibid.*) Thus, the record as a whole demonstrates that an appropriate inquiry was made into the voluntariness of appellant's waiver.

Appellant further suggests that Judge Ransom failed to determine whether appellant "truly desired" to represent himself. (AOB 41-43.) His contention lacks merit. Judge Ransom asked the precise question, and appellant responded that he wanted to represent himself. (1RTS 14-15.) Also, appellant's words and actions did not create any ambiguity as to his desire to represent himself. His motion was not ambivalent, "made in passing anger or frustration," or made "for the purpose of delay or to frustrate the orderly administration of justice." (*People v. Marshall, supra,* 15 Cal.4th at p. 23.) Consequently, Judge Ransom had no reason to deny the timely motion or appoint different counsel, particularly where there had been no request to relieve counsel. (AOB 41-43; see e.g., *People v. Clark* (1992) 3 Cal.4th 41, 105 [a *Faretta* request does not trigger a duty to

conduct an inquiry pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, 123-124 or to suggest substitution of counsel as an alternative]; *People v. Joseph* (1983) 34 Cal.3d 936, 944, fn. 3 [describing difference between a *Faretta* motion to waive counsel and a *Marsden* motion to relieve counsel.)

3. None of appellant's claims regarding Judge Long show that the *Faretta* advisements were defective

Appellant contends that Judge Long's *Faretta* advisements were "insufficient to assure that appellant actually understood what the state was required to prove and the possible defenses."[17] (AOB 43.) Appellant suggests that Judge Long should have asked about his legal experience, discussed the possible defenses, defined malice aforethought, explained the difference between express and implied malice, described first and second degree felony murder, defined attempted murder, explained the elements of premeditation and deliberation, and discussed lesser included offenses. (AOB 43-45.) His contention is unpersuasive. As stated earlier, appellant's "technical legal knowledge" is not relevant to an assessment of his knowing exercise of the right to self-representation. (*Faretta, supra,* 422 U.S. at p. 836.) "One need not pass a 'mini-bar examination' in order to exhibit the requisite capacity to make a valid *Faretta* waiver." (*People v. Joseph, supra,* 34 Cal.3d at p. 943.) Indeed, it would have been improper for Judge Long to quiz appellant on topics other than the dangers and disadvantages arising from self-representation and then draw on appellant's "lack of

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[17] Appellant indicates that if he wanted to waive counsel because "counsel refused to permit him to plead guilty, then a comprehension of what the prosecutor would be required to prove to convict him of capital murder, and an understanding of possible defenses and the existence of lesser included offenses, would likely have affected appellant's decision." (AOB 45.) However, Judge Ransom told appellant at the outset, "It's true. You can't voluntarily take - - you cannot plead guilty to a death penalty case and get the death penalty." (1RTS 12.) Thus, appellant knew he could not plead guilty to the capital offenses even if he waived counsel.

knowledge of the substantive law as a basis for denying the right to proceed without counsel." (*People v. Riggs* (2008) 44 Cal.4th 248, 277-278, fn. 10.) Moreover, there is no binding precedent from this Court or the United States Supreme Court holding that the Sixth Amendment requires the specific advisements appellant contends should have been given.

People v. Riggs, supra, 44 Cal.4th 248 (*Riggs*) is instructive. In *Riggs,* defendant represented himself during trial in a capital case. On appeal, he claimed that the trial court should have advised him "(1) that defenses offered in the guilt phase must be carefully considered because they may conflict with potential penalty phase defenses; (2) that there are different burdens of proof in the guilt and penalty phases; (3) that evidence that would not be admissible at the guilt phase might be admissible at a penalty phase; and (4) that if defendant were convicted at the guilt phase, there would be a separate penalty phase of the trial." (*Id.* at p. 276.) This Court found that each area was an "aspect[] of the substantive law of a capital case, not dangers and disadvantages arising from a decision to represent oneself in a capital trial." (*Id.* at p. 277.) This Court also found that a trial court is not required to ensure that a defendant is aware of substantive law "before the trial court can determine that a defendant has been made aware of the pitfalls of self-representation, such that he...can make a knowing and intelligent decision whether to waive the right to counsel." (*Ibid.*)

Similarly, here, contrary to appellant's assertion, Judge Long was not required to inform appellant of the substantive law concerning murder and attempted murder before accepting a waiver of the right to counsel. (AOB 43-44.) Instead, Judge Long was obligated to sufficiently warn appellant of the hazards and disadvantages of self-representation such that his choice to proceed without counsel would be made with eyes open. (*Lawley, supra,* 27 Cal.4th at p. 142 [*Faretta* waiver not defective where trial court failed to

explain in any detail the rules and procedures that defendant would be expected to follow].) Judge Ransom and Judge Long's remarks, taken together, adequately admonished appellant of the significant pitfalls and consequences of self-representation. Furthermore, with respect to defenses, the failure to query appellant on his understanding of potential defenses does not invalidate his *Faretta* waiver. (*Blair, supra,* 36 Cal.4th at p. 709, fn. 7.) Besides, appellant indicated that he felt as though he could present a defense; he was present during the preliminary hearing when counsel argued that the Carolina murder involved self-defense; and he alluded to a self-defense claim in a letter he wrote to Nikki. (1RTS 42; 1RTL 400; CAT 852.) Thus, "the whole record-not merely the transcript of the hearing on the *Faretta* motion itself," demonstrates that appellant was amply advised of the hazards ahead. (*Koontz, supra,* 27 Cal.4th at p. 1070.)

Appellant further contends that there is no showing he understood what the assistance of counsel would mean at the penalty phase, at least in part, because Judge Long did not define "aggravation" and "mitigation" or provide examples of each. (AOB 46.) The record belies his contention. As an initial matter, Judge Long was not required to educate appellant on the substantive law related to aggravating and mitigating factors. (*Riggs, supra,* 44 Cal.4th at p. 277.) Furthermore, Judge Long explained the two phases of a capital trial. During the arraignment that occurred just before the *Faretta* waiver, Judge Long told appellant that the special circumstance allegations meant that he would proceed to a penalty phase if found guilty. (1RTS 26.) Judge Long also indicated that "upon a finding of a special circumstance[]," the penalty could be "life in prison without the possibility of parole, or death. And the People have represented that they are seeking the death penalty." (1RTS 32.) Indeed, in responding to Judge Long's question about what could happen during the penalty phase if the guilt and special circumstances were found true, appellant said, "I could be put to

death." (1RTS 40-41.) Judge Long further explained the guilt and penalty phases when accepting appellant's jury trial waiver. (1RTS 44-45.) Thus, the record as a whole shows that appellant understood at least the purpose of a penalty phase trial.

Appellant finally contends that Judge Long had a duty to clarify what appellant meant when he said, "I don't look at [self-representation] as a disadvantage." (AOB 46-47.) He is wrong. Appellant's statement does not suggest that he "did not really understand the disadvantages," operated under a mistaken belief, or understood that he would receive some "undisclosed benefit." (*Ibid.*) Instead, appellant's statement simply repeats what he had previously indicated—he had accepted responsibility for the charged offenses and knew that death was a potential punishment. (See CAT 805-815.) Presumably, appellant did not view self-representation as a disadvantage because he preferred death to life in prison. (CAT 853 ["I can see death around the corner.... I'm not afraid to die. I would much rather be dead, then spend life in prison with punks & fagets."]; see e.g., *People v. Bloom* (1989) 48 Cal.3d 1194, 1223-1225 [elaborate catalog of dangers and pitfalls was unnecessary where defendant announced intention to seek the death penalty].) Also, appellant apparently viewed self-representation – i.e., being the "captain of the ship," as an advantage. While that may not have been the best decision, the decision certainly was not uninformed or unknowing. Thus, appellant's statement does not invalidate the waiver.

4. Any inadequacy in the admonitions given to appellant was harmless

While the United States Supreme Court has not yet decided whether a defective *Faretta* waiver is reversible per se, some California courts have determined that the failure to obtain a knowing and intelligent waiver is prejudicial unless the People can show beyond a reasonable doubt that the defendant would have waived counsel even with proper advisements. (See

People v. Burgener, supra, 46 Cal.4th at pp. 244-245.) The *Chapman v. California* (1967) 386 U.S. 18, 24 standard of prejudice should be applied here because "[t]he constitutional error in the present case had no effect on the decision to proceed in propria persona and thoughtful observers of the justice system would honestly question the intelligence and sensibility of an automatic reversal rule in such circumstances." (*People v. Wilder* (1995) 35 Cal.App.4th 489, 503.)

Appellant did not desire to be represented by counsel, and he made that desire known to the court at a relatively early stage of the proceedings. He was thoroughly advised by different judges regarding the substantial pitfalls and consequences of proceeding without counsel. Still, having been so warned and advised, appellant opted for self-representation. There is nothing in the record which suggests that appellant would have elected to proceed with counsel had Judge Ransom or Judge Long educated him on malice aforethought, the difference between express and implied malice, first and second degree felony murder, attempted murder, the elements of premeditation and deliberation, or lesser included offenses. (See AOB 43-45.) To be sure, as the guilt and penalty phases proceeded and the pitfalls of self-representation presented themselves, appellant denied offers for advisory counsel and insisted that he wanted to continue with self-representation. (1RTS 77-78, 87-88; 2RTS 316-317.) Hence, a recitation of the specific advisements that appellant contends should have been given would have led to the same result; he would have voluntarily proceeded without counsel. Consequently, any inadequacy in the advisements provided appellant was harmless beyond a reasonable doubt.

5. Conclusion

In sum, the record is replete with instances in which appellant was warned of the pitfalls of self-representation such that his choice to proceed without counsel was made with eyes open. The lengthy advisements given

told appellant that it was unwise to proceed with self-representation; that he was placing himself at a severe disadvantage; that he would need to follow technical rules and would not receive any special treatment; that he would be opposed by a trained prosecutor; and that his right to self-representation would be terminated if he was disruptive in court. Moreover, the record shows that appellant understood the possibility of a penalty phase that might result in a death sentence and was told that he would not be able to raise claims concerning ineffectiveness of counsel. And, Judge Long found appellant competent and determined that his waiver was voluntary. Thus, when viewed as a whole – as it must be – the record amply demonstrates that appellant was warned of the pitfalls of self-representation such that his choice to proceed without counsel was voluntarily made with eyes open. Regardless, any error was harmless beyond a reasonable doubt because appellant was determined to waive counsel no matter the warnings given. Accordingly, appellant's *Faretta* claim is meritless and should be rejected.

II. APPELLANT MADE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF THE RIGHT TO A JURY TRIAL

Appellant contends that his express jury trial waivers were not knowing and intelligent because they were made without receiving any admonitions concerning the nature of the right being waived. (AOB 50-67.) Specifically, appellant contends that the trial court failed to inform him of the "essential element of unity in the verdict." (AOB 52-53.) He further contends that he was "never informed that a direct consequence of his waiver would be the loss of the right to an independent trial court review of the penalty imposed by the jury." (AOB 66.) Appellant concludes that the guilty and penalty determinations must be reversed regardless of prejudice. (AOB 63-64, 67.) As set forth below more fully, appellant's contentions are meritless. The totality of the circumstances under which the express jury trial waivers were made shows that appellant

entered knowing and intelligent waivers of the right to have a jury decide the guilt and penalty phases. Moreover, any error in the admonitions given is harmless under any prejudice-based standard. Accordingly, the judgment and sentence should be affirmed.

A. Background

On January 5, 2001, after Judge Long granted appellant's *Faretta* motion, the following exchange occurred:

> THE COURT: The other question I think I might raise with you is do you intend to proceed in terms of the guilt phase, and if there is a penalty phase, by way of jury trial or by way of court trial?
>
> [APPELLANT]: Court trial.
>
> THE COURT: Are you satisfied that that's what you want to do?
>
> [APPELLANT]: Yes.
>
> THE COURT: Do you understand that you have an absolute right to proceed by way of jury trial both in the guilt phase and at penalty phase, if there is a penalty phase, if you want to do that? Do you understand me?
>
> [APPELLANT]: Yes.
>
> THE COURT: What you are telling me then is that you wish to waive your right to jury trial in the guilt phase and in the penalty phase which basically means if there is two phases, you will not have a jury determine your fate, but rather the Court will make certain findings based upon what you have been charged with? Do you understand that?
>
> [APPELLANT]: I understand.
>
> THE COURT: Do you understand that it you go by way of court trial rather than jury trial, I will decide whether the prosecution has proven its case beyond a reasonable doubt in the guilt phase of the trial, it will be my job to determine whether you are guilty or not guilty of the charges and allegations made against you? Do you understand that?

[APPELLANT]: Yes.

THE COURT: Do you understand if I find you guilty of murder, of special circumstances, in the guilt phase of the trial, I will also determine whether the punishment is life without the possibility of parole or the death penalty in the penalty phase of the trial? You understand that?

[APPELLANT]: Yes, I understand.

THE COURT: Have you understood everything that I have told you relative to your right to proceed by way of jury trial or by way of court trial?

[APPELLANT]: Yes.

PROSECUTOR: If I could just interject one thing. You did touch on it, but he would also have the right to have the jury determine the truth or not truth of the special circumstances. I think you did mention that.

THE COURT: Yes. If you waived jury, then the jury will not determine the truth and validity of the special circumstances, that will be my job to determine whether they are true or not true. Do you understand that?

[APPELLANT]: I understand.

THE COURT: Now, in terms of waiving your right to jury trial in both the guilt and if there is a penalty phase, that phase also, are you doing this of your own free will?

[APPELLANT]: Yes.

THE COURT: Have any threats been made against you or any members of your family to get you to waive your right to a jury trial?

[APPELLANT]: No.

THE COURT: Have you been subject to any force to get you to waive your right to a jury trial?

[APPELLANT]: No.

THE COURT: Is there some consideration or secret promise or deal or something that I am not aware of that's making you or forcing you to waive your right to jury trial and proceed by way of court trial?

[APPELLANT]: No.

THE COURT: Are you presently under the influence of any substance that would cause you not to be able to think clearly?

[APPELLANT]: No.

THE COURT: Do you know what you are doing?

[APPELLANT]: Yes.

THE COURT: All right. Do the People join, also?

PROSECUTOR: Yes.

THE COURT: Also in the waiver of jury trial rights as to the guilt phase and also if there is a penalty phase, that the People waive their right to a jury trial in the penalty phase?

PROSECUTOR: Yes, People join.

THE COURT: All right. Do you know what you have just done, sir?

[APPELLANT]: Yes.

THE COURT: All right. The Court finds that Mr. Daniels understands and freely and voluntarily waives his right to jury trial and has elected to proceed by way of court trial in the guilt phase and also by way of court trial in the penalty phase if, in fact, there is a penalty phase. And these waivers are now made part of the records of this Court.

(1RTS 43-46.)

On January 16, 2001, before receiving guilt phase evidence, Judge Long inquired,

THE COURT: We also talked about your right to a jury trial with members of these communities that would determine

whether or not - - the question of guilt or innocence. [¶] Do you remember that?

[APPELLANT]: Yes.

THE COURT: And you would have a right to a jury trial, certainly in terms of the guilt phase, and if we get beyond the guilt phase, you would have that same right if you wish to have that right as it pertains to the question of penalty. [¶] Do you understand what I am telling you at this stage?

[APPELLANT]: Yes, Your Honor.

THE COURT: And despite that, it is still your request and still your view that you wish to waive any jury in this matter and proceed by way of court trial, is that true?

[APPELLANT]: Yes, I do, Your Honor.

THE COURT: And if, in fact, we go to a penalty phase, that I will, in fact, try the question about whether or not aggravating factors outweigh those mitigating factors. [¶] Do you understand - - do you understand that?

[APPELLANT]: I do.

THE COURT: And despite me telling you all of this, you still wish to proceed in the legal posture that you are presently in?

[APPELLANT]: Yes, Your Honor, I do.

(1RTS 88-89.)

On January 19, 2001, prior to receiving penalty phase evidence, the following colloquy occurred:

THE COURT: All right. [¶] Do you understand now that what will occur is that we will go into the penalty phase of this trial? [¶] Do you understand?

[APPELLANT]: Yes, sir, Your Honor.

THE COURT: Do you understand that when one goes into a penalty phase of this type of legal proceeding that the consequences are the gravest consequences in the criminal law in terms of punishment. [¶] Do you understand?

[APPELLANT]: Yes, understand, Your Honor.

THE COURT: Do you understand that the court will consider whether or not you should be imprisoned for the rest of your life without the possibility of parole, or whether you shall suffer death. [¶] Do you understand that?

[APPELLANT]: I understand, Your Honor.

THE COURT: Do you understand that you have the right to present what is known as mitigating evidence, that the - - I would consider relative to aggravating factors versus mitigating factors? [¶] Do you understand?

[APPELLANT]: I do.

[¶] ... [¶]

THE COURT: Do you realize, although you have waived your right to a jury trial, that I would empanel a jury to try these questions in the penalty phase, you have that right, but heretofore you have waived that right, and said you wanted a court trial. [¶] Do you still feel that way?

[APPELLANT]: I do.

(2RTS 315-317.)

B. Discussion

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." The Sixth Amendment jury trial right has been made applicable to the states by the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 148-149.) Similarly, our state Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all." (Cal. Const., art. I, § 16; *People v. Hovarter* (2008) 44 Cal.4th 983, 1026.) The right to a jury trial is considered a fundamental right under federal and state law. (*Sullivan v. Louisiana* (1993) 508 U.S.

275, 281-282; *People v. Ernst* (1994) 8 Cal.4th 441, 448-449 (*Ernst*), overruled on another ground as recognized in *People v. French* (2008) 43 Cal.4th 36, 53, fn. 8.)

However, a criminal defendant may waive his right to a jury trial. (*Patton v. United States* (1930) 281 U.S. 276, 312; *Adams v. United States ex rel. McCann, supra,* 317 U.S. 269, 281; *People v. Collins* (2001) 26 Cal.4th 297, 305 ["the practice of accepting a defendant's waiver of the right to jury trial, common in both federal and state courts, clearly is constitutional."] (*Collins*).) This is true even where the defendant is facing the death penalty. (*People v. Cook* (2007) 40 Cal.4th 1334, 1342-1343 ["Capital defendants are permitted to waive 'the most crucial of rights,' including the rights to counsel, to a jury trial, to offer a guilt phase defense, and to be present at various stages of trial."], citing *People v. Robertson* (1989) 48 Cal.3d 18 (*Robertson*).)

To be effective, a jury trial waiver must be the express and intelligent choice of the defendant. (*Patton v. United States, supra,* 281 U.S. at p. 312; see *Collins, supra,* 26 Cal.4th at p. 305.) As with the waiver of other constitutional rights, a defendant's waiver of the right to jury trial must be knowing and intelligent, that is, made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it, as well as voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. (*People v. Weaver* (2012) 53 Cal.4th 1056, 1071-1072; see *Collins, supra,* 26 Cal.4th at p. 305, citing *Colorado v. Spring* (1987) 479 U.S. 564, 573 [requiring a knowing, intelligent, and voluntary waiver of the Fifth Amendment privilege against self-incrimination; see also *McCarthy v. United States* (1969) 394 U.S. 459, 465-466 [an "intentional revocation of a known right or privilege" must accompany a guilty plea, which in effect is a waiver of the right to trial by jury, the right to confront witnesses, and the

privilege against self-incrimination]; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464, 468 [requiring knowing and intentional waiver of the Sixth Amendment right to the assistance of counsel].) "[I]n determining whether there has been an effective waiver of a jury trial in favor of a court trial, the cases do not require a specific formula or extensive questioning beyond assuring that the waiver is personal, voluntary and intelligent." (*People v. Castaneda* (1975) 52 Cal.App.3d 334, 344.)

A waiver is ordinarily considered knowing and intelligent when the defendant fully understands the nature of the right and how it would likely apply in general under the circumstances, even though the defendant may not know the specific detailed consequences of invoking it. (*United States v. Ruiz* (2002) 536 U.S. 622, 629.) "A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide." (*Id.* at pp. 629-630.) There is no constitutional requirement that a defendant understand "all the ins and outs" of a jury trial in order to waive his right to one. (*People v. Wrest* (1992) 3 Cal.4th 1088, 1105.) And, in some circumstances, a waiver may be deemed knowing and intelligent despite the absence of admonitions concerning the burden of proof (*People v. Wrest, supra,* 3 Cal.4th at p. 1103), unanimity requirement (*People v. Tijerina* (1969) 1 Cal.3d 41, 44-46), consequences of a jury deadlock (*Robertson, supra,* 48 Cal.3d at pp. 35-37), or loss of an independent reevaluation of the verdict by the judge (*People v. Deere* (1985) 41 Cal.3d 353, 359-360).

1. Appellant was aware of the nature of a jury trial and the consequences of abandoning it when he waived jury for the guilt and penalty trials

In the instant case, contrary to appellant's assertion, his express jury trial waivers for the guilt and penalty phases were knowing and intelligent. (AOB 57, 60-61.) Judge Long did not tell appellant that a jury consisted of 12 persons who had to reach a unanimous verdict. (See *People v. Traugott* (2010) 184 Cal.App.4th 492, 500 [essential elements of a jury trial include that a jury consist of 12 persons who reach a unanimous verdict through consensus after deliberation].) However, at the time he entered the express waiver, appellant was aware of the essential elements of a jury trial. His criminal history spanned nearly 13 years and included at least five prior felony convictions. (2CT 332; CAT 816-850.) In October 1990, when he pleaded to a violation of Health and Safety Code section 11352, defense counsel confirmed that she had discussed with appellant his right to be tried by a jury, including that he could not "be convicted unless all twelve jurors agree that the prosecution has proved his guilt beyond a reasonable doubt." (CAT 828-829.) Also, in March 1988, when appellant pleaded to a violation of Health and Safety Code section 11350, defense counsel advised that he had told appellant that he had the right to be tried by a jury, including that he could not be "convicted unless all twelve jurors agree that the prosecution has proved his guilt beyond a reasonable doubt." (CAT 840.) The court indicated, "you have a right to have a trial by jury of twelve people who must unanimously find you guilty beyond a reasonable doubt for conviction to stand." (CAT 842.) Thus, appellant was aware of the nature of a jury trial when he waived the right in the instant case based on his prior experience of waiving that right when pleading guilty to prior offenses.

As further proof of appellant's knowledge of the nature of a jury trial, before receiving guilt phase evidence, Judge Long confirmed with appellant that he wished to proceed with a court trial. (1RTS 88-89.) During the exchange, Judge Long said "[w]e also talked about your right to a jury trial with members of these communities that would determine whether or not -- the question of guilt or innocence." (1RTS 88.) Although Judge Long apparently misspoke because there were no on the record discussions of a jury trial being with members of the community, appellant still responded that he understood the right. (*Ibid.*) He did not express confusion or ask questions about a jury consisting of members of the community. (*Ibid.*) And, each time Judge Long explained that appellant could have a jury or the court decide guilt or innocence, the truth of the special circumstances, and the penalty, appellant declined to ask Judge Long what he meant by a "jury." (1RTS 43-46, 88-89; 2RTS 315-317.) Instead, appellant repeatedly stated that he understood and wished to proceed with a court trial. (*Ibid.*) He asserted that he knew what he was doing. (1RTS 46.)

Additionally, on September 1, 2000, when appellant's matter was set for jury trial, he was represented by counsel and had been for about nine months. (1RTS 11; see 1RTL 7 [counsel appointed on January 11, 2000].) Counsel had hired experts and was interviewing people in preparation for the penalty phase. (See 2RTL 406.) Respondent presumes that competent counsel would have informed appellant of the nature of a jury trial when discussing the need for experts and requesting the names of people who may provide helpful testimony. (See *Robertson, supra,* 48 Cal.3d at p. 36 [when represented by counsel at the time of an express waiver, "absent an assertion or evidence to the contrary, we presume that competent counsel would have informed defendant of the effect of a jury deadlock."].) No doubt, competent counsel would have discussed with appellant the nature of a jury trial, including the unanimity requirement, when urging that a jury

trial was more beneficial than a guilty plea. (*People v. Tijerina, supra,* 1 Cal.3d at pp. 45-46 [when represented by counsel and defendant told the court what a jury trial was, the court was not required to explain further to defendant the significance of his waiver]; see 1CT 180; 2RTL 405 [appellant's desire to enter a plea].) Accordingly, the totality of the circumstances surrounding appellant's express jury trial waivers shows that they were knowingly and intelligently entered for both phases of trial.

Moreover, appellant was informed of the consequences of his express jury trial waiver. Judge Long made clear that he would decide appellant's fate if appellant waived the right to a jury trial. Judge Long specifically advised appellant that if he waived jury, he would "not have a jury determine [his] fate, but rather the Court will make certain findings based upon what you have been charged with." (1RTS 44.) Judge Long added, "it will be my job to determine whether you are guilty or not guilty of the charges and allegations made against you" and "to determine whether [the special circumstances] are true or not true." (1RTS 44-45.) "[I]f I find you guilty of murder, of special circumstances, in the guilt phase of the trial, I will also determine whether the punishment is life without the possibility of parole or the death penalty in the penalty phase of the trial." (*Ibid.*) Judge Long reiterated these consequences before receiving penalty phase evidence. (2RTS 315-317.) Thus, the record proves that appellant was advised that Judge Long, rather than a jury, would be deciding the case.

In addition to the absence of an explanation regarding the essential elements, appellant contends that his jury trial waiver for the penalty phase was not knowing and intelligent because Judge Long failed to inform him "that a direct consequence of his waiver would be the loss of the right to an independent trial court review of the penalty imposed by a jury." (AOB 66-67.) His contention is meritless because this Court has already rejected the same argument. In *People v. Deere, supra,* 41 Cal.3d 353, defendant

complained "that he was never told his waiver of a penalty jury would necessarily preclude an independent reevaluation of the verdict by the judge." (*Id.* at p. 360.) Without mentioning that defendant had been represented by counsel, this Court rejected defendant's claim and, finding the point frivolous, noted: "Defendant is deemed to have known that by waiving a jury trial he would lose his statutory right to a penalty decision by both the jury and the judge." (*Ibid.*, overruled on another ground in *People v. Bloom, supra,* 48 Cal.3d at p. 1228, fn. 9 (*Bloom*).) Four years later, in *Robertson, supra,* 48 Cal.3d 18, this Court rejected defendant's claim that his jury trial waiver was invalid because the trial court failed "to inform him that it would automatically review any verdict of death returned by a jury." (*Id.* at p. 38.) Thus, Judge Long's omission of the independent review provision of the death penalty law does not invalidate appellant's express jury trial waiver, and appellant's claim should be rejected.

2. Any inadequacy in the admonitions given to appellant was harmless in light of the totality of the circumstances surrounding the waiver

Although this Court has not squarely decided the issue, its precedent suggests that an express jury trial waiver should not be reversible per se if the record affirmatively shows that the waiver is voluntary and intelligent under the totality of the circumstances. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1175 [considering standard of review for *Yurko* error involving *Boykin/Tahl* admonitions].) Respondent does not dispute that an express jury trial waiver involuntarily obtained is reversible per se (*Collins, supra,* 26 Cal.4th at pp. 310-312), or that the denial of the right to a jury trial constitutes a structural defect requiring reversal (*Ernst, supra,* 8 Cal.4th at pp. 448-449). However, appellant's case does not fall within either line of cases. Instead, the circumstances of appellant's case reveal that the validity of his express jury trial waiver should be determined by

examining the totality of the circumstances under which it was made. (See *Collins, supra,* 26 Cal.4th at p. 313 (conc. opn. Brown, J.).)

Following the United States Supreme Court's decision in *Boykin v. Alabama* (1969) 395 U.S. 238, this Court held that a defendant must be expressly advised of and waive his self-incrimination, confrontation, and jury trial rights before a guilty plea may be accepted. (*In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*).) *Tahl* did not hold that error involving the *Boykin/Tahl* admonitions was reversible per se. Still, later cases suggested that such error was reversible regardless of prejudice. (See e.g., *People v. Ibarra* (1983) 34 Cal.3d 277, 283, fn. 1 [failure to obtain express waiver of *Boykin/Tahl* rights requires automatic reversal on direct appeal].) The lower courts adopted varying approaches, with some finding *Boykin/Tahl* error to be reversible per se and others finding the error to be reversible only upon a finding of prejudice. (*People v. Howard, supra,* 1 Cal.4th at p. 1175, fn. 17, cases cited therein (*Howard*).)

In *People v. Howard, supra,* 1 Cal.4th 1132, this Court addressed which standard of review should apply to error involving *Boykin/Tahl* admonitions. It concluded that "the overwhelming weight of authority no longer supports the proposition that the federal Constitution requires reversal when the trial court has failed to give explicit admonitions on each of the so-called *Boykin* rights." (*Id.* at p. 1175.) Instead,

> [E]rror involving *Boykin/Tahl* admonitions should be reviewed under the test used to determine the validity of guilty pleas under the federal Constitution. Under that test, a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances. [Citations.] In the exercise of our supervisory powers, we shall continue to require that trial courts expressly advise defendants on the record of their *Boykin/Tahl* rights. However, errors in the articulation and waiver of those rights shall require the plea to be set aside only if the plea fails the federal test.

(*Ibid.*) This Court reaffirmed that explicit admonitions and waivers are an important part of the process of accepting a guilty plea or admission of a prior conviction because "[t]hey are the only realistic means of assuring that the judge leaves a record adequate for review." (*Id.* at pp. 1178-1179.)

Two years later, in *People v. Ernst, supra,* 8 Cal.4th 441, this Court addressed whether the rule announced in *Howard* should apply when a court trial is conducted in a criminal prosecution without an express jury trial waiver. In *Ernst*, defendant was charged with two counts of murder, among other offenses. (*Ernst, supra,* 8 Cal.4th at p. 444.) When the matter was called in the master calendar court, the People informed the court that both sides were ready, and added, "There is a waiver." (*Ibid.*) Defense counsel confirmed, "We are prepared to waive jury as to both issues." (*Ibid.*) Defendant did not personally enter an express waiver; however, and the case was assigned out for trial. (*Ibid.*)

On appeal, the People urged that the totality of the circumstances test announced in *Howard* should apply. (*Ernst, supra,* 8 Cal.4th at p. 443.) This Court found *Howard* distinguishable: "The question before us does not involve the validity of a plea of guilty, but instead whether a judgment in a criminal case must be reversed because a court trial was conducted without the defendant expressly having waived his or her right to a trial by jury as required by article I, section 16, of the California Constitution." (*Id.* at p. 446.) This Court was mindful

> [O]f the People's contention that requiring reversal of the judgment in the present case would create 'an anomaly in the law,' because an 'omission of an express waiver of a jury trial by a defendant who pleads guilty or admits a prior conviction would be reviewed under the federal totality of the circumstances test, while a similar omission involving a defendant who gives up *only* his right to a jury, and proceeds to a court trial with all other rights intact, would be reversible per se.'

(*Id.* at p. 446, italics in original.) However, this Court stated, "whether or not such a result is anomalous, reversal of a conviction resulting from a court trial not preceded by an express waiver of the right to jury trial is required by the terms of our state Constitution." (*Ibid.*)

Subsequently, in *People v. Collins, supra,* 26 Cal.4th 297, this Court considered the validity of an express jury trial waiver obtained by the trial court's assurance of an unspecified benefit. There, defendant was charged with various sexual offenses and expressly waived his right to a jury trial. When the trial court asked defendant if he understood that he was not being promised anything to waive jury, defendant replied, "I was told that it would-that it was some reassurance or some type of benefit." (*Id.* at p. 302.) The trial court responded, "I indicated to counsel when somebody mentioned that this issue is going to be discussed with you that there might well be a benefit in it. Just by having waived jury, that has some effect on the court. Do you understand that? By not taking up two weeks' time to try the case, but rather giving-just having it in front of a judge alone." (*Ibid.*) The trial court later said, "I didn't specify and I'm not specifying that there's any particular benefit, but that by waiving jury, you are getting some benefit, but I can't tell you what that is because I don't know yet." (*Ibid.*) When asked, defendant said that he had not been promised anything to waive jury. (*Id.* at p. 303.) The trial court accepted the jury trial waiver finding it "free, knowing and intelligent." (*Ibid.*)

The Court of Appeal determined that the issue was analogous to the question of the sufficiency of a defendant's waiver of the right to trial considered in *Howard, supra,* 1 Cal.4th 1132. (*Collins, supra,* 26 Cal.4th at p. 304.) Consequently, it employed the totality of the circumstances test and reached a split decision. (*Ibid.*) After granting review, this Court held that "a harmless error standard does not, and cannot, apply in the present case." (*Id.* at p. 311.) Although defendant had sufficient knowledge of the

right being waived, he relinquished the right only after having been told that he *would* receive a "benefit of an undetermined nature to be determined by the court at a later time." (*Ibid.*) Under the circumstances, defendant's express waiver of his right to jury trial could not be deemed voluntary. (*Id.* at p. 312.) This Court found, "[l]ike a trial court's denial of the right to jury trial by an outright refusal to provide such a trial," "improperly inducing a waiver of that right amounts to a 'structural defect in the proceedings'" requiring reversal regardless of prejudice. (*Id.* at pp. 312-313.)

In a concurring opinion, Justice Brown agreed that defendant's waiver could not be deemed knowing and intelligent in light of the trial court's promise of some unspecified benefit. (*Collins, supra,* 26 Cal.4th at pp. 313-314.) However, Justice Brown would have evaluated the validity of the jury trial waiver under the totality of the circumstances test. (*Id.* at p. 313.) Justice Brown indicated,

> It is difficult to imagine how else we would determine the waiver's validity other than by examining the circumstances under which it was made. Indeed, the majority alludes to such an approach in parts of its analysis. [Citations.] Moreover, this is the standard the parties and both the majority and the dissent in the Court of Appeal agree should apply in the context of jury trial waivers, and it is the standard for the waiver of numerous, if not all, constitutional rights. [Citations.]

(*Id.* at pp. 313-314; see also *Moran v. Burbine* (1986) 475 U.S. 412, 421, [validity of *Miranda* waiver depends on whether the totality of the circumstances surrounding the interrogation reveals an uncoerced choice and the requisite level of comprehension]; *Edwards v. Arizona* (1981) 451 U.S. 477, 482 [validity of waiver of the right to counsel depends on the "particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."]; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 [validity of Fourth Amendment waiver depends on the totality of the surrounding circumstances]; *Brady v.*

United States (1970) 397 U.S. 742, 747-749 [validity of guilty plea requires consideration of all the relevant circumstances surrounding it]; *People v. Arnold* (2004) 33 Cal.4th 294, 306-308 [validity of custody credit waiver depends on totality of circumstances]; *People v. Panizzon* (1996) 13 Cal.4th 68, 84 [validity of waiver of appellate rights requires consideration of the surrounding circumstances].)

"Plainly, not every violation of the state and federal right to a jury trial is a structural defect requiring reversal without regard to whether the defendant suffered actual prejudice." (*People v. Mil* (2012) 53 Cal.4th 400, 411 [addressing whether structural defect occurs where a jury instruction omits more than one element of the offense].) Given the above precedent, where, as here, an express jury trial waiver is voluntarily entered without the promise of an undisclosed benefit, the matter should not be reversible if the totality of the circumstances reveals that the waiver was knowing and intelligent. Even though Judge Long did not advise appellant of the essential element of unity, appellant was aware of the nature of a jury trial. He graduated from a California high school (1RTS 38) and his criminal career included many criminal convictions by plea where he had been expressly told that he had the right to a trial by jury of twelve people who must unanimously find him guilty beyond a reasonable doubt for conviction to stand (CAT 828-829, 840, 842). Also, Judge Long advised appellant of the consequences of abandoning his jury trial right, including that Judge Long would decide his guilt or innocence and the truth of the special circumstance allegations. (1RTS 43-46; 2RTS 315-317.) Judge Long also informed appellant that he would decide the ultimate penalty, choosing between life in prison without the possibility of parole and death. (*Ibid.*) Appellant never expressed confusion or asked for clarification regarding his jury trial right. Instead, at all times, appellant indicated that he understood and desired to have Judge Long decide his fate. Thus, a reading of the

specific advisements that appellant contends should have been given would have led to the same result; appellant would have proceeded with a court determination of guilt and penalty. As a result, any inadequacy in the admonitions given to appellant was harmless.

In sum, appellant's express jury trial waivers were knowing and intelligent. The totality of the circumstances under which the express jury trial waivers were made demonstrates that appellant entered a knowing and intelligent waiver of the right to jury trial. While he may not have been advised of the essential element of unity in these proceedings, throughout his lengthy criminal history, appellant had repeatedly been advised of the nature of a jury trial right. Here, Judge Long advised appellant of the consequences of choosing to proceed without a jury. Still, appellant clearly expressed his preference to have Judge Long decide both phases of the trial. Moreover, appellant cannot establish that he would have proceeded with a jury trial had the suggested advisements been given. Thus, appellant's claim is meritless and the judgment and sentence should be affirmed.

III. APPELLANT DID NOT ENTER A GUILTY PLEA IN VIOLATION OF PENAL CODE SECTION 1018 AND THE EIGHTH AND FOURTEENTH AMENDMENTS; INSTEAD, HE PUT THE STATE TO ITS PROOF

Appellant contends that "[b]y waiving counsel and his right to a jury trial on guilt and penalty, by not presenting any evidence or argument in his behalf or cross-examining any witness, after his efforts to plead guilty had been rejected because his counsel did not consent, appellant was allowed to do what Penal Code section 1018 prohibits for defendants charged with capital offenses – pleading guilty without the consent of counsel." (AOB 71, 72-84.) He also contends that, because his slow plea violated section 1018, the judgment and sentence must be reversed without reference to prejudice. (AOB 85.) Appellant further suggests that his slow plea violated the Eighth and Fourteenth Amendments to the federal Constitution

because it inhibited a just and reliable imposition of the death penalty. (AOB 85-87.) As more fully set forth below, appellant's contentions are meritless. First, even if section 1018 is applicable to defendants who discharge counsel and proceed with self-representation, appellant's conduct was not tantamount to a guilty plea because he did not surrender any rights in consequence of a stipulation or negotiated disposition. Instead, appellant underwent a court trial and maintained the opportunity to challenge the evidence, to cross-examine witnesses, and to refuse to incriminate himself. Moreover, having waived counsel, appellant had no duty to present a defense, but rather could simply put the state to its proof. The court could not require anything more of appellant. Finally, the reliability required by the Eighth and Fourteenth Amendments was attained because the judgment was entered in conformity with the rigorous standards of California's death penalty law. Accordingly, the judgment and sentence should be affirmed.

A. Background

On April 28, 2000, when appellant's matter was continued for nearly one month for further proceedings, appellant asked if he could speak with the court. (1RTL 20.) Judge Ransom told appellant that he had to speak through his lawyer. (*Ibid.*) Appellant responded, "I'm not agreeing with nothing that's going on. I'm not agreeing with nothing that's going on here - - I'm not agreeing with nothing that's going on here." (*Ibid.*) The hearing ended thereafter. (*Ibid.*)

On August 7, 2000, when defense counsel requested a preliminary hearing, appellant said, "Your Honor, I wish to - - I wish not to plead not guilty at this stage; I wish to plead guilty." (1RTL 44.) Defense counsel indicated that appellant did not mean that he wished to plead guilty, and the following colloquy occurred:

> [APPELLANT]: I know exactly what I am saying. We discussed this already.

[DEFENSE COUNSEL]: We have explained to Mr. Daniels the necessity of having a not guilty plea entered on the record so we can move the case forward for a preliminary hearing.

THE COURT: Do you understand that, Mr. Daniels?

[APPELLANT]: I understand exactly what she is saying. What I am saying I am prepared to enter a plea of guilty.

THE COURT: What are the possible consequences of his plea?

[DEFENSE COUNSEL]: He is facing the death penalty because the way the prosecution has charged the case.

[¶] ... [¶]

THE COURT: You are not allowed to do this without your lawyers agreeing on it, sir.

(1RTL 44-45.) When the prosecutor indicated that the People were not willing to accept life without possibility of parole, the court entered not guilty pleas on appellant's behalf. (1RTL 45.)

On August 23, 2000, the court (Judge Crossland) asked appellant if he would be willing to waive his right to a continuous preliminary hearing. (1RTL 377.) Appellant replied, "at this time I'm willing to waive all of my rights at this present time and go no further in this matter." (*Ibid.*) The next day, after appellant was held to answer, the court asked appellant if he wished to reaffirm his denials and not guilty pleas. (1RTL 404-405.) He responded, "No, I do not. I wish to enter a guilty plea." (1RTL 405.) The matter was continued without entry of a plea. (1RTL 406.)

On September 1, 2000, after arraignment, appellant asked to address the court in private. (1RTS 11.) The court (Judge Ransom) denied appellant's request and set the matter for jury trial. (*Ibid.*)

In a letter dated December 7, 2000, appellant advised the court:

I am Respectfully Requesting that I be allowed To withdraw my "Not Guilty" plea and enter a "Guilty Plea."

> I am also requesting that I Be allowed to Represent myself. My Feretta [*sic*] rights.
>
> I fully understand that I am charged with the capitol [*sic*] offense of Murder penal code section 187 with the special circumstances.

(1CT 180, underscore in original.)

On December 20, 2000, defense counsel indicated that appellant had filed a *Faretta* motion and requested to set aside his not guilty plea. (1RTS 12.) Defense counsel further indicated that he had explained to appellant that he could not plead guilty while in pro per status. (*Ibid.*) The court advised appellant that he "can't voluntarily take - - you cannot plead guilty to a death penalty case and get the death penalty." (*Ibid.*) Appellant proceeded with the *Faretta* motion, which the court granted. (1RTS 13-16.)

On January 5, 2001, after the matter had been assigned to Judge Long for all purposes, appellant reiterated that he wanted to proceed without counsel. Judge Long warned appellant of the pitfalls and dangers of self-representation. (1RTS 18-19, 34-43.) Ultimately, Judge Long granted appellant's *Faretta* motion, finding that his waiver of counsel was knowing, intelligent, and voluntary. (1RTS 43.) Immediately thereafter, appellant informed Judge Long that he wished to proceed with a court trial for the guilt and penalty phases. (*Ibid.*) Judge Long advised appellant of his rights relative to a jury trial, and inquired into the voluntariness of appellant's waiver. (1RTS 43-46.) After a discussion, Judge Long found appellant's waivers to be knowing, intelligent, and voluntary. (1RTS 46.)

Then, the clerk noted that appellant had not entered a plea following the arraignment. (1RTS 47.) At that time, appellant reiterated his desire to plead guilty. (1RTS 48.) Judge Long told appellant that he could not plead guilty to the special circumstances. (*Ibid.*) Appellant suggested that he wanted to plead guilty to the counts unrelated to the murder charges. (*Ibid.*)

The prosecutor stated that he had discussed with appellant the possibility of having Judge Long review the preliminary hearing transcript for the factual basis. (1RTS 52.) The prosecutor also asked Judge Long to make sure that appellant understood that the People "may ask the Court to take notice of the facts underlying those robberies that he is pleading guilty to in either the guilt or penalty phase as they may be legally relevant." (*Ibid.*) Judge Long responded, "Well, you know the rule is that that may well be - - when you read just a transcript, that may well be tantamount they say to a slow plea, but it is in a different context, you understand?" (*Ibid.*) The prosecutor said, "Yes," and the court recessed without further discussion on the issue. (*Ibid.*)

On January 8, 2001, Judge Long accepted appellant's plea to all charges unrelated to the capital offenses. (1RTS 68-76.)

On January 16, 2001, a court trial began. (1CT 286; 1RTS 79-86.) The prosecutor presented 13 witnesses and introduced more than 90 exhibits (1CT 295-300.) Judge Long asked witnesses questions when he deemed that clarification or elaboration was needed. (See e.g., 1RTS 117-118, 128, 148, 154-155, 159, 194-196.) Judge Long also sustained his own objections to some of the prosecutor's questions (see e.g., 1RTS 139, 145, 155, 183) and ordered stricken certain testimony (see e.g., 1RTS 157, 160). The trial concluded on January 19, 2001. Appellant did not present an opening statement, ask questions, or object to any of the People's evidence. (1RTS 265.) He rested the defense case without testifying or presenting evidence on his behalf. (*Ibid.*)

On January 23, 2001, the penalty phase court trial began. (2RTS 319.) The prosecutor presented 14 witnesses and introduced more than 20 exhibits. (2CT 321-322.) When the prosecutor finished the People's case, appellant asked for a "couple days to use the law library" to "look at a couple tapes that [he had] not seen." (1RTS 405.) He later rested without

presenting evidence in mitigation or closing argument. (1RTS 419.) However, appellant offered an apology to the Carolina and McCoy families. (2RTS 453-454.)

B. Standard of Review

In deciding whether a course of conduct is a slow plea or tantamount to a guilty plea, an appellate court "must assess the circumstances of the entire proceeding. It is not enough for a reviewing court to simply count the number of witnesses who testified at the hearing... ." (*People v. Wright* (1987) 43 Cal.3d 487, 496, overruled on another ground as recognized in *People v. Mosby* (2004) 33 Cal.4th 353, 360.)

C. Discussion

1. This Court has never held that section 1018 prevents a capital defendant from discharging counsel, representing himself, and entering a guilty plea

Appellant contends that "in California, the trial court does not have the authority to accept a plea of guilty to a capital crime from a defendant who has waived counsel." (AOB 72-78.) At the time of appellant's trial, Penal Code section 1018 provided, in relevant part,

> No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel.

This Court has never squarely considered the issue of whether a defendant in a capital case may discharge counsel, engage in self-representation, and enter a guilty plea. (See *People v. Chadd* (1981) 28 Cal.3d 739, 746-747; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1299, fn. 4 (*Alfaro*).) Resolution of this automatic appeal; however, does not require consideration of the issue because appellant did not enter a guilty plea.

2. Regardless, the application of section 1018 is not relevant in this matter because appellant did not engage in conduct tantamount to a guilty plea

A "slow plea" or conduct tantamount to a guilty plea is "an agreed-upon disposition of a criminal case via any one of a number of contrived procedures which does not require the defendant to admit guilt but results in a finding of guilt on an anticipated charge and, usually, for a promised punishment." (*People v. Tran* (1984) 152 Cal.App.3d 680, 683, fn. 2.) It must be defined by the rights a defendant surrenders. (*Robertson, supra,* 48 Cal.3d at p. 40.) There is no surrender of rights, and thus no need for *Boykin/Tahl* waivers, when a defendant has a trial and the opportunity to cross-examine the witnesses against him and to refuse to incriminate himself.[18] (*Id.* at p. 40; *People v. Hendricks* (1987) 43 Cal.3d 584, 592-593 (*Hendricks*); *People v. Griffin* (1988) 46 Cal.3d 1011, 1029.)

In *Hendricks, supra,* 43 Cal.3d 584, a special circumstance murder case where the penalty was fixed at death, defendant claimed that counsel's defense was tantamount to a guilty plea, requiring a waiver of rights under *Boykin, supra,* 395 U.S. 238 and *Tahl, supra,* 1 Cal.3d 122. (*Id.* at p. 592.) During trial, defense counsel did not present an opening statement; cross-examined only a few of the prosecution's witnesses; stipulated to the admissibility of defendant's confession; failed to call defendant or any other witnesses; stipulated to defendant's prior convictions for murder; and did not present a closing argument. (*Ibid.*) In rejecting defendant's claim, this Court focused on two points. First, *Boykin/Tahl* waivers are necessary only when the defendant agrees to a submission procedure, "by virtue of

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[18] Under *Boykin, supra,* 395 U.S. 238 and *Tahl, supra,* 1 Cal.3d 122, a guilty plea cannot stand unless the record in some manner indicates a free and intelligent waiver of the three enumerated rights necessarily abandoned by a guilty plea, namely, the privilege against self-incrimination, the right to trial by jury, and the right to confrontation.

which he surrenders one or more of the three specified rights." (*Hendricks, supra,* 43 Cal.3d at p. 592.) "Second, there is no such surrender when the defendant undergoes – and thereby exercises his right to – a jury trial and has the opportunity to cross-examine the witnesses against him and to refuse to incriminate himself." (*Id.* at pp. 592-593; see *People v. Murphy,* (1972) 8 Cal.3d 349, 365-366 [presentation of a "minimal defense" was not tantamount to a guilty plea].) Given that defendant had a jury trial, cross-examined the People's witnesses, and exercised his right against self-incrimination, this Court concluded that counsel's defense was not tantamount to a guilty plea requiring *Boykin/Tahl* waivers. (*Ibid.*; see *People v. Griffin, supra,* 46 Cal.3d at p. 1029; *People v. Memro* (1995) 11 Cal.4th 786, 857-858 [concession during closing argument was not tantamount to a plea]; *People v. Cook* (2006) 39 Cal.4th 566, 590 [same].)

Subsequently, this Court decided *Robertson, supra,* 48 Cal.3d 18, and extended the principles highlighted in *Hendricks* to a penalty phase tried without a jury. In *Robertson*, defendant was found guilty of special circumstance murder and the penalty was fixed at death. (*Robertson, supra,* 48 Cal.3d at p. 28.) This Court reversed the judgment as to penalty. (*Ibid.*) On retrial, defendant waived jury trial and defense counsel stipulated that the court could read and consider the former testimony of 21 specified witnesses addressing the circumstances of the crimes, the background to defendant's statements to police, the special hearing on the admissibility of defendant's confession, and the first trial. (*Id.* at pp. 38-39.) The parties understood that either side could call any of the witnesses for additional testimony. (*Ibid.*) In fact, the parties called three of the 21 witnesses whose prior testimony had been submitted, along with 20 additional witnesses. (*Id.* at p. 39.)

On appeal after retrial of the penalty phase, defendant claimed the procedure constituted a submission which required *Boykin/Tahl* waivers.

(*Robertson, supra,* 48 Cal.3d at pp. 39-40.) This Court rejected defendant's claim, noting that a "'submission' is defined by the rights a defendant surrenders" and reiterating that there is no surrender when the defendant undergoes a trial and has the opportunity to cross-examine witnesses and refuse to incriminate himself. (*Id.* at p. 40.) This Court observed that a capital defendant has "no constitutional right at the penalty phase to a jury trial." (*Ibid.*) This Court further observed that even though defendant waived his statutory right to a jury trial, "[h]is waiver of the statutory right, ..., was not a consequence of his stipulation to admission of the witnesses' former testimony, but preceded it." (*Ibid.*) Turning to the facts, this Court found that counsel's conduct was not tantamount to a guilty plea requiring *Boykin/Tahl* waivers because defendant had the opportunity in the prior proceedings to cross-examine the witnesses whose former testimony was admitted and preserved that opportunity in the new penalty trial. (*Ibid.*)

Similarly, in *People v. Sanders* (1990) 51 Cal.3d 471, counsel failed to cross-examine the prosecution's witnesses during the penalty phase, offered no mitigating evidence, and presented no closing argument. (*Id.* at p. 527.) On appeal, defendant urged that "his decision to forgo presentation of evidence at the penalty phase of his trial was tantamount to a guilty plea without the consent of counsel." (*Ibid.*) This Court found

> the premise faulty: his decision to refrain from offering evidence is not tantamount to a guilty plea and is thus not governed by section 1018. His choice did not amount to an admission that he believed death was the appropriate penalty, nor did he give up his right to confront or cross-examine those testifying against him at the penalty phase. (Cf. *Boykin v. Alabama* (1969) 395 U.S. 238, 243 [23 L.Ed.2d 274, 279, 89 S.Ct. 1709]; *In re Tahl* (1969) 1 Cal.3d 122, 130-133 [81 Cal.Rptr. 577, 460 P.2d 449].) Moreover, his decision refusing to take part in the penalty phase did not necessarily make it any more likely that his jury would find death was the appropriate penalty. The jury could, for example, have found mitigating factors from evidence presented at the guilt phase. We conclude the scope of section 1018 is not

> so broad as to embrace defendant's decision of nonparticipation in the penalty phase of his trial.

(*People v. Sanders, supra,* 51 Cal.3d at p. 527.)

In the instant case, the circumstances of the proceedings demonstrate that appellant did not enter a slow plea or engage in conduct tantamount to a guilty plea. Initially, as defined by the court in *People v. Tran, supra,* 152 Cal.App.3d 680, a slow plea typically involves "an agreed-upon disposition," "a finding of guilt on an anticipated charge," and a "promised punishment." (*Id.* at p. 683, fn. 2.) None of these characteristics is present in appellant's case. Indeed, the record lacks any discussion or negotiation between the parties concerning the disposition, charges for which appellant likely would be convicted, or a promised punishment. Therefore, the circumstances of appellant's matter are outside the definition of a slow plea.

More importantly, this Court has repeatedly stated that a submission constituting a slow plea or conduct tantamount to a guilty plea is defined by the rights a defendant surrenders. (*Robertson, supra,* 48 Cal.3d at p. 40.) In this matter, appellant was repeatedly told he could not plead guilty without consent of counsel and he was told at the time the court granted his *Faretta* motion that he could not plead guilty and get the death penalty. (1RTL 44-45; 1RTS 12.) He was also advised of his right to a jury trial, and knowingly and intelligently waived his constitutional right to jury for the guilt phase and statutory right to jury for the penalty phase. (1RTS 43-46, 88-89; 2RTS 315-317.) The waiver preceded the presentation of the prosecution's witnesses and was not the consequence of any negotiated agreement with the prosecution concerning the disposition, punishment, or evidence to be presented. (See *Robertson, supra,* 48 Cal.3d at p. 40.) Further, appellant received a trial during which the court, as finder of fact, ensured that the prosecution properly discharged its burden of proof at the guilt phase and presented substantial aggravating evidence at the penalty

phase. Appellant had the opportunity to challenge the prosecution's evidence, to cross-examine the witnesses against him, and to call witnesses on his behalf; he simply refused to do so. Moreover, appellant preserved his right against self-incrimination by declining to testify during the guilt and penalty phases. Since appellant did not surrender any constitutional rights in consequence of any negotiated agreement, his conduct was not "a bargained-for submission" on the transcripts from prior proceedings which may constitute a slow plea or conduct tantamount to a guilty plea. (*People v. Wright, supra,* 43 Cal.3d at p. 496; see *Hendricks, supra,* 43 Cal.3d at pp. 592-593; *Griffin, supra*, 46 Cal.3d at p. 1029; see also *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 602-603.)

3. None of appellant's contentions establish that he engaged in conduct tantamount to a guilty plea

Appellant contends that, under the circumstances, the court should have inquired into his intentions before commencing trial. (AOB 81-82.) He further suggests that if the parties "confirmed that the court trial was tantamount to a guilty plea to capital murder," "the court could have averted error by refusing to accept the jury waiver." (AOB 82.) His contention fails for several reasons. First, as previously indicated, appellant's conduct was not tantamount to a guilty plea. He simply chose to defend himself by nonparticipation. In addition, the court had no authority to overrule the consent of the parties to waive trial by jury. (*People v. Terry* (1970) 2 Cal.3d 362, overruled on another ground in *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382.) According to our state Constitution, "[a] jury may be waived in a criminal case by the consent of both parties expressed in open court... ." (Cal. Const., art. I, § 16.) Once a defendant has knowingly and voluntarily waived jury trial, and both parties have consented, the court must accept the waiver. (*People v. Scott* (1997) 15 Cal.4th 1188, 1209.) Even if the court could have refused

to accept the jury waiver, appellant fails to explain how that would have materially changed the manner in which he chose to defend himself. (AOB 81-82.) Besides, this Court has already determined that a submission is defined by the rights surrendered, regardless of whether the defendant proceeds before the court or a jury. (See *Robertson, supra,* 48 Cal.3d at p. 40.) Here, appellant did not surrender any constitutional rights as a consequence of a stipulation or negotiated agreement.

Appellant further contends that, before submitting the case for decision, the court should have appointed counsel to determine how to proceed given appellant's lack of participation at trial. (AOB 82.) His contention is unpersuasive. As an initial matter, having determined that appellant made a knowing, voluntary, and intelligent waiver of the right to counsel, the court lacked authority to force counsel upon appellant absent some disruption or manipulation of the proceedings. (*Faretta, supra,* 422 U.S. at p. 834, fn. 46; see *People v. Clark, supra,* 3 Cal.4th at pp. 114-115.) Also, the court could not compel appellant to do anything more than put the state to its proof. (*People v. Teron, supra,* 23 Cal.3d at p. 115; see *Bloom, supra,* 48 Cal.3d at p. 1227 ["A rule requiring a pro se defendant to present mitigating evidence would be unenforceable, as the court has no means to compel a defendant to put on an affirmative defense"].) Indeed, appellant had a fundamental right to control and present a defense of his choosing, even if that meant refusing to participate actively. (*Ibid.*) As the Supreme Court has said, "[t]he right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. ... And although he may conduct his own defense ultimately to his own detriment, his choice must be honored... ." (*Faretta, supra,* 422 U.S. at p. 834.) The court cannot revoke a defendant's right to engage in self-representation simply because the court dislikes the defense strategy.

For example, in *People v. Teron, supra,* 23 Cal.3d 103, defendant was charged with murder and the prosecution sought the death penalty. (*Id.* at p. 108.) The trial court granted defendant's *Faretta* motion and, the day before trial was scheduled to begin, defendant waived jury. (*Id.* at p. 110.) During the prosecution's case, defendant asked no questions of witnesses and presented only one objection. (*Ibid.*) Defendant suggested that the trial court admit the transcripts of his taped confession, rather than the tape itself. (*Ibid.*) When the prosecution rested, defendant advised the trial court that he did not wish to present evidence. (*Id.* at p. 111.) He also said that he did not want to present evidence regarding his intoxication level on the night in question, despite that defendant had mentioned it during his confession. (*Ibid.*) Defendant offered no closing argument. (*Ibid.*) Thereafter, the trial court found defendant guilty of first degree murder. (*Ibid.*) Before starting the penalty phase, defendant again entered a *Faretta* waiver and waived a jury trial. (*Ibid.*) He presented no evidence or argument on penalty. (*Ibid.*) The trial court sentenced defendant to death. (*Id.* at pp. 111-112.) On appeal, counsel urged "that once it had become clear during the guilt trial that defendant did not intend to present a defense, the court should have revoked his right to represent himself." (*People v. Teron, supra,* 23 Cal.3d at p. 115.) This Court rejected the contention, finding that a defendant "bears no duty to present a defense." (*Ibid.*) "A fortiori, having put the state to its proof, [a defendant] has no obligation to try to rebut it." (*Ibid.*)

Similarly, here, appellant endured a trial during which the prosecution satisfied its burden of proof. He had the opportunity to cross-examine the witnesses against him and to present evidence, but declined to do so. His personal choice to proceed by nonparticipation did not morph the trial into a slow plea. (*People v. Teron, supra,* 23 Cal.3d at p. 115; see *People v. McKenzie* (1983) 34 Cal.3d 616, 628; *United States v. Clark* (7th Cir. 1991) 943 F.2d 775, 782 [defendant has a personal constitutional right to face the

charges alone by standing mute and forcing the state to its proof]; *Savage v. Estelle* (9th Cir. 1990) 924 F.2d 1459, 1464, fn. 10 [same]; *United States v. McDowell* (6th Cir. 1987) 814 F.2d 245, 250 [same]; *cf. People v. Stansbury* (1993) 4 Cal.4th 1017, 1041-1047 [when a defendant stands mute because of a desire to disrupt or manipulate the proceedings, the trial court may threaten to terminate his pro per status].) Thus, appellant did not engage in conduct tantamount to a guilty plea in violation of section 1018.

4. The death judgment is reliable because it was entered in conformity with the rigorous standards of California's death penalty law

Appellant contends that the death judgment is arbitrary and unreliable because he proceeded without counsel and failed to participate actively in his defense. (AOB 85-87.) His contention is meritless. The constitutional standards for the reliability of a death judgment have been satisfied.

In *People v. Bloom, supra,* 48 Cal.3d 1194, this Court considered whether a death judgment may be regarded as unreliable in a constitutional sense when a self-represented defendant chooses not to present mitigating evidence. (*Id.* at p. 1227.) There, when the jury returned guilty verdicts, defendant made a *Faretta* motion. (*Id.* at p. 1214.) He chose to proceed as "co-counsel" during the penalty phase. (*Id.* at p. 1215.) Defendant urged the jury to impose death, explained that he deserved to die, and said that he wanted to die. (*Id.* at pp. 1216-1217.) He also suggested that there were no mitigating factors, but said, "Every man on the jury, if you knew the facts on my life, you'd kill him too." (*Id.* at p. 1217.) The jury returned a death verdict. On appeal, defendant claimed that the death verdict was unreliable because he withheld substantial mitigating evidence. (*Id.* at p. 1227.) This Court rejected the argument, finding practical and theoretical flaws.

> A rule requiring a pro se defendant to present mitigating evidence would be unenforceable, as the court has no means to compel a defendant to put on an affirmative defense. [Citation.]

> The threat of appellate reversal would be not merely ineffective but counterproductive. A knowledgeable defendant desiring to avoid the death penalty could make a timely request for self-representation under *Faretta, supra*, 422 U.S. 806, and then decline to present any mitigating evidence at the penalty phase, secure in the knowledge that any death judgment would be reversed by this court, while a defendant genuinely desiring death could circumvent the rule by presenting a bare minimum of mitigating evidence. A rule so easily evaded or misused is clearly unsound. The sanction of appellate reversal is not the answer, nor has any alternative method been suggested to compel an unwilling defendant to present an effective penalty defense.
>
> While the United States Supreme Court has frequently stated that the Eighth Amendment and evolving standards of societal decency impose a high requirement of reliability on the determination that death is the appropriate penalty in a particular case [citations], the high court has never suggested that this heightened concern for reliability requires or justifies forcing an unwilling defendant to accept representation or to present an affirmative penalty defense in a capital case. Indeed, the lack of any legal or practical means to force a pro se defendant to present mitigating evidence, or indeed any defense at all, compels the conclusion that the death-verdict-reliability requirement cannot mean that a death verdict is unsound merely because the defendant did not present potentially mitigating evidence. Rather, 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. [Citations.]

(*Bloom, supra,* 48 Cal.3d at pp. 1227-1228, footnote omitted.)

The same considerations apply here. The death verdict was rendered only after the prosecutor discharged its burden of proof at the guilt phase and presented aggravating evidence at the penalty phase that substantially

outweighed the relevant mitigating evidence. Although appellant did not present evidence at the penalty phase, the court, as trier of fact, considered evidence of appellant's drug use that was presented during the guilt phase as a potentially mitigating circumstance, and also considered appellant's apologies to the victims's families and showing of remorse when selecting the appropriate punishment. (2RTS 468-469; see *People v. Sanders, supra,* 51 Cal.3d at p. 527.) The court followed the demanding guidelines of California's death penalty law throughout the proceedings. And, the court could not compel appellant to present a defense, offer mitigating evidence, or forego his right to self-representation. (See *People v. Clark, supra,* 50 Cal.3d at p. 618 ["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."].) Consequently, the judgment of death does not violate the reliability requirements of the Eighth and Fourteenth Amendments, and should be affirmed. (*Bloom, supra,* 48 Cal.3d at p. 1228; *People v. Lang* (1989) 49 Cal.3d 991, 1029-1030.)

5. Conclusion

In sum, appellant did not enter a slow plea in violation of section 1018, thereby rendering the death judgment unreliable. Initially, even if section 1018 prevented a capital defendant from entering a guilty plea after discharging counsel and proceeding with self-representation, appellant's conduct was not tantamount to a guilty plea because he did not surrender any constitutional rights in consequence of a stipulation or negotiated agreement as to the presentation of the evidence. Instead, he endured a trial and maintained the opportunity to challenge the evidence, to cross-examine witnesses, and to refuse to incriminate himself. Appellant had no duty to present a defense, and the court could not require him to do anything more than put the state to its proof. Moreover, the reliability required by the

Eighth and Fourteenth Amendments was attained because the death judgment was entered in accord with the rigorous standards of California's death penalty law. Thus, the judgment and sentence should be affirmed.

IV. THE TRIAL COURT PROPERLY CONSIDERED APPELLANT'S DRUG USE WHEN EVALUATING THE MITIGATING FACTORS

Appellant contends that the trial court erroneously refused to consider his drug use as a mitigating circumstance in violation of state law and the Eighth and Fourteenth Amendments. (AOB 88, 89-98.) Appellant further urges that the court committed *Lockett* error by refusing to consider his impairment at the time of the offenses. (AOB 98-104.) He finally contends that the court's refusal to consider mitigating evidence requires reversal without an inquiry into prejudice. (AOB 104-106.) Alternatively, appellant suggests that the court's error was not harmless beyond a reasonable doubt. (AOB 107-111.) As more fully set forth below, appellant's contentions are meritless. First, appellant's claim is premised on the erroneous assumption that the voluntary ingestion of illegal drugs is per se mitigating. Further, the court did not *refuse* to consider mitigating evidence. Rather, the court considered all of the evidence offered during the guilt and penalty phases, and determined that appellant's drug use was not mitigating. That the court did not mention appellant's drug use or impairment more particularly under factor (k) does not mean that the evidence was not considered. Moreover, to the extent the court erred, the error was harmless beyond a reasonable doubt. Therefore, the judgment and sentence should be affirmed.

A. Background

When rendering the penalty phase verdict, the court declared that, among other things, it had considered "[a]ny other circumstances which extenuates the gravity of the crime and any sympathetic or other aspect of [appellant's] character or record that [appellant] offers as a basis for a sentence less than death, whether or not related to the offense for which he

is on trial." (2RTS 461.) The court also "considered mercy, sympathy and/or sentiment in deciding what weight to give each factor." (*Ibid.*)

During the motion for modification of the death verdict, the court addressed appellant's drug use or other circumstances extenuating the gravity of the offenses as follows:

> Factor H: Whether or not at the time of the offense the capacity of Mr. Daniels to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or the affects of intoxication.
>
> There was evidence that prior to the killing of Mr. Carolina, Mr. Daniels had ingested three cigarettes laced or filled with cocaine. As stated on the record during the guilt phase of the trial, Mr. Daniels' other actions on the night of Mr. Carolina's death indicate that he was able to understand the nature and the criminality of his actions. The facts do not constitute a mitigating circumstance.
>
> [¶] ... [¶]
>
> Factor K: Any other circumstance which extenuates the gravity of this crime even though it is not a legal excuse for the crime.
>
> During the penalty phase, Mr. Daniels addressed the families of the victims. At that time, Mr. Daniels did express some remorse for his actions and took some responsibility for the crimes. These facts may constitute a mitigating factor.

(2RTS 464-469.) The court noted that it had taken into consideration the evidence presented during the guilt and penalty phases. (2RTS 464.)

B. Discussion

1. The court was not required to find appellant's drug use a per se mitigating circumstance

Appellant contends that the court erroneously refused to consider his drug use in mitigation. (AOB 88-111.) His contention is premised on the faulty assumption that voluntary and repeated ingestion of illegal drugs is

per se mitigating. (See AOB 91-104.) In reality, after proper consideration of the evidence, the court was not required to find that appellant's drug use does in fact mitigate. Thus, appellant's contention must fail.

For example, in *People v. Scott, supra,* 15 Cal.4th 1188, defendant was charged with special circumstance murder after he raped a woman and set her on fire. (*Id.* at p. 1198.) He waived jury for the guilt and penalty phases, and the court reached a death verdict. (*Id.* at pp. 1198-1199.) The court declined to find defendant's drug use mitigating, noting "that even though there was drug use, that [defendant] was not impaired by the effects of intoxication." (*Id.* at p. 1222.) On appeal, defendant alleged that the court erroneously refused to consider his cocaine use shortly before the crime as a mitigating factor. (*Ibid.*) This Court rejected defendant's claim:

> The court did not refuse to consider any evidence. It merely found that some evidence did not, in fact, mitigate. As defendant argues, the court may not be precluded from considering any potentially mitigating evidence the defendant offers. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S.Ct. 1669, 1670-1671, 90 L.Ed.2d 1].) California's death penalty statute does not preclude any such consideration. Once the sentencer considers the evidence, however, it is not required to find that any particular evidence does in fact mitigate. "Defendant appears to assume that the court was required to conclude that the evidence he had offered in mitigation did in fact amount to a mitigating circumstance. The assumption is unsound." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1107 [25 Cal.Rptr.2d 867, 864 P.2d 40].) There was no evidence that defendant's cocaine use affected the crime or that his references to "Tony" were genuine or showed any mental impairment. The court properly considered the evidence and then found it not mitigating.

(*People v. Scott, supra,* 15 Cal.4th at p. 1222.)

Similarly, here, the court was not required to find that appellant's drug use does in fact mitigate. Appellant had prior felony convictions for drug use and sales (2CT 332), and there was evidence that appellant had ingested

three cocaine cigarettes before the Carolina murder (1RTS 192). During his closing argument, the prosecutor noted appellant's drug use and possible intoxication as a potentially mitigating factor. (2RTS 445.) The court considered this evidence and found that it was not mitigating. (See 2RTS 464 [noting consideration of evidence presented during guilt and penalty phases]; 468 [consideration under factor (h)].) Since there is no rule that drug use is per se mitigating, appellant's claims must fail. (See *People v. Kennedy* (2005) 36 Cal.4th 595, 639 [court found evidence of defendant's drug use to be the only mitigating factor, but noted that it was unmoving and inconclusive]; *People v. Gaston* (1999) 74 Cal.App.4th 310, 322 [drug abuse is not mitigating circumstance when the defendant has not made efforts to "root out" the dependency]; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 ["drug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment"].)

2. The court did not refuse to consider drug usage or impairment as a mitigating factor

It is settled that the sentencer in a capital case may not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4.) The corollary of this rule is that the sentencer may not refuse to consider any relevant mitigating evidence presented by the defendant. (*Ibid.*) These principles were derived from prior decisions of the Supreme Court.

In *Lockett v. Ohio* (1978) 438 U.S. 586 (*Lockett*), the Supreme Court invalidated an Ohio statute which limited mitigating factors to three and did not include consideration of any mitigating aspects of a defendant's character and background. (*Id.* at pp. 597-605; see also *Bell v. Ohio* (1978)

438 U.S. 637 [same statute, which limited consideration of mental state to psychosis or mental deficiency (not amounting to insanity) and precluded consideration of mental deficiency because of low intelligence and use of drugs].) Thus, once the sentencer determined that the victim did not induce or facilitate the offense, that the defendant did not act under duress or coercion, and that the offense was not primarily the product of the defendant's mental deficiency, a death sentence was mandated. (*Lockett, supra,* 438 U.S. at p. 608.) The Supreme Court found the limited range of mitigating circumstances to be incompatible with the Eighth and Fourteenth Amendments, and determined that, "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." (*Ibid.*)

In *Eddings v. Oklahoma* (1982) 455 U.S. 104, the Supreme Court addressed a statute which provided, "evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act." (*Id.* at p. 106.) Defendant had presented evidence concerning his troubled youth and emotional disturbance. (*Id.* at pp. 107-108.) However, the sentencer refused to consider the substantial evidence stating, "Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background." (*Id.* at p. 109.) Finding *Lockett* error, the Supreme Court concluded that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." (*Id.* at pp. 113-114.) Accordingly, the sentencer may determine the weight to be given relevant mitigating evidence, but cannot, *as a matter of law*, exclude the evidence from consideration. (*Id.* at pp. 114-115, italics in original.)

California's death penalty law does not preclude consideration of any relevant mitigating circumstances. Under section 190.3, in determining the

penalty, the trier of fact shall take into account any of the following factors if relevant:

> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.
>
> (i) The age of the defendant at the time of the crime.
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

In the instant case, adhering to the requirements of section 190.3, the court did not refuse to consider appellant's drug usage or impairment in

violation of *Lockett*.[19] (AOB 91-103.) Instead, appellant chose to proceed by nonparticipation, leaving the court to scour the record in search of "possible mitigating circumstances presented by the evidence" during the guilt and penalty phases. (2RTS 469.) In doing so, the court expressly considered "[a]ny other circumstances which extenuate[d] the gravity of the crime and any sympathetic or other aspect of [appellant's] character or record that [appellant] offer[ed] as a basis for a sentence less than death, whether or not related to the offense for which [appellant] is on trial." (2RTS 461, referring to § 190.3, subd. (k).) The court also considered whether appellant's drug impairment prevented him from conforming his conduct to the law or appreciating the criminality of his behavior. (2RTS 467, § 190.3, subd. (h).) Based on appellant's drug-related convictions and the court's questions to O'Neal during the guilt trial, this clearly encompassed appellant's drug use and impairment on the night of the Carolina murder. (See 1RTS 194-196.) The court stated,

> There was evidence that prior to the killing of Mr. Carolina, Mr. Daniels had ingested three cigarettes laced or filled with cocaine. As stated on the record during the guilt phase of the trial, Mr. Daniels' other actions on the night of Mr. Carolina's death indicate that he was able to understand the nature and the criminality of his actions. The facts do not constitute a mitigating circumstance.

(2RTS 468.) That the court did not refer to appellant's drug usage more particularly under section 190.3, subdivision (k), does not mean that the court refused to consider such evidence or that its consideration was limited to the portion of section 190.3, subdivision (h) related to appreciating criminality. The most reasonable inference is that the court simply found

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[19] *Lockett* error is also referred to as *Skipper* error based on the Supreme Court's decision in *Skipper v. South Carolina* (1985) 476 U.S. 1. (See e.g., *People v. Mickey* (1991) 54 Cal.3d 612, 692.)

that the "mitigation evidence was insufficient to vitiate" the penalty determination. (*People v. Wader* (1993) 5 Cal.4th 610, 668.)

3. In any event, any error was harmless beyond a reasonable doubt

Appellant contends that *Lockett* error requires reversal without regard to prejudice. (AOB 104-106.) Alternatively, he suggests that the trial court's error was not harmless beyond a reasonable doubt. (AOB 107-111.) He is mistaken. This Court has already determined that *Lockett* error is subject to the harmless error analysis announced in *Chapman v. California* (1967) 386 U.S. 18. Based on the circumstances of this case, if the court committed *Lockett* error, the error was harmless beyond a reasonable doubt.

In *People v. Lucero* (1988) 44 Cal.3d 1006, this Court noted that the exclusion of potentially mitigating evidence is federal constitutional error subject to a harmless error analysis. (*Id.* at p. 1031.) This Court presumed that the test of *Chapman v. California, supra,* 386 U.S. 18 governed, and noted that, under that test, "error is reversible unless the state proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Id.* at p. 1032, quoting *Chapman v. California, supra,* 386 U.S. at p. 24; see *Robertson, supra,* 48 Cal.3d at p. 57 [applying *Chapman* to *Skipper* error.) Thereafter, this Court held that reversal of the penalty was required because,

> Defendant offered a substantial showing in mitigation: the absence of any prior acts of criminal violence, the absence of any prior felony convictions, a deprived and harrowing childhood, a traumatic military experience, and a serious mental illness. In contrast, the prosecution presented no affirmative evidence in aggravation at the penalty trial.

(*People v. Lucero, supra,* 44 Cal.3d at p. 1032; see *People v. Fudge* (1994) 7 Cal.4th 1075, 1119 [finding *Skipper* error harmless beyond a reasonable doubt "after considering the strong aggravating evidence in the form of the

circumstances of the offense, other mitigating evidence, and the strength of the improperly excluded evidence"].)

Unlike the defendant in *People v. Lucero, supra,* 44 Cal.3d 1006, appellant did not make any showing of mitigation. Instead, the court was presented with the prosecutor's affirmative evidence in aggravation, including the circumstances of the offenses. Appellant murdered Carolina with a gunshot wound to the head after Carolina refused to give appellant what he wanted. (1RTS 191.) Then, appellant shot Hillian because she would not stop screaming; the gunshot wounds caused extensive injuries to her hand and leg. (1RTS 126-127.) Days later, appellant attempted to evade officers by driving at high speeds even though it was foggy outside. (1RTS 199, 203.) While fleeing from officers, appellant smashed into McCoy's car at a minimum speed of 80 miles per hour, causing the car to burst into flames. (1RTS 205-206.) McCoy ultimately burned to death after attempts to remove her from the car were unsuccessful. (1RTS 138, 206.) Contending that he was stuck in the car he had been driving, appellant lured officers closer to him. (1RTS 263-264.) As soon as Sergeant Weinrich broke the plane of appellant's car, appellant shot him in the chest and thigh. (1RTS 222-223.) Sergeant Weinrich was left with extensive injuries, remained in the hospital for about nine days, and required at least three surgeries. (1RTS 224-225.)

The prosecutor also presented evidence which demonstrated that appellant had five prior felony convictions, including convictions for attempted residential burglary (§§ 664/459), possession of a controlled substance (Health & Saf. Code, § 11350), cocaine sales (Health & Saf. Code, § 11352), robbery (§ 211), and second degree burglary (§ 459). (2CT 332; see CAT 816-850.) In addition, appellant had pleaded guilty to nearly one dozen armed robberies prior to the guilt phase trial. And, the prosecutor proved during the penalty phase that appellant had committed

several uncharged violent crimes, including robbery and carjacking. He had also assaulted a police officer with a firearm and threatened police officers while being treated at UC Davis Medical Center. Though appellant expressed some remorse for killing Carolina and McCoy, he wrote that he wished he would have "killed every last one" of the "punk ass police [he] shot." (CAT 852-853.)

In sum, the court was presented with strong aggravating evidence, including the circumstances of the offenses, five felony convictions, nearly one dozen armed robberies that appellant pleaded to before the start of trial, and numerous uncharged violent offenses that the court found true. Given the strength of this evidence, any error in the manner in which the court considered appellant's drug use and impairment was harmless beyond a reasonable doubt. Hence, the judgment and sentence should be affirmed.

V. APPELLANT FORFEITED HIS CLAIMS REGARDING THE MOTION TO MODIFY THE VERDICT; MOREOVER, APPELLANT RECEIVED A PROPER HEARING UNDER THE STATUTE DURING WHICH THE COURT PROVIDED A DETAILED STATEMENT OF ITS REASONS FOR THE DEATH VERDICT

Appellant contends that he was denied an independent review of his automatic motion for modification of the death verdict in violation of section 190.4, subdivision (e), and the Eighth and Fourteenth Amendments. (AOB 112.) Specifically, appellant claims that independent review of the penalty verdict at the trial court level prevents the arbitrary and capricious imposition of the death penalty – a protection that the Legislature intended to provide. (AOB 114-122.) He further claims that failing to have the penalty verdict reviewed by an unbiased judge violates due process and that depriving judge-sentenced capital defendants from such independent review violates the Equal Protection Clause. (AOB 122-131.) Finally, appellant claims that the error was harmless under any prejudiced-based standard of review. (AOB 132-133.) As more fully set forth below, appellant's claims

lack merit. Initially, appellant has forfeited any claim regarding the motion to modify the death verdict by failing to object in the trial court. Further, appellant was not entitled to separate review by a different judge at the trial court level; accordingly, he received a proper modification hearing under the statute when giving the plain language its most expansive reading. Also, the court gave a detailed statement of its reasons for the verdict, and thus the record is adequate for meaningful review of the propriety of the death verdict, which is the statute's purpose. Finally, appellant forfeited the due process and equal protection claims by failing to object; in any event, the claims are meritless. Hence, the judgment and sentence should be affirmed.

A. Background

On January 31, 2001, the court rendered a death verdict. (2RTS 462.)

On February 14, 2001, the court decided the automatic motion to modify the death verdict. It denied the motion for the following reasons:

> The Court has taken into consideration the evidence in this case that was presented during the guilt and penalty phase and only that evidence. In doing so, the Court has made certain findings that are necessary to properly evaluate the circumstances of the case, including the findings on evidence presented at the guilt phase and the penalty phase. The Court's evaluation of the evidence and findings concerning the evidence are as follows:
>
> Factor A: The circumstances of the crime of which Mr. Daniels was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> The circumstances of the crimes committed by Mr. Daniels show an indifference to and callous disregard for human life. In the killing of LeWayne Carolina, Mr. Daniels entered the residence with the intent to commit armed robbery. When Mr. Carolina responded with gunfire, Mr. Daniels returned fire, killing Mr. Carolina with a gunshot in the head. Mr. Daniels later made the statement that he shot Mr. Carolina because he did not give Mr. Daniels what he wanted.

Mr. Daniels then shot at and seriously wounded Tamarra Hillian for no reason other than Ms. Hillian was screaming. In the killing of Latanya McCoy, Mr. Daniels was engaged in a dangerous and reckless high speed chase, attempting to evade capture by police officers. His excessive speed on a dark and foggy road, driving without headlights, led to his collision with Ms. McCoy. Ms. McCoy's car was then engulfed in flames, killing Ms. McCoy. Mr. Daniels' lack of remorse and disregard for the effects of his actions were demonstrated when police officers surrounded his car after the collision. Rather than giving himself up, he lied to police officers to lure them closer to him so that he could execute his express plan of killing as many police officers as possible and not being recaptured alive. But for his badge and bullet proof vest, Sergeant Steven Weinrich likely would have been another casualty in Mr. Daniels' increasingly dangerous and violent crime spree. During the guilt phase, the Court found that the special circumstances of murder during the commission of a robbery, murder during the commission of a burglary, and multiple murder were all true. These facts constitute an aggravating circumstance.

Factor B: The presence or absence of any criminal activity by Mr. Daniels which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

Before trial on these charges, Mr. Daniels pled guilty to numerous crimes, all of which occurred in a two-month time period before and after the murders in this case. Of these crimes, ten were armed robberies, one was a robbery, one was an armed carjacking, and one was a theft of a vehicle. The underlying basis for the armed crimes demonstrated an express or implied threat to use force or violence. In addition to the crimes to which Mr. Daniels pled guilty, during the penalty phase of the trial, the Court found true beyond a reasonable doubt that Mr. Daniels committed additional crimes. Mr. Daniels committed four armed robberies, assaulted a peace officer with a semiautomatic firearm, and attempted to murder a peace officer outside Sacramento County during the same two-month time period. Even after Mr. Daniels was taken into custody and was being treated for his injuries, he made threats against police officers. These facts constitute an aggravating circumstance.

Factor C: The presence or absence of any prior felony convictions.

At the penalty phase the prosecutor proved beyond a reasonable doubt that Mr. Daniels has been convicted of a felony on five prior occasions. These facts constitute an aggravating circumstance.

Factor D: Whether or not the offense was committed while Mr. Daniels was under the influence of extreme mental or emotional disturbance.

There was no evidence of this factor; it is therefore neither an aggravating nor a mitigating circumstance.

Factor E: Whether or not the victim was a participant in Mr. Daniels' homicidal conduct or consented to the homicidal act.

There was evidence to suggest that Mr. Carolina fired the first shots and that Mr. Daniels responded with gunfire that killed Mr. Carolina. As stated in the record during the trial phase, this action by Mr. Carolina did not justify Mr. Daniels' actions as Mr. Carolina was likely authorized to use deadly force to repel Mr. Daniels' armed robbery attempt. Nor was Mr. Carolina an accomplice to Mr. Daniels' crimes. Similarly, Ms. McCoy did not participate in or consent to Mr. Daniels' conduct. The facts therefore do not constitute a mitigating circumstance.

Factor F: Whether or not Mr. Daniels acted under extreme duress or under the substantial domination of another person.

There was no evidence of this factor; it is therefore neither an aggravating nor a mitigating circumstance.

Factor H: Whether or not at the time of the offense the capacity of Mr. Daniels to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or the affects of intoxication.

There was evidence that prior to the killing of Mr. Carolina, Mr. Daniels had ingested three cigarettes laced or filled with cocaine. As stated on the record during the guilt

phase of the trial, Mr. Daniels' other actions on the night of Mr. Carolina's death indicate that he was able to understand the nature and the criminality of his actions. The facts do not constitute a mitigating circumstance.

Factor I: Mr. Daniels' age at the time of the crime.

There was no evidence of this factor; it is therefore neither an aggravating nor a mitigating circumstance.

Factor J: Whether or not Mr. Daniels was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

All of the evidence shows that Mr. Daniels was the principal and the sole perpetrator of these crimes. Contrary to merely being an accomplice, Mr. Daniels actually engaged others as accomplices and endangered passengers during the various reckless exploits. These facts do not constitute a mitigating factor.

Factor K: Any other circumstance which extenuates the gravity of this crime even though it is not a legal excuse for the crime.

During the penalty phase, Mr. Daniels addressed the families of the victims. At that time, Mr. Daniels did express some remorse for his actions and took some responsibility for the crimes. These facts may constitute a mitigating factor.

Throughout the trial phase of this case, Mr. Daniels has represented himself after numerous admonitions on the dangers of self-representation. Mr. Daniels exercised his constitutional right to self-representation and chose to neither present a defense nor put forth any mitigating evidence, as was also his right.

Having reweighed the aggravating circumstances presented by the prosecutor and having independently examined the possible mitigating circumstances presented by the evidence, the Court has determined that the aggravating circumstances justify the imposition of death. The weight of the evidence supports the verdict in this case, and the verdict is not contrary to the law or the evidence presented. Therefore, the Court den[ies] the motion to modify the verdict.

(2RTS 464-469.)

B. Discussion

1. By failing to object to the automatic motion to modify death verdict procedures utilized by the court, appellant has forfeited the claim on appeal

Appellant contends that he was denied an independent review of his automatic motion to modify the death verdict because it was heard by the same judge that determined guilt and penalty at trial. (AOB 112-127.) Because he failed to make a specific objection at the modification hearing, the claim is not cognizable on appeal. (*People v. Weaver* (2012) 53 Cal.4th 1056, 1090-1091; *People v. Horning* (2004) 34 Cal.4th 871, 912; *People v. Riel* (2000) 22 Cal.4th 1153, 1220.) Nevertheless, the claim lacks merit.

2. Appellant received a proper modification hearing under the statute during which the court gave a detailed statement of its reasons for the verdict, thus allowing for meaningful appellate review

"[T]o assure thoughtful and effective appellate review" (*People v. Frierson* (1979) 25 Cal.3d 142, 179), section 190.4, subdivision (e), provides,

> 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[81]. 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. 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. ...

In ruling on the application for modification of the verdict, "the trial court reweighs the evidence, considers the aggravating and mitigating circumstances, and determines whether, in its independent judgment, the weight of the evidence supports the jury's verdict. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1139.) "The trial court must make an 'independent' determination concerning the propriety of the death verdict in light of the evidence and the applicable law. [Citation.] The court need not, however, recount 'every detail' supporting its determination. [Citation.] The ruling need only be sufficiently articulated to assure meaningful appellate review." (*People v. Lewis* (2006) 39 Cal.4th 970, 1063-1064.)

This Court has never decided whether a defendant who waives a jury trial on the issue of penalty is entitled to a modification hearing under section 190.4, subdivision (e). However, this Court has observed that the statutory language is ambiguous:

> Section 190.4, subdivision (e) states in relevant part: "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 .... In ruling on the application, the judge 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." (Italics added.) The italicized reference to the "trier of fact" suggests that the statute applies regardless of whether the penalty phase was tried by a judge or by a jury, but the italicized reference to the "jury's findings" suggests that the statute is applicable only when a jury has made the penalty determination.

(*People v. Diaz* (1992) 3 Cal.4th 495, 576, fn. 34, italics in original.)

After discussing the ambiguity in the statutory language, this Court noted that a modification motion after a penalty phase court trial serves an important function:

> Although at first glance a modification motion after a penalty phase court trial appears to be an exercise in futility, there is one aspect of the modification motion that is significant even when the penalty issue has been determined by a court rather than a jury: the requirement in section 190.4, subdivision (e) that the trial court "state on the record the reasons for his [or her] findings." As we have discussed (*ante*, p. 571), this requirement is one of the "safeguards for assuring careful appellate review" that played a significant role in our conclusion that the federal Constitution does not require such findings at the penalty phase. (See *People v. Frierson, supra*, 25 Cal.3d 142, 179.) The statutory requirement that the reasons be stated on the record enables us to review the propriety of the penalty determination made by the trial court sitting without a jury.

(*People v. Diaz, supra,* 3 Cal.4th at p. 576, fn. 34.)

In *People v Horning, supra,* 34 Cal.4th 871, defendant had been convicted by jury of first degree murder with special circumstances. He waived a penalty phase jury trial and, after a contested penalty trial before the court, the court rendered a death verdict. (*Id.* at p. 911.) The court provided a detailed statement of reasons for its verdict. (*Ibid.*) Then, the court denied defendant's motion for a new trial, again with a statement of reasons. (*Ibid.*) The court also permitted defendant to argue again for a life sentence. (*Id.* at p. 912.) When defendant finished speaking, defense counsel mentioned, "I'm told there's some modification or something else the Court is supposed to do prior to the time... ." (*Ibid.*) The court noted the decision in *People v. Diaz, supra,* 3 Cal.4th 495, and pointed out that it had already stated its reasons for the death sentence when it rendered its verdict. (*Ibid.*) After further argument by the parties concerning the sentence, the court imposed the death sentence. (*Ibid.*) On appeal, this Court determined that there was neither error nor prejudice and that a

"ruling on a modification motion would have been superfluous." (*Ibid.*) The trial court provided a detailed statement when it originally rendered its verdict, even though it was not required to do so at that time. (*Ibid.*) The detailed statement of reasons was sufficient for meaningful appellate review of the penalty determination. (*Ibid.*)

More recently, in *People v. Weaver, supra,* 53 Cal.4th 1056, this Court reiterated that section 190.4, subdivision (e), serves an important function because it assures meaningful appellate review of the propriety of the penalty determination made by a trial court sitting without a jury. (*Id.* at p. 1091.) There, defendant waived jury for the guilt and penalty phases. (*Id.* at p. 1090.) At the end of the penalty phase, before it rendered its verdict, the trial court indicated that it could not conduct an independent review pursuant to section 190.4, subdivision (e). (*Ibid.*) However, it gave a detailed explanation for the verdict. (*Ibid.*) About two months later, the court conducted a modification hearing "in an abundance of caution," and reviewed in detail the aggravating and mitigating evidence. (*Ibid.*) It denied the automatic motion to modify. (*Id.* at p. 1091.) On appeal, this Court found that there was no error because "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." (*Ibid.*)

Similarly, here, the court entertained an automatic motion to modify the death verdict. (2RTS 464-469.) During the hearing on the motion, the court discussed the evidence relevant to each of the factors listed in section 190.3. (*Ibid.*) Then, the court decided whether the evidence supporting each factor constituted an aggravating or mitigating circumstance. (*Ibid.*) Thereafter, the court found that the weight of the evidence supported the verdict. (2RTS 469.) Because the court provided a detailed statement of its reasons for imposing the death sentence, and this Court has a record from which it can review the propriety of the court's decision, appellant has

obtained the "thoughtful and effective appellate review" that the statute was designed to provide and protect. (*People v. Frierson, supra,* 25 Cal.3d at p. 179.) There was no error. (See *People v. Horning, supra,* 34 Cal.4th at p. 912; *People v. Weaver, supra,* 53 Cal.4th at p. 1091.)

3. Failure to provide a separate and independent review does not constitute a due process violation

Appellant contends that his due process rights were violated when the court denied him the independent review required by section 190.4, subdivision (e). (AOB 128-129.) His contention is meritless.

Initially, appellant has forfeited his due process challenge by failing to object in the trial court. (*People v. Monterroso* (2004) 34 Cal.4th 743, 759 [failure to object in trial court forfeited due process, fair trial, and unbiased jury claim on appeal].) Regardless, his contention lacks merit.

In *People v. Weaver, supra,* 53 Cal.4th 1056, this Court rejected the same constitutional claim that appellant presents here. There, defendant claimed that section 190.4, subdivision (e), was unconstitutional because it failed to provide a mechanism for an independent review of a trial court's penalty phase verdict. (*Id.* at p. 1091.) Defendant also argued, as appellant suggests here (AOB 113), that the statute should require another judge to review the penalty verdict. (*People v. Weaver, supra,* 53 Cal.4th at p. 1091.) This Court declined to hold that a defendant who waives a jury has a constitutional right to an independent review of the court's verdict. (*Ibid.*) Appellant fails to offer any persuasive reason why this Court should vary from its decision in *People v. Weaver, supra,* 53 Cal.4th 1056.

4. Failure to provide a separate and independent review does not violate equal protection

Appellant contends that "depriving appellant and other judge-sentenced defendants the independent review statutorily guaranteed to all

capital defendants denies these defendants equal protection." (AOB 129, 129-131.) His contention lacks merit.

At the outset, appellant has forfeited his equal protection challenge by failing to raise it in the trial court. (*People v. Carpenter* (1997) 15 Cal.4th 312, 362 [an equal protection claim must be raised in the trial court or is forfeited], superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.) Nevertheless, respondent addresses the issue to demonstrate that appellant's contention is meritless.

"Broadly stated, equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws [that] is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness.' [Citation.]" (*People v. Wutzke* (2002) 28 Cal.4th 923, 943.) It does not mean, however, that "'things...different in fact or opinion [must] be treated in law as though they were the same.' [Citation.]" (*In re Eric J.* (1979) 25 Cal.3d 522, 530, fn. 1.) "[N]either the Fourteenth Amendment of the Constitution of the United States nor the California Constitution [citations] precludes classification by the Legislature or requires uniform operation of the law with respect to persons who are different." (*In re Gary W.* (1971) 5 Cal.3d 296, 303.) Therefore, a threshold requirement of any meritorious equal protection claim "is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. [Citation.]" (*In re Eric J., supra*, 25 Cal.3d at p. 530.)

"This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) "The 'similarly situated' prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently

similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." (*People v. Goslar* (1999) 70 Cal.App.4th 270, 277.) If this initial showing is not made, then the court need not "ask the further question of whether this identifiable group is a suspect class or is being denied some fundamental interest, thus requiring the discrimination to be subjected to close scrutiny." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 258.)

Here, appellant has not demonstrated that he is "similarly situated" to capital defendants whose penalty phases were tried to juries. (See *City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439 [explaining that the Equal Protection Clause is essentially a direction that all persons "similarly situated" should be treated alike].) Unlike capital defendants who exercise their right to have a jury determination on penalty, appellant waived a jury trial in the penalty phase, and did so knowing that his fate would be exclusively in the hands of the court. (1RTS 43-46.) Since appellant has not shown that the parties are similarly situated for the purposes of the law challenged, his claim must fail.

5. Conclusion

In sum, appellant has forfeited any claim regarding the automatic motion for modification of the death verdict by failing to object in the trial court. Moreover, this Court has not decided whether a defendant who waives a jury on the issue of penalty is entitled to a modification hearing under section 190.4, subdivision (e). Even if that is what the Legislature intended by the ambiguous statutory language, appellant received a proper hearing on his automatic motion to modify during which the court gave a detailed statement of its reasons for reaching a death verdict. Accordingly, the record is adequate for meaningful appellate review of the propriety of the death verdict. Finally, appellant forfeited the due process and equal

protection claims by failing to object in the trial court. Regardless, the claims lack merit. Thus, the judgment and sentence should be affirmed.

VI. THERE WAS NO CUMULATION OF ERRORS WHICH UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Appellant contends that the cumulative effect of the errors "undermines any confidence in the integrity of the guilt and penalty phase verdicts, and warrants reversal of the judgment." (AOB 134.) As discussed in the preceding arguments, appellant's claims of error are meritless. Thus, he has not demonstrated any cumulative error requiring reversal.

In a close case, the cumulative effect of multiple errors may constitute a miscarriage of justice. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1236; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) The litmus test is whether appellant received due process and a fair trial. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Accordingly, an appellate court reviews each claim and assesses the cumulative effect of any errors to see if the errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) Appellant is "entitled to a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

Here, having found no error when considering appellant's contentions individually, there can be no cumulative error requiring reversal of the guilt and penalty phase verdicts.

VII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE

Appellant was sentenced to death under California's 1978 death penalty law. He contends that "[m]any features of California's capital sentencing scheme violate the United States Constitution." (AOB 136.) Appellant acknowledges that this Court has consistently rejected these

same challenges to California's death penalty scheme, but repeats them here for reconsideration by this Court and in order to preserve them for federal review. (AOB 136, citing *People v. Schmeck* (2005) 37 Cal.4th 240.) None of appellant's contentions warrant reconsideration by this Court. (See, e.g., *People v. Vines* (2011) 51 Cal.4th 830, 890-892.) Thus, the judgment and sentence should be affirmed.

A. The Application of Section 190.3, Factor (a) Is Constitutional

Appellant claims that factor (a) of section 190.3, which directs jurors to consider the "circumstances of the crime" in determining penalty, "has been applied in such a wanton and freakish manner [that] almost all features of murder can be and have been characterized by prosecutors as 'aggravating.'" (AOB 137.)

This Court has repeatedly rejected this claim finding that "section 190.3, factor (a) is not impermissibly overbroad facially or as applied." (*People v. Robinson* (2005) 37 Cal.4th 592, 655, and cases cited therein; see also *People v. Vines, supra*, 51 Cal.4th at p. 891, and *id.* at p. 889 [discussing admissibility of victim impact evidence under factor (a)].) Section 190.3, factor (a) correctly allows the jury to consider the "circumstances of the crime." (*People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Nelson* (2011) 51 Cal.4th 198, 225; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308.)

Appellant has not presented a compelling reason for this Court to reconsider its prior decisions rejecting this same claim. Accordingly, the instant claim should also be rejected.

B. The Death Penalty Statute Is Constitutional Even Though It Does Not Include a Burden of Proof

In a multi-faceted argument, appellant contends that California's death penalty sentencing statute is unconstitutional because it fails to set

forth the appropriate burden of proof. (AOB 138-140.) He submits that the prosecutor should bear the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and that death is the appropriate penalty. (AOB 138-139.) Appellant further submits that the Eighth and Fourteenth Amendments of the federal Constitution and Evidence Code section 520 require some burden of proof in capital sentencing. (AOB 139-140.)

This Court has repeatedly rejected any claims that focus on a burden of proof in the penalty phase. (*People v. Welch* (1999) 20 Cal.4th 701, 767-768; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Box* (2000) 23 Cal.4th 1153, 1216; *People v. Holt* (15 Cal.4th 619, 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].) "Unlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; see *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) Neither the Due Process Clause nor the Eighth Amendment requires a different result. (*People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Griffin* (2004) 33 Cal.4th 536, 593-594.) Moreover, contrary to appellant's claim, "Evidence Code section 520, establishing that a party 'claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue,' does not apply to the normative decision on penalty that is performed by the trier of fact at the penalty phase of a capital trial." (*People v. Dykes* (2009) 46 Cal.4th 731, 814; see *People v. Jones* (2011) 51 Cal.4th 346, 381 [rejecting claim that Evidence Code section 520 requires an instruction on the prosecution's burden of proof].) Appellant fails to offer any persuasive reason why this Court should vary from its prior decisions rejecting this same claim.

Appellant's claim that the United States Supreme Court's holdings in *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 530 U.S. 584, 604, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, compel a different conclusion also fails. (AOB 138-139.) This Court has determined that *Ring*, *Blakely*, and *Apprendi* simply have no application to the penalty phase procedures of this state. (*People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Monterroso, supra,* 34 Cal.4th at p. 796; *People v. Prieto* (2003) 30 Cal.4th 226, 263.)

As this Court explained,

> [U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole. Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi*.

(*People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14; *People v. Prieto, supra*, 30 Cal.4th at p. 263.)

Appellant does not offer a valid reason why this Court should revisit these issues. Thus, the instant claims should be denied.

C. The Death Penalty Determination Does Not Turn on an Impermissibly Vague And Ambiguous Standard

Appellant contends that the death penalty determination turns on a vague and ambiguous standard because "[t]he phrase 'so substantial' is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing." (AOB 140.)

CALJIC No. 8.88 [Penalty Trial—Concluding Instruction] provides that to return a judgment of death, the fact-finder "must be persuaded that

the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." This Court has repeatedly rejected claims that the instruction is unconstitutional because the "so substantial" language is impermissibly vague and ambiguous. (*People v. Loy* (2011) 52 Cal.4th 46, 78; *People v. Hartsch* (2010) 49 Cal.4th 472, 516; *People v. Mendoza* (2007) 42 Cal.4th 686, 707; *People v. Boyette* (2002) 29 Cal.4th 381, 465.)

Appellant has failed to present a compelling reason for this Court to reconsider its prior decisions rejecting this same claim. Accordingly, the instant claim should be denied.

D. The Death Penalty Statute Permissibly Refers to Whether the Death Penalty Is "Warranted"

Appellant contends that the death penalty statute violates the Eight Amendment and Fourteenth Amendment by failing to distinguish between the determinations of whether death is "warranted" and whether death is "appropriate." (AOB 141.)

CALJIC No. 8.88 explains that to return a judgment of death, the aggravating circumstances must be so substantial in comparison with the mitigating circumstances that it warrants death. This Court has repeatedly rejected claims concerning the death penalty statute's reference to whether death is "warranted," finding that:

> By advising that a death verdict should be returned only if aggravation is 'so substantial in comparison with' mitigation that death is 'warranted,' the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty.

(*People v. Arias* (1996) 13 Cal.4th 92, 171; see *People v. Loy, supra*, 52 Cal.4th at p. 78; *People v. Mendoza, supra*, 42 Cal.4th at p. 707; *People v. Perry* (2006) 38 Cal.4th 302, 320.)

Appellant does not offer a valid reason why this Court should reconsider its earlier decisions rejecting the same claim. Accordingly, the instant claim should be denied.

E. There Is No Constitutional Requirement That the Sentencer Consider the Presumption of Life

Appellant contends that the "sentencer should be required to consider the presumption of life." (AOB 141.)

This Court has consistently rejected such claim finding that "there is no constitutional requirement to instruct...on any presumption that life without the possibility of parole is the favored or appropriate remedy." (*People v. Garcia* (2011) 52 Cal.4th 706, 764; see *People v. Taylor* (2010) 48 Cal.4th 574, 662; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 228.)

Because appellant does not offer a valid reason why this Court should reconsider its earlier decisions, the instant claim should be denied.

F. The Use of Restrictive Adjectives in the List of Potential Mitigating Facts Does Not Violate the Eighth and Fourteenth Amendments

Appellant contends that the use of restrictive adjectives in the list of potential mitigating factors — such as "extreme" and "substantial" — violates the federal Constitution. (AOB 142.)

This Court has repeatedly rejected this challenge to the California death penalty statute finding that use in the sentencing factors of such adjectives as "extreme" and "substantial" (§ 190.3, factors (d) & (g)) does not act as a barrier to the consideration of mitigating evidence in violation of the federal Constitution. (*People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Avila* (2006) 38 Cal.4th 491, 614.)

Appellant does not offer a compelling reason why this Court should reconsider its earlier decisions, and thus the instant claim should be denied.

G. The Prohibition Against Intercase Proportionality Review Does Not Guarantee Arbitrary And Disproportionate Imposition of the Death Penalty

Appellant contends that the "failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process." (AOB 142.)

This Court has consistently rejected this argument. "The failure to require intercase proportionality does not guarantee 'arbitrary, discriminatory, or disproportionate impositions of the death penalty,' or violate the Fifth, Sixth, Eighth, and Fourteenth Amendments.' [Citation.] Moreover, 'capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law.' [Citation.]." (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1356; see *People v. Foster* (2010) 50 Cal.4th 1301, 1368.)

Appellant offers no persuasive reason for this Court to reconsider this conclusion. Accordingly, this claim should be denied.

H. The California Capital Sentencing Scheme Does Not Violate the Equal Protection Clause

Appellant claims that California's death penalty scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it denies procedural safeguards to capital defendants that are afforded to noncapital defendants. (AOB 142-143.) Specifically, appellant claims that the death penalty scheme is unconstitutional because there is no requirement of juror unanimity on the aggravating factors, no standard of proof in the penalty phase, and no reasons need be given for a death sentence. (AOB 143.) On the other hand, sentencing allegations in a

noncapital case must be found unanimously, beyond a reasonable doubt, and a trial court must orally state its reasons on the record for selecting an upper-term sentence. (AOB 143.)

As this Court has stated, "The death penalty law does not violate equal protection by denying capital defendants certain procedural safeguards that are afforded to noncapital defendants because the two categories of defendants are not similarly situated. [Citations.]" (*People v. Lee* (2011) 51 Cal.4th 620, 653.) In other words,

> 'The availability of certain procedural protections in noncapital sentencing---such as a burden of proof, written findings, jury unanimity and disparate sentence review---when those same protections are unavailable in capital sentencing, does not signify that California's death penalty statute violates Fourteenth Amendment equal protection principles. [Citations.]' [Citation.]

(*People v. Thomas, supra*, 51 Cal.4th at p. 507.)

Once again, appellant has presented no compelling reason for this Court to reconsider its prior decisions rejecting this same claim.

I. California's Use of the Death Penalty Does Not Violate International Norms Or the Federal Constitution

In this argument, appellant claims that California's use of the death penalty as a "regular" form of punishment violates international law and the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 143.) This claim has also been rejected repeatedly.

"California's use of capital punishment as an assertedly 'regular form of punishment' for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, does not offend the Eighth and Fourteenth Amendments by violating international norms of human decency. [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 53-54; see also *People v. Lee, supra*, 51 Cal.4th at p. 654; *People v. Thomas, supra*, 51 Cal.4th at p. 507.) In fact, California does not use capital

punishment "'as *regular punishment* for substantial numbers of crimes.'" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 43, original italics.)

Since appellant offers nothing new to cause this Court to reconsider its prior decisions rejecting this claim, the claim should be denied.

VIII. THE SENTENCE OF DEATH IMPOSED FOR SECOND DEGREE MURDER MUST BE VACATED

Appellant contends that the death sentence imposed on count XXI, murder of LaTanya McCoy, is a legally unauthorized sentence which must be vacated. (AOB 144.) Respondent agrees. The trial court should be directed to issue an amended abstract of judgment reflecting the appropriate sentence for second degree murder, which is imprisonment for 15 years to life. In all other respects, the judgment should be affirmed.

The court found appellant guilty beyond a reasonable doubt of count XXI, the LaTanya McCoy murder (§ 187, subd. (a)). (2RTS 311-312.) The court fixed the degree of murder at second degree, and found true the special circumstance allegation that appellant committed multiple murders (§ 190.2, subd. (a)(3)). (2RTS 312-313.) Subsequently, the court sentenced appellant to death on count XXI based on the multiple murder special circumstance allegation. (2RTS 510.)

The death penalty may be imposed only where the defendant has been convicted of first degree murder and an enumerated special circumstance has been charged and found true. (§§ 190, subd. (a), 190.2, subd. (a), 190.3, subd. (a).) The offense of second degree murder is not punishable by death. (*People v. Thomas* (2012) 53 Cal.4th 771, 837.) Thus, under this Court's authority to modify an unauthorized sentence (§ 1260), the death sentence imposed on count XXI for second degree murder should be vacated and the trial court should be directed to issue an amended abstract of judgment reflecting the appropriate sentence for second degree murder of someone other than a peace officer, which is imprisonment for 15 years

to life. (*People v. Thomas, supra*, 53 Cal.4th at p. 837 [where trial court imposed death sentence for second degree murder, this Court ordered the trial court to issue an amended abstract of judgment reflecting the correct sentence of imprisonment for 15 years to life]; *People v. Rogers* (2009) 46 Cal.4th 1136, 1174 [where trial court imposed death sentence for second degree murder, this Court modified the judgment to reflect the appropriate sentence]; see *People v. Lawley, supra*, 27 Cal.4th at p. 172 [where trial court imposed death sentence on conspiracy to commit murder, this Court directed the trial court to prepare an amended abstract of judgment reflecting the appropriate sentence].)

CONCLUSION

For the foregoing reasons, the trial court should be directed to issue an amended abstract of judgment reflecting the appropriate sentence for second degree murder on count XXI, imprisonment for 15 years to life. In all other respects, the judgment and death sentence should be affirmed.

Dated: August 28, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 38,080 words.

Dated: August 28, 2012

KAMALA D. HARRIS
Attorney General of California

LARENDA R. DELAINI
Deputy Attorney General
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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **People v. David Scott Daniels** No. **S095868**

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; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On August 29, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with ***Golden State Overnight***, addressed as follows:

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The Honorable Jan Scully
District Attorney
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Clerk of the Court
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Superior Court of California
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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 August 29, 2012, at Sacramento, California.

_____
Declarant

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