IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DAVID SCOTT DANIELS,<br><br>Defendant and Appellant. | No. S095868<br><br>(Sacramento County Sup. Ct. No. 99F10432) |



# APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California
for the County of Sacramento

HONORABLE JAMES L. LONG, JUDGE

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# APPELLANT'S REPLY BRIEF

## INTRODUCTION

In this brief, appellant does not reply to respondent's arguments which are adequately addressed in appellant's opening brief. Unless expressly noted to the contrary, the absence of a response to any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. For the convenience of the Court, the arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.[1]

[1] The record will be cited here in the same manner as in Appellant's Opening Brief: "CT," Clerk's Transcript; "ACT," Augmented Clerk's

(continued...)

## I.

## 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

### A. Introduction

As described in greater detail in appellant's opening brief (AOB 23-31), Judge Gary Ransom of the Sacramento County Superior Court granted appellant's motion to represent himself on December 20, 2000. (1 RTS 12-16.) On January 5, 2001, after the case was assigned to Judge James Long, appellant stated that he wished to continue representing himself.

Appellant argued that the record does not affirmatively show a knowing, intelligent and voluntary waiver of the right to counsel in either instance. Judge Ransom made no inquiry at all into appellant's understanding of the charges and Judge Long made no meaningful inquiry. Neither judge made any inquiry into appellant's legal experience or informed him of the complexities of a capital trial. Further, Judge Long ignored appellant's statement that he did not view self-representation as a disadvantage, despite the warnings he had received. As a result, the record does not demonstrate that appellant "understood the disadvantages of self-representation, including the risks and complexities of the particular case."

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[1](...continued)
Transcript; "RTL," Reporter's Transcript in the Lower Court; "RTS," Reporter's Transcript in the Superior Court. appellant refers to the record on appeal in the same manner as in his opening brief. (See AOB, fn. 2.)

(AOB 23-49.)[2]

Respondent contends that appellant's contentions are meritless because (1) 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, and (2) any error was harmless beyond a reasonable doubt because appellant was determined to waive counsel regardless of the warnings provided. (RB 35-63.) Respondent's contentions are incorrect.

### B. A Valid Waiver of the Right to Counsel Requires That the Record Affirmatively Show That the Waiver Was Knowing, Intelligent and Voluntary

#### 1. Pertinent Legal Principles

In *Faretta v. California* (1975) 422 U.S. 806, 819, the United States Supreme Court held that, under the Sixth and Fourteenth Amendments, a defendant in a state criminal trial has a right to the assistance of counsel as well as a corresponding right to self-representation. However, a defendant who elects to represent himself or herself may do so only after knowingly, intelligently, and voluntarily choosing to forgo the assistance of counsel. (*Id.* at p. 835.) Because the Court in *Faretta* recognized a tension between the right of self-representation and its decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel, it

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[2] In a supplemental opening brief filed on February 7, 2014, appellant raises two additional arguments relating to the trial court's decision to allow him to represent himself: (1) the trial court erred when it permitted appellant to represent himself in a capital trial; and, (2) the convictions, special circumstance findings, and death verdict must be reversed because the trial court erroneously permitted appellant to waive counsel in violation of Penal Code section 686.1.

imposed a dual duty upon trial courts: first, to ascertain that a defendant who seeks to exercise the right to self-representation has knowingly and intelligently foregone the traditional benefits associated with the right to counsel, and secondarily, to ensure that the record establishes that the defendant knows what he is doing, i.e., that his choice is made with eyes open. (*Ibid.*; *Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 279.)

Although this Court has held that "no particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation," and that "the test is whether the record as a whole demonstrates that defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070), it is clear that, at a minimum, a waiver of the right to counsel cannot withstand constitutional scrutiny under the Sixth and Fourteenth Amendments unless it is preceded by an inquiry and findings by the court that the defendant was both competent to stand trial and that his decision to forgo the assistance of counsel was both knowing and voluntary. (*Godinez v. Moran* (1993) 509 U.S. 389, 400-401; see also *People v. Lawley* (2002) 27 Cal.4th 102, 139 ["The requirements for a valid waiver of the right to counsel are (1) a determination that the accused is competent to waive the right, i.e., he or she has the mental capacity to understand the nature and object of the proceedings against him or her; and (2) a finding that the waiver is knowing and voluntary, i.e., the accused understands the significance and consequences of the decision and makes it without coercion"].) In assessing whether the record affirmatively reflects a constitutionally valid waiver of counsel, "the focus should be on what the defendant understood,

rather than on what the court said or understood." (*United States v. Lopez-Osuna* (9th Cir. 2001) 242 F.3d 1191, 1199, cited with approval in *People v. Burgener* (2009) 46 Cal.4th 231, 241.)

Moreover, given the obvious dangers of proceeding to trial without counsel, the Supreme Court has insisted that "a more searching or formal inquiry" is required when a defendant wishes to waive his right to counsel at trial because "the full dangers and disadvantages of self-representation" are more substantial and less obvious at trial than during other stages of the proceedings. (*Patterson v. Illinois* (1988) 487 U.S. 285, 299-300.) The Court has therefore "imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed before permitting him to waive his right to counsel at trial." (*Id.* at p. 298.)

An even more searching inquiry is required in a capital case because of the Eighth Amendment's demand for heightened reliability in the findings leading to a death judgment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) "[W]ith respect to [capital cases] we have held that the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case." (*Gilmore v. Taylor* (1995) 508 U.S. 333, 342.) Although this Court has held that a capital defendant may waive counsel and represent himself (*People v. Joseph* (1983) 34 Cal.3d 936, 943-944), it has also recognized that self-representation is not intended "to enhance the reliability of the truth-determining or fact-finding process." (*People v. McDaniel* (1976) 16 Cal.3d 156, 166.) Therefore, before accepting a waiver of counsel, a trial court must conduct a full and careful inquiry to assure that a capital defendant's waiver is knowing, intelligent and voluntary.

This Court has summarized with approval a set of advisements and inquiries suggested by the Court of Appeal in *People v. Lopez* (1977) 71 Cal.App.3d 568 to ensure a clear record of a defendant's knowing and voluntary waiver of counsel. (*People v. Koontz, supra*, 27 Cal.4th at p. 1070.) Specifically, the *Lopez* court advised the following:

> 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." (*Faretta, supra*, at p. 834 [45 L.Ed.2d at p. 581].)
>
> (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. It should be made crystal clear that the same rules that govern an attorney will govern, control and restrict him – and that he will get no help from the judge. He will have to abide by the same rules that it took years for a lawyer to learn.
>
> (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. It would be Joe Louis vs. a cripple, or Jack Nicklaus vs. a Sunday hacker.
>
> (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. For example, can he read and write? If not, how does he propose to handle such items as written exhibits and instructions?

(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. It would be a trifle embarrassing to get half way through a trial only to discover that a court has determined that a mentally deficient or seriously mentally ill person has been allowed to make a "knowing and intelligent" decision to represent himself.

(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. While this may seem to be sliding back into pre-*Faretta* practices, it will serve to point up to defendant just what he is getting himself into and establish beyond question that "'he knows what he is doing and his choice is made with eyes open.'" (*Faretta*, *supra*, at p. 835 [45 L.Ed.2d at p. 582].)

(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. Pitiful though his efforts may

> be, he cannot thereafter complain that his self-representation was inadequate. As *Faretta* says (fn. 46, p. 834 [45 L.Ed.2d, p. 581]), "Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" In other words, by choosing to represent himself, he will be throwing away one of the criminal defendant's favorite contentions on appeal.

(*People v. Lopez*, *supra*, 71 Cal.App.3d at pp. 572-574; see also *People v. Burdine* (1979) 99 Cal.App.3d 442, 447 [noting that the *Lopez* court suggested ten areas, divided into the following three categories, that may be considered and explored by the trial court in a *Faretta* hearing: (1) the dangers and disadvantages of self-representation; (2) the defendant's intellectual capacity to make "this so-called 'intelligent decision'"; and (3) the waiver of the right to appeal on the ground of inadequacy of representation].)[3]

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*, *supra*, 27 Cal.4th at p. 1070.) True, this Court has explained that "[n]o particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation; the test is whether the record as a whole demonstrates that defendant understood the disadvantages of self-representation, including the risks and complexities of

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[3] Although the *Lopez* court explained that it was not attempting to establish any minimum requirements, it recognized that "it is rather obvious that an adequate inquiry [must] be made in order for the reviewing court to ascertain that the defendant has knowingly and intelligently elected to represent himself." (*People v. Lopez*, *supra*, 71 Cal.App.3d at p. 574.)

the particular case." (*Ibid.*) Nevertheless, it is clear that, at a minimum, a waiver of the right to counsel cannot withstand constitutional scrutiny under the Sixth and Fourteenth Amendments unless it is preceded by an inquiry and findings by the court that the defendant was both competent to stand trial and that his decision to forgo the assistance of counsel was both knowing and voluntary. (*Godinez v. Moran*, *supra*, 509 U.S. at pp. 400-401; see also *Indiana v. Edwards* (2008) 554 U.S. 164, 175-178 [holding that the United States Constitution permits a State to limit a defendant's right to self-representation by insisting upon representation by counsel at trial where the defendant lacks the mental capacity to conduct his own trial defense]; *People v. Johnson* (2012) 53 Cal.4th 519, 528 [holding that California's trial courts may deny self-representation where *Edwards* permits such denial].)

### C. The Record Does Not Affirmatively Show That Appellant Made a Knowing, Intelligent and Voluntary Waiver of His Right to Counsel

According to respondent, the record amply demonstrates that appellant was warned of the pitfalls of self-representation such that his choice to proceed without counsel was made with eyes open. (RB 53-55.) Respondent is incorrect.

As respondent notes (RB 55-56), a 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*, *supra*, 27 Cal.4th at p. 1071.) Even under that standard, however, a careful reading of the record shows that the admonitions given in this case did not suffice to ensure that appellant's waiver of his right to counsel was voluntary, knowing and intelligent within the meaning of *Faretta v. California*, *supra*, 422 U.S. at p.

835.

### 1. The December 20, 2000, Hearing

In his opening brief, appellant argued that, during the proceedings of December 20, 2000, Judge Ransom's brief advisements to appellant fell far short of what is required for a valid waiver of counsel in a capital case. (AOB 39-43.) In particular, Judge Ransom failed to explore "the nature of the proceedings, potential defenses and potential punishments." (*People v. Koontz, supra*, 27 Cal.4th at p. 1071.)

Respondent contends that none of appellant's arguments regarding Judge Ransom show that the *Faretta* advisements were defective. (RB 55-58.) In particular, respondent contends that appellant examined Judge Ransom's advisements in isolation, and that the record as a whole demonstrates that appellant's waiver was valid. Respondent's position is incorrect.

As a preliminary matter, respondent contends that appellant's argument fails because these particular advisements are not required by *Faretta* (RB 55, citing *People v. Koontz, supra*, 27 Cal.4th at p. 1070), and the failure to inquire appellant's awareness of potential defenses or the precise nature of the proceedings does not automatically invalidate a waiver (RB 55, citing *People v. Blair* (2005) 36 Cal.4th 686, 709, fn. 7, and *People v. Lawley, supra*, 27 Cal.4th at p. 142). However, while it is true that "[n]o particular form of words is required in admonishing a defendant" (*People v. Koontz, supra*, 27 Cal.4th at p. 1070), it is not insignificant that this Court approved and summarized the *Lopez* guidelines from which these areas of inquiry were derived (*id.* at pp. 1070-1071).

Moreover, respondent unduly minimizes the significance of *People v. Floyd* (1970) 1 Cal.3d 694, 703 (cited at AOB 35, 38), a pre-*Faretta* case

in which this Court held that a knowing and intelligent waiver requires that the defendant "understand[] the nature of the offense, the available pleas and defenses and the possible punishments." (RB 55.)[4] As one court has pointed out:

> Although only limited reliance may now be placed on pre-*Faretta* cases, *these [Faretta] standards are not unlike those set forth in People v. Floyd* (1970) 1 Cal.3d 694, 703 [83 Cal.Rptr. 608, 612, 464 P.2d 64, 68], wherein the court stated that "Although the defendant's right to represent himself cannot be denied simply because he is unable to 'demonstrate either the acumen or the learning of a skilled lawyer' [citations], a defendant may waive counsel and choose to represent himself only if the defendant has an intelligent conception of the consequences of his act [citation] and understands the nature of the offense, the available pleas and defenses, and the possible punishments [citation]." [Italics added, original italics omitted.]

(*Thomas v. Superior Court* (1976) 54 Cal.App.3d 1054, 1058, fn. 4.)[5]

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[4] *People v. Floyd, supra*, 1 Cal.3d 694 was overruled on another ground in *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36.

[5] Respondent points out that, contrary to appellant's suggestion (AOB 34), the United States Supreme Court did not "hold" in *Von Moltke v. Gillies* (1948) 332 U.S. 708, 723-724 (plur. opn. of Black, J.), 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." (RB 55-56, fn. 16.) Nevertheless, appellant's larger point stands: the United States Supreme Court, in a post-*Faretta* decision, referred to *Von Moltke v. Gillies* in support of its statement that "we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." (*Patterson v. Illinois, supra*, 487 U.S. at p. 298.)

Turning to the adequacy of Judge Ransom's *Faretta* advisements, a close reading of the record demonstrates that he failed to address some of the crucial advisements identified in *People v. Lopez*, *supra*, 71 Cal.App.3d at pp. 572-574. (See *People v. Burdine*, *supra*, 99 Cal.App.3d at p. 447.) First, Judge Ransom failed to adequately inform appellant with respect to "the dangers and disadvantages of self-representation." (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1070; *People v. Lopez*, *supra*, 71 Cal.App.3d at pp. 572.) In particular, Judge Ransom failed to advise appellant that he would receive no more library privileges than those available to any other pro per defendant, that he would receive no extra time for preparation, and that there would be limitations on his access to investigators. (See *People v. Lopez*, *supra*, 71 Cal.App.3d at p. 573.)

There can be no question that legal research (and therefore access to the law library) and investigative resources are crucial to a legal defense. (See *People v. Blair*, *supra*, 36 Cal.4th at p. 733 [a defendant's federal and state constitutional rights to self-representation include the right to all reasonably necessary means of presenting a defense; "[t]hus, 'a defendant who is representing himself or herself may not be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense.' [Citation.]"]; *People v. Corona* (1978) 80 Cal.App.3d 684, 705 [important decisions to withdraw crucial defenses, or to waive the assertion of clear legal rights, will render representation inadequate if made without the benefit of necessary factual and legal research].) Therefore, because the trial court failed to advise appellant with respect to law library privileges and access to investigators, it cannot be said that he was adequately advised

of the disadvantages of self-representation.[6]

Second, Judge Ransom failed to sufficiently inquire into appellant's intellectual capacity to make this so-called "intelligent decision." (*People v. Lopez, supra,* 71 Cal.App.3d at p. 573.) For instance, he failed to probe appellant's familiarity with legal procedures. Further, although Judge Ransom noted that appellant was facing the death penalty, he failed to probe the nature of the proceedings, possible defenses, and the fact that he was facing not only a death sentence, but a sentence of life imprisonment without parole.

Even more remarkable, the trial court failed to explore appellant's mental capacity (*ibid.*), although gunshot wounds sustained by appellant prior to his arrest had left him severely incapacitated, at least at the time of his January 11, 2000, arraignment.[7] Appellant's participation in subsequent

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[6] Respondent claims that appellant was given a form which explained his library privileges as a self-represented inmate. (RB 53, citing 1 CT 185 ["ORDER: COUNTY JAIL INMATE PRO PER STATUS and PRIVILEGES"].) In fact, that form was an order signed by Judge Ransom and directed to the sheriff of Sacramento County. Nothing in the record indicates that appellant ever saw the form, let alone that he was aware of all the advisements contained therein.

[7] Appellant's arraignment, which took place in the intensive care unit of the Sacramento Medical Center (1 RTL 1, 3), commenced as follows:

[Court]: David Scott Daniels. Mr. Daniels, I'm Judge Michael G. Virga of the Sacramento Superior Court. We're convening court proceedings at this time. I'm going to be asking you some questions at this time. Can you understand me at this time, Mr. Daniels? If you could indicate by putting forward one finger if you can hear me. Okay. There's no response from Mr. Daniels. Mr. Daniels[,] can you hear me? If you can, nod your head if you can hear me at this time. I see no response from Mr.

(continued...)

proceedings was minimal – mostly confined to brief, one-word, responses – and the record on appeal sheds little light on his mental capacity on those occasions. (1 RTL 17 [during March 3, 2000, arraignment, appellant was silent except to respond "Yes" when the court asked whether he waived time for his preliminary hearing]; 1 RTL 37-38 [during proceedings of May 24, 2000, appellant refused to waive time for the preliminary hearing]; 1 RTL 40-41 [during proceedings of May 31, 2000, appellant joined in withdrawing his not guilty plea, and waived time for his preliminary hearing]; 1 RTL 43 [during proceedings of June 14, 2000, appellant waived

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[7](...continued)
Daniels at this time.

(1 RTL 1-2.) A nurse asked appellant to respond to the court's questions by nodding his head, then stated that he had nodded his head slightly. She then asked appellant to hold up two fingers to show that he could hear her, but he did not respond. According to the nurse,

> for the most part of today he has been communicating with me by nodding his head yes or no. If I asked him to open his mouth, he has. This morning when I did my neuro assesments he held up two fingers, squeezed my hand, released. For the neuro surgeon who was just in here, he did the same thing, so.

(1 RTL 2.) The prosecutor himself informed the court that appellant had been unconscious until just days before the arraignment. (1 RTL 2-3.) Judge Virga later stated that appellant had made eye contact with him, and also with other individuals in the room. (1 RTL 9.) The court granted defense counsel's request that, in light of appellant's incapacitated state, arraignment on additional charges be continued for eight weeks. (1 RTL 7-9.) Even if this Court should find that appellant's mental condition at the time of his arraignment is irrelevant to whether his *Faretta* waiver was knowing, intelligent and voluntary, the same cannot be said of his use of Neurontin, a medication he took to address nerve damage related to his injuries. (See Section C.2, *post.*)

time for further proceedings]; 1 RTL 44-45 [during proceedings of August 7, 2000, appellant stated that he wished to plead guilty]; 1 RTL 47 [during proceedings of August 18, 2000, appellant waived time for his preliminary hearing]; 2 RTL 405 [at the conclusion of his four-day preliminary hearing, appellant declined to reaffirm his not-guilty pleas, and instead stated that he wished to enter a guilty plea, and that he agreed to take up the matter at a later time]; 1 RTS 11 [during proceedings of September 1, 2000, appellant stated that he could not afford to hire his own lawyer, asked to address the court in private, and declined to waive time for the next proceeding].) Even if appellant "did not engage in incomprehensible outbursts and groundless diatribes" (RB 56), this history should have prompted the trial court to inquire into appellant's mental capacity.

As such, respondent is incorrect in asserting that nothing occurred during the proceedings that would have caused concern about appellant's competency. Respondent's reliance upon *People v. Teron* (1979) 23 Cal.3d 103, 114, is misplaced. There, the defendant argued that the trial court should not have granted his *Faretta* motion without his having undergone a psychiatric evaluation. This Court rejected his argument, reasoning that neither defendant nor the public defender suggested any basis for a psychiatric examination, and the court's interrogation of defendant revealed nothing suggestive of mental illness. (*Ibid.*) In this case, on the other hand, Judge Ransom did not even inquire into appellant's mental capacity. As respondent itself acknowledges, "if there is any question in the court's mind, a rather careful inquiry into mental capacity should be made." (RB 56, citing *People v. Lopez, supra*, 71 Cal.App.3d at p. 573.)

Third, respondent's assertion that "nothing suggested that appellant's waiver was involuntary" (RB 57) should be given little weight. A valid

waiver of the right to counsel requires a finding that the waiver is knowing and voluntary, i.e., the accused understands the significance and consequences of the decision and makes it without coercion. (*Godinez v. Moran, supra*, 509 U.S. at pp. 400-401 & fn. 12; *People v. Koontz, supra,* 27 Cal.4th at pp. 1069-1070.) Yet, as respondent acknowledges (RB 57), Judge Ransom failed to inquire into whether appellant's waiver was voluntary.

Finally, respondent incorrectly dismisses appellant's argument that Judge Ransom failed to determine whether he "truly desired" to represent himself (AOB 41-42). (RB 57-58.) According to respondent, "Judge Ransom asked the precise question, and appellant responded that he wanted to represent himself. (1RTS 14-15.)" (RB 57.) However, the trial court's cursory inquiry was unlikely to uncover appellant's true desires. The court merely asked, "Do you want to represent yourself?" (1 RTS 14.) After appellant answered, "Yes, I do," the court did not inquire further, but simply stated that it was satisfied appellant was "doing this knowingly and intelligently," and granted his motion. (1 RTS 15.) Tellingly, respondent ignores appellant's position that it should have been apparent to the trial court that his probable reason for waiving counsel was not an unequivocal desire to represent himself but an attempt to get around Penal Code section 1018's limit on his ability to plead guilty. (AOB 41-43.)

Therefore, as appellant has pointed out (AOB 43), the record of Judge Ransom's inquiry and advisements does not show a knowing, intelligent and voluntary waiver of the right to counsel. Moreover, as appellant demonstrates in his opening brief (AOB 43-48) and in the section below, the advisements given by Judge Long on January 5, 2001, did not cure the inadequacy of Judge Ransom's advisements.

### 2. The January 5, 2001, Hearing

In his opening brief, appellant argued that the record of the hearing before Judge Long on January 5, 2001, does not cure the inadequacy of Judge Ransom's advisements, and raises further questions about the validity of appellant's waiver. In particular, appellant argued that Judge Long failed to define "malice aforethought" or explain the difference between express and implied malice; failed to explain the first- and second-degree felony murder rules on which the prosecutor and the court relied in finding appellant guilty of counts 12 and 21; failed to define attempted murder or explain the elements of premeditation and deliberation alleged in connection with Count 22; and, failed to discuss the possible defenses to murder or the lesser included offenses within the charged offenses. (AOB 43-48.)

Invoking the principle that "technical legal knowledge" is not relevant to an assessment of whether a defendant made a knowing exercise of his or her right to self-representation (RB 58, citing *Faretta v. California*, *supra*, 422 U.S. at p. 836), respondent contends that Judge Long's *Faretta* advisements were not deficient. (RB 58-61.) Respondent's position is incorrect.

First, there is a crucial difference between a trial court's failure to inquire into matters which constitute the core of a defendant's case – such as the elements of the charged offenses and the lesser charges thereof, or the possible defenses against those charges – and technical matters such as evidentiary rules, e.g., "the various burdens of proof, the rules of evidence, or the fact that the pursuit of one avenue of defense might foreclose another." (*People v. Riggs* (2008) 44 Cal.4th 248, 277; see also *Faretta v. California*, *supra*, 422 U.S. at pp. 835-836 ["We need make no assessment

of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. [Footnote omitted.]"].) Appellant does not argue that a defendant must "pass a 'mini-bar examination' in order to exhibit the requisite capacity to make a valid *Faretta* waiver" (*People v. Joseph* (1983) 34 Cal.3d 936, 943, cited at RB 58), but rather that, as suggested by the salutary *Lopez* advisements, the trial court should have inquired into matters such as the nature of the proceedings, the possible outcome, possible defenses and possible punishments might be in order. (See *People v. Lopez*, *supra*, 71 Cal.App.3d at p. 573.) For this reason, respondent's reliance upon *People v. Riggs*, *supra*, 44 Cal.4th at pp. 227-278, fn. 10, is misplaced. (RB 58-59.)[8]

Second, contrary to respondent's suggestion (RB 56, 57, 60), Judge Long's *Faretta* advisement did not cure the inadequacy of Judge Ransom's advisement. As noted above, Judge Long failed to define "malice aforethought" or explain the difference between express and implied

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[8] In *Riggs*, this Court commented that "it is improper for a trial court to quiz a defendant on such topics [as "the various burdens of proof, the rules of evidence, or the fact that the pursuit of one avenue of defense might foreclose another"] and then draw on the defendant's lack of knowledge of the substantive law as a basis for denying the right to proceed without counsel." (*People v. Riggs*, *supra*, 44 Cal.4th at pp. 227-278, fn. 10.) In support of its comment, this Court cited *People v. Windham* (1977) 19 Cal.3d 121, 128, which in turn quoted *Faretta v. California*, *supra*, 422 U.S. at p. 836 ["the defendant's '*technical legal knowledge*' is irrelevant to the court's assessment of the defendant's knowing exercise of the right to defend himself"] (italics added).) Appellant respectfully submits that this Court's reference to "knowledge of the substantive law" (as opposed to "technical legal knowledge") in footnote 10 of *Riggs* is unsupported by *Faretta*.

malice; failed to explain the first- and second-degree felony murder rules on which the prosecutor and the court relied in finding appellant guilty of counts 12 and 21; failed to define attempted murder or explain the elements of premeditation and deliberation alleged in connection with Count 22; and, failed to discuss the possible defenses to murder or the lesser included offenses within the charged offenses. (See AOB 43-48.) In addition, Judge Long, like Judge Ransom, failed to (1) advise appellant that he would receive no more library privileges than those available to any other pro. per., that he would receive no extra time for preparation, and that there would be limitations on his access to investigators; and, (2) failed to probe appellant's familiarity with legal procedures. (See *People v. Lopez*, *supra*, 71 Cal.App.3d at p. 573.)

Judge Long's advisement similarly failed to cure the inadequacy of Judge Ransom's inquiry with respect to appellant's mental capacity. Although Judge Long, unlike Judge Ransom, asked appellant questions about his mental condition (1 RTS 38-39), he nevertheless failed to conduct the "rather careful inquiry into that subject" required in this case. (See *People v. Lopez*, *supra*, 71 Cal.App.3d at p. 573.) In particular, Judge Long failed to adequately follow up on appellant's statement that he was taking Neurontin (1 RTS 39), a drug whose side effects may include dizziness, somnolence, abnormal thinking, and amnesia (Physician's Desk Reference (61st ed. 2007) p. 2490). As such, Judge Long should not have ended the inquiry at appellant's statement that the medication was not interfering with his choice to represent himself (1 RTS 39), but instead should have ordered a psychiatric examination. (See *People v. Lopez*, *supra*, 71 Cal.App.3d at p. 573.) At a minimum, the court should have inquired into the effects of Neurontin before accepting appellant's waiver; for example, the court could

have appointed an expert to report to the court with respect to the effects of that drug on a patient's mental functioning. In the absence such an inquiry, there can be no assurance that the drug was not, in fact, "clouding [appellant's] mind." (1 RTS 39.)

Third, contrary to respondent's suggestion (RB 60), the record does not indicate that appellant was aware of the possible defense or defenses in his case. Although appellant stated that he felt he could present a defense (1 RTS 42), he did not say, nor was he asked to explain, what that defense or defenses might be. Moreover, appellant's letter to Nikki (ACT 852, cited at RB 60) does not show that appellant was aware of, or that he intended to, present a self-defense theory. Even if appellant heard defense counsel's reference to self-defense during the preliminary hearing (1 RTL 400, cited at RB 60), it cannot be assumed that he truly understood whether and how he might present such a defense were he to waive his right to counsel.

Respondent's reliance upon *Blair* on this point is misplaced. (RB 60.) There, this Court stated in a footnote that the trial court's failure to query the defendant concerning his understanding of potential defenses did not invalidate his waiver. (*People v. Blair*, *supra*, 36 Cal.4th at p. 709, fn. 7.) However, that case is readily distinguishable: in concluding that Blair understood the *Faretta* warnings given in his case, this Court acknowledged that he had "demonstrated considerable legal knowledge, and had represented himself at his previous trial on the attempted murder charges involving the same underlying events." (*Id.* at p. 709.) This circumstance alone readily distinguishes *Blair* from the instant case.

Fourth, contrary to respondent's position (RB 60-61), the record does not show that the *Faretta* advisements were adequate notwithstanding Judge Long's failure to define "aggravation" or "mitigation," or to explain

those concepts by providing examples from section 190.3. Respondent states that Judge Long told appellant that the special circumstance allegations meant that he would proceed to a penalty phase if found guilty (RB 60, citing 1 RTS 26, 40-41), a fact appellant himself acknowledged (AOB 45). But, tellingly, respondent does not address appellant's argument that, because Judge Long failed to define or explain the concepts of "aggravation" and "mitigation," there is no showing that appellant understood what the assistance of counsel would mean at the penalty phase. (AOB 45-46.)

Finally, respondent incorrectly contests appellant's argument that Judge Long should have asked appellant to explain why he did not view self-representation as a disadvantage. (RB 61, citing AOB 46-47; see also 1 RTS 35.) Respondent suggests that appellant's statement simply "repeats" what he had previously indicated, i.e., that he had accepted responsibility for the charged offenses and knew that death was a potential punishment. (RB 61, citing ACT 805-815.) It does no such thing. Similarly, there is no basis for respondent's pronouncement that "appellant apparently viewed self-representation – i.e., being the 'captain of the ship,' as an advantage." (RB 61.) The record simply does not establish why appellant wanted to waive counsel. (See AOB 45-46.)

Moreover, respondent's reliance upon *People v. Bloom* (1989) 48 Cal.3d 1194 is misplaced. (RB 61.) In particular, Bloom moved to represent himself after the jury returned guilt verdicts. (*Id.* at p. 1203.) Therefore, Bloom's guilt phase did not raise the due process and reliability concerns implicated in this case (see AOB 39-49), where appellant's failure to meaningfully participate in his own defense calls into question the reliability of the guilt verdicts and special circumstances. (See AOB 39-

49.) Even assuming, arguendo, that appellant preferred death to life in prison (see RB 57, 61), a death sentence rendered under these circumstances is constitutionally unacceptable.

For the foregoing reasons, the *Faretta* advisements given by Judge Long, even viewed in combination with those given by Judge Ransom, were constitutionally inadequate. Thus, the record does not demonstrate that appellant's waiver of his right to counsel was knowing, intelligent and voluntary.

**D. The Invalid Waiver of Counsel Requires Reversal**

Appellant has adequately demonstrated that the trial court's error requires that the judgment be reversed in its entirety. (AOB 47-49.) That discussion need not be repeated here.

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## II.

## APPELLANT'S WAIVER OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL ON THE MURDER AND RELATED CHARGES, SPECIAL CIRCUMSTANCES AND PENALTY WAS NOT A KNOWING AND INTELLIGENT WAIVER

### A. Introduction

In his opening brief, appellant argued that his waiver of his constitutional rights to a jury trial as to his guilt and the truth of the charged special circumstances was neither knowing nor intelligent, as he was never informed of or waived the "essential element of unity in the verdict" (*People v. Traugott* (2010) 184 Cal.App.4th 492, 500) – that a jury in a felony case consists of 12 persons whose verdict must be unanimous – nor was he informed of the consequences of his waiver. That error was structural, requiring automatic reversal of the entire judgment. Moreover, appellant's waiver of his rights to a jury trial on whether the death penalty should be imposed was invalid and independently requires that the death judgment imposed by the court be set aside. (AOB 50-67.)

Respondent contends that the totality of the circumstances under which the express jury trial waivers were made shows that appellant entered knowing and intelligent waivers of the rights to have a jury decide the guilt and penalty phases. Respondent further contends that any error in the admonitions given is harmless under any prejudice-based standard. (RB 63-80.) Respondent's contentions are incorrect.

### B. Appellant's Waiver of His Constitutional and Statutory Rights to a Jury Trial Was Not a Knowing and Intelligent Waiver Because It Was Not Made With a Full Awareness of the Nature of the Rights Being Relinquished

Acknowledging that Judge Long did not tell appellant that a jury consists of 12 persons who must reach a unanimous verdict, respondent contends nonetheless that appellant was aware of the nature of a jury trial and the consequences of abandoning it because: (1) appellant was aware of the nature of a jury trial based on his experience of waiving that right when pleading guilty to prior offenses; (2) 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, and appellant repeatedly stated that he understood and wished to proceed with a court trial; (3) appellant had been represented by counsel prior to his waiver of his right to a jury trial, and respondent presumes that counsel would have discussed with appellant the nature of a jury trial; and, (4) appellant was informed of the consequences of his express jury trial waiver, i.e., that the court would make the necessary findings. (RB 71-73.) Respondent's position is incorrect.

First, respondent is incorrect in contending that appellant was aware of the essential elements of a jury trial based on the fact that, in prior cases, he had been advised of his right to have a jury of 12 people reach a unanimous decision. (RB 71, citing ACT 828-829, 840, 842.) Even assuming, arguendo, that appellant recalled the advisements he had received more than a *decade* earlier (ACT 826, 828-829 [reporter's transcript of October 22, 1990, proceedings]; ACT 839-840, 842 [reporter's transcript of March 16, 1988, proceedings]), they were given in noncapital cases.

Therefore, it cannot be assumed that he understood the consequences of waiving his rights to a jury trial in this capital case, at least with respect to the special circumstance allegations and penalty.

Second, Judge Long's explanation that appellant could have a jury or the court decide guilt or innocence, the truth of the special circumstances, and penalty, told him just that: that he could have a jury or the court decide guilt or innocence, the truth of the special circumstances, and penalty. (Rb 72, citing 1 RTS 43-46, 88-89, & 2 RTS 315-317.) Similarly, it is immaterial that Judge Long "made clear that he would decide appellant's fate if appellant waived the right to a jury trial." (RB 73, citing 1 RTS 44-45 & 2 RTS 315-317.) Judge Long's statements did not inform appellant of the essential elements of a jury trial: (1) the number of jurors; (2) impartiality of the jurors; and, (3) unanimity of the verdict. (Cal. Const., art. 1, § 16; *People v. Howard* (1930) 211 Cal. 322, 324.) Judge Long apparently understood this was a critical matter; as respondent concedes (RB 72), Judge Long mistakenly stated that "[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" (1 RTS 88). Perhaps Judge Long erroneously believed that he had addressed the elements of a jury trial during their supposed talk.

Third, the fact that appellant had been represented by counsel prior to his waiver of the right to a jury trial does not undermine his claim. For instance, respondent's reliance upon *People v. Robertson* (1989) 48 Cal.3d 18 is misplaced. (RB 72-73.) There, Robertson was represented by two counsel at the time of the waiver "who *over the course of several days* discussed with him 'at length' the consequences and nature of his proposed waiver." (*Id.* at p. 36; italics added.) As such, it is reasonable to presume,

as this Court did, that Robertson's counsel would have informed him of the effect of a jury deadlock, a subject which the trial court apparently failed to cover in its "extensive and thorough voir dire expressly directed to determining his waiver was knowing, intelligent and voluntary." (*Id.* at pp. 36-37 & fn. 5.) It is also significant that Robertson's counsel made clear that, as a tactical matter, they had determined that it was to his advantage that he waive his right to a jury trial and opt for a court trial instead. (*Id.* at p. 36 & fn. 4.)

Respondent's reliance upon *People v. Tijerina* (1969) 1 Cal.3d 41 is similarly misplaced. As respondent acknowledges (RB 73), Tijerina was represented by an attorney at both the preliminary hearing and at trial, and he was carefully questioned before his waiver of a jury trial was accepted. He stated that he knew what a jury trial was, and he was also told that "[t]hat is when twelve people sit over here in the box and hear all the evidence." (*Id.* at pp. 45-46.) Under those circumstances, this Court held that the trial court's failure to advise Tijerina that a jury's verdict must be unanimous did not render his waiver ineffective. (*Id.* at p. 46.)

In the instant case, appellant did *not* have the benefit of an advisement by counsel, as he was representing himself at the time of his waiver. (See AOB 61-62.) Appellant acknowledges that, after he informed the trial court that he wished to plead guilty, and defense counsel confirmed that they wished to enter not guilty pleas on his behalf, the trial court told appellant that he could "take that issue up with [his] counsel at a later time." (2 RTL 405.) But the record is silent as to whether defense counsel did confer with appellant regarding his request to plead guilty, let alone whether they explained the essential elements of a jury trial or the consequences of non-unanimity. (See AOB 57-62.) Thus, respondent's assertion that, "[n]o

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" (RB 72-73), amounts to nothing more than mere speculation.[9]

Finally, respondent does not squarely address appellant's argument that the waiver of a penalty phase jury was also invalid because 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 a jury (AOB 66-67). (RB 73-74.) In particular, respondent relies on *People v. Robertson* (1989) 48 Cal.3d 18, 38, where this Court rejected a similar argument, but fails to address appellant's argument that that case is distinguishable because Robertson (unlike appellant) was represented at counsel at the guilt phase, and therefore this Court could presume that Robertson's counsel had informed him of the "consequences and nature" of the penalty phase jury right (AOB 66-67). (RB 74.) For the same reason, respondent's reliance upon *People v. Deere* (1985) 41 Cal.3d 353 is misplaced. (RB 73-74.) The defendant in *Deere*, like the defendant in *Robertson*, was represented by counsel at the guilt phase and waived his right to a penalty phase jury. (*People v. Deere*, *supra*, 41 Cal.3d at pp. 357, 359-360.) Under these circumstances, it cannot be said that appellant's waiver of a penalty phase jury was knowing and intelligent.

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[9] Of course, as appellant has pointed out (AOB 62), it is ultimately the court's responsibility, not that of counsel or the defendant himself, to ensure that the record reflects that the waiver of a fundamental constitutional right is knowing and intelligent. (See, e.g., *Boykin v. Alabama* (1969) 395 U.S. 238, 244.)

### C. The Denial of Appellant's Rights to a Jury Trial Was Structural Error, Requiring Reversal of Appellant's Conviction of the Murders, Special Circumstances and Related Felonies Tried By the Court

Appellant has already demonstrated that (1) because his waiver of his rights to a jury trial was not knowing and intelligent, he was denied his fundamental constitutional right to a jury trial, and (2) that the denial of his rights to a jury trial was structural error, requiring reversal of his conviction of the murders, special circumstances and related felonies tried by the court. (AOB 63-64.) However, appellant here addresses respondent's contention that the validity of his jury trial waiver should be determined by examining the totality of the circumstances under which it was made, and that, viewed in that light, any inadequacy in the admonitions was harmless. (RB 74-80.) Respondent's analysis is fatally flawed for the following reasons.

First, whether appellant's waiver was "express" – as respondent repeatedly characterizes it (RB 63, 71, 73, 74, 79, 80) – is a separate question from whether it was knowing and intelligent. As appellant has pointed out (AOB 51): (1) a waiver of the rights to a jury trial under both the federal and state constitutions requires an express and personal waiver by the defendant (*People v. Collins* (2001) 26 Cal.4th 297, 304-305 & fn. 2 [express waiver in open court required under both state and federal law]; Calif. Const., art. 1, § 16; *Patton v. United States* (1930) 281 U.S. 276, 308-312 [express personal waiver required under federal Constitution]; see also Fed. Rules of Crim. Proc. Rule 23 [express, written waiver required under federal rules]); *and*, (2) a waiver of the right to a jury trial must be voluntary, knowing, and intelligent, "'made with a full awareness both of the nature of the right being abandoned and the consequences of the

decision to abandon it'" (*People v. Collins, supra*, 26 Cal.4th at p. 305, citing *Colorado v. Spring* (1987) 479 U.S. 564, 573; *McCarthy v. United States* (1969) 394 U.S. 459, 465-466; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *Patton v. United States, supra*, 281 U.S. 276, 308-312).

Second, contrary to respondent's assertion (RB 74-75), this Court has made clear that an invalid waiver, even an express one, is structural error. (*People v. Collins, supra*, 26 Cal.4th at pp. 311-312.) Although Collins was fully advised of the of the "nature of the right to trial by jury," including that "all 12 jurors would have to agree to the verdict" (*id.* at pp. 301, 311), this Court held that a waiver of a jury trial obtained by a trial court's assurance of an unspecified benefit was involuntary and therefore invalid. (*Id.* at pp. 311-312.) In reaching this conclusion, this Court refused to engage in the "totality of circumstances" analysis employed by the Court of Appeal, and endorsed by Justice Brown in her concurrence. (*Id.* at pp. 304, 314.) This Court further held that "a harmless error standard does not, and cannot, apply in the [] case." (*Id.* at p. 311; see also *People v. Ernst* (1994) 8 Cal.4th 441, 448-449 [trial of the charges to the court, without an express waiver by defendant of his right to have the case tried to a jury, denied him his right to a jury trial, requiring reversal of the judgment].) Significantly, respondent offers no reason, other than the reasoning of Justice Brown which this Court has already rejected, to overrule *Collins*.

Third, respondent allows that "an express jury trial waiver involuntarily obtained is reversible per se" (RB 74, citing *People v. Collins, supra*, 26 Cal.4th at pp. 310-312), and acknowledges that the denial of the right to a jury trial constitutes a structural defect (RB 74, citing *People v. Ernst, supra*, 8 Cal.4th at pp. 448-449), but its attempt to distinguish the

instant case from *Collins* and *Ernst* falls short. (RB 74-80.) All three cases involve invalid waivers, albeit for different reasons: Collins' waiver was involuntary; Ernst did not expressly waive his right to a jury trial; and, as explained in appellant's opening brief and the preceding sections, appellant's waiver was not knowing and intelligent. The basis of the invalidity is irrelevant to assessing prejudice. Where a defendant's waiver of the jury trial is invalid, he or she has been denied the constitutional rights to a jury trial, and the error is reversible per se under both the state and federal Constitutions. (*People v. Collins*, *supra*, 26 Cal.4th at p. 310-311, and cases cited therein.)

Fourth, respondent has erroneously conflated the question of whether the waiver was valid – i.e., whether there was error – and the test for assessing prejudice if the waiver was invalid. That is, respondent suggests that this Court examine the totality of the circumstances in determining whether there was any inadequacy in the trial court's admonitions, and, if there was, whether that inadequacy was harmless. (RB 74-80.) Respondent's position reflects a misunderstanding of the totality-of-the-circumstances test.[10]

Respondent's reliance upon Justice Brown's concurring opinion in *People v. Collins*, *supra*, 26 Cal.4th at pp. 313-314 is misplaced. (RB 78.) Although Justice Brown indicated that she would have evaluated the *validity* of the jury trial waiver in that case under the totality-of-the-circumstances test (*id.* at p. 313), she did not suggest that the test had any

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[10] In *Ernst*, this Court specifically rejected the People's suggestion that it apply a totality-of-the-circumstances test in that case and find, under that test, that the defendant validly waived his right to a jury trial despite his failure to do so expressly. (*People v. Ernst*, *supra*, 8 Cal.4th at p. 448.)

bearing on the issue of *prejudice*. Indeed, she stated that, "once we determine the jury waiver was not valid under the totality of circumstances, then the question becomes the effect of the absence of a valid waiver. I agree the trial court was not authorized to proceed in the absence of a valid waiver, and hence we must reverse." (*Id.* at p. 314.)

Thus, for the reasons set forth in appellant's opening brief and in the instant brief, the death judgment must be reversed.

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## III.

## ALLOWING APPELLANT TO REPRESENT HIMSELF, WAIVE JURY TRIAL AND NOT CHALLENGE THE PROSECUTION'S EVIDENCE IN ANY WAY WAS TANTAMOUNT TO PLEADING GUILTY, IN VIOLATION OF PENAL CODE SECTION 1018 AND THE EIGHTH AND FOURTEENTH AMENDMENTS

### A. Introduction

In his opening brief, appellant argued that, by 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, he was allowed to do what Penal Code section 1018 prohibits for defendants charged with capital offenses – pleading guilty without the consent of counsel. Appellant further argued that, because his convictions were obtained in violation of section 1018, the murder convictions and special circumstance findings, as well as the death judgments predicated on those convictions, must be reversed. Finally, appellant also argued that reversal is required because the proceedings below, which were tantamount to a slow plea, undermined the reliability of appellant's convictions and the death judgment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 68-87.)

Respondent contends that even if Penal Code 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. Moreover, respondent contends, 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. (RB 80-96.) Respondent's contentions are incorrect.

### B. Appellant's Actions Were Tantamount to Guilty Pleas to Capital Murder Without the Consent of Counsel in Violation of Penal Code Section 1018

#### 1. Penal Code Section 1018 Precludes a Capital Defendant From Discharging Counsel, Representing Himself, and Entering a Guilty Plea

In his opening brief, appellant argued that Penal Code section 1018 precludes a trial court from accepting a plea of guilty to a capital crime from a defendant who has waived counsel. (AOB 72-78.)

Respondent contends that this Court has never squarely confronted the issue of whether a defendant in a capital case may discharge counsel, engage in self-representation, and enter a guilty plea. (RB 85, citing *People v. Chadd* (1981) 28 Cal.3d 739, 746-747, and *People v. Alfaro* (2007) 41 Cal.4th 1277, 1299, fn. 4.) However, relying in part on those cases, this Court recently reaffirmed that:

> a plea of guilty to a capital felony may not be taken except in the presence of counsel, and with counsel's consent. (§ 1018.) Even if otherwise competent to exercise the constitutional right to self-representation (*Faretta v. California* (1975) 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562), a defendant may not discharge his lawyer in order to enter such a plea over counsel's objection. (E.g., *People v. Chadd* [*supra*, 28 Cal.3d at pp. 747-757]; see *People v. Alfaro* [*supra*, 41 Cal.4th at pp. 1299-1302].)

(*People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1055.)[11]

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[11] Mai's counsel, unlike defense counsel in this case, consented to a "slow plea" on the issues of guilt and special circumstances. (*People v.*

(continued...)

This Court has identified strong reasons why allowing a capital defendant to discharge his lawyer in order to plead guilty over his lawyer's objection would be improper. Among other things, this Court observed that "it is difficult to conceive of a plainer statement of law than the rule of section 1018 that no guilty plea to a capital offense shall be received 'without the consent of the defendant's counsel.'" (*People v. Chadd, supra,* 28 Cal.3d at p.746, quoting *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198 ["When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it"].) In addition, this Court pointed out that the Attorney General's suggestion that section 1018 could be interpreted to read that a capital defendant could fire his attorney, represent himself, and plead guilty would "obliterate" section 1018's careful distinction between capital and non-capital defendants, and concluded that "[s]uch a construction would be manifestly improper." (*Id.* at p. 747.) In this regard, appellant again points out that, in enacting section 1018, the Legislature included the requirement of counsel's consent to "eliminate arbitrariness" and "serve as a further independent safeguard against erroneous imposition of the death penalty." (*People v. Chadd* , *supra*, 28 Cal.3d at p. 750.)

### 2. Appellant's Actions and Inaction in the Trial Court Were Tantamount to a Guilty Plea, in Violation of Section 1018

In his opening brief, appellant argued that, given his counsel's refusal to allow him to plead guilty, he waived counsel and asserted his right of self-representation. When, despite his waiver of counsel, the trial

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[11](...continued)
*Hung Thanh Mai, supra,* 57 Cal.4th at p. 1055.)

court still refused to allow him to plead guilty to the capital charges, he requested a court trial and then did nothing at all. He did not cross-examine the prosecution witnesses, did not raise any objections to their testimony, and did not present any witnesses or evidence or make any argument in defense or in mitigation. In short, the court trial was nothing more than a slow plea of guilty, in violation of Penal Code section 1018. (AOB 78-84.)

Respondent, however, contends that application of section 1018 is not relevant in this matter because appellant did not engage in conduct tantamount to a guilty plea. (RB 86-93.) That is, the case did not involve an "agreed-upon disposition," "a finding of guilt on an anticipated charge," or a "promised punishment." (RB 89, citing *People v. Tran* (1984) 152 Cal.App.3d 680, 683, fn. 2.)[12] Moreover, because 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 constituting a slow plea or conduct tantamount to a guilty plea. (RB 90, citing *People v. Wright* (1987) 43 Cal.3d 487, 496.) Respondent's contentions are incorrect.

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. Wright, supra*, 43 Cal.3d at p. 496, quoting

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[12] To be precise, the *Tran* court defined a "slow plea" as "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, supra*, 152 Cal.App.3d at p. 683, fn. 2; italics added.)

*People v. Tran, supra*, 152 Cal.App.3d at p. 683, fn. 2; italics added.) This Court has explained that:

> Under the rule of *Boykin v. Alabama* [(1969) 395 U.S. 238], and *In re Tahl* [(1969) 1 Cal.3d 122], as extended in *Bunnell v. Superior Court* (1975) 13 Cal.3d 592 [119 Cal.Rptr. 302, 531 P.2d 1086] and other cases, "when the defendant agrees to a submission procedure, such as a guilty plea or a submission on the preliminary hearing transcript, by virtue of which he surrenders one or more of the three specified rights [jury trial, confrontation and privilege against self-incrimination]" (*People v. Hendricks* [(1987) 43 Cal.3d 584, 592]), the record must reflect that he was advised of and personally waived the applicable right or rights. (*Bunnell* [*v. Superior Court* (1975) 13 Cal.3d 592, 605].) When the submission is a guilty plea or "tantamount to a plea of guilty" (*In re Mosley* (1970) 1 Cal.3d 913, 924 [83 Cal.Rptr. 809, 464 P.2d 473]) the *Boykin-Tahl* requirements are constitutionally compelled. (*Id.* at p. 926, fn. 10; see *People v. Levey* (1973) 8 Cal.3d 648, 652 [105 Cal.Rptr. 516, 504 P.2d 452].) When, however, the submission is in fact not tantamount to a guilty plea – when "it appears on the whole that the defendant advanced a substantial defense" (*People v. Wright* (1987) 43 Cal.3d 487, 497 [233 Cal.Rptr. 69, 729 P.2d 260]) – the *Boykin-Tahl* advisements and waivers are not constitutionally compelled, but are required only as a matter of judicial policy. (*Ibid.*; see *People v. Hendricks*, *supra*, 43 Cal.3d at p. 592; cf. *People v. Gray* (1982) 135 Cal.App.3d 859, 869 [185 Cal.Rptr. 772] [hybrid proceeding].)

(*People v. Robertson* (1989) 48 Cal.3d 18, 39.) Although this Court has explained that "[i]f it appears on the whole that the defendant advanced a substantial defense, the submission cannot be considered to be tantamount to a plea of guilty" (*People v. Wright*, *supra*, 43 Cal.3d at p. 497; see also *People v. Robertson*, *supra*, 48 Cal.3d 18, 39), it has also made clear that "a submission that did not appear to be a slow plea because the defendant

reserved the right to testify and call witnesses or to argue the sufficiency of the evidence [citation] may turn out to be a slow plea if the defense presented no evidence or argument contesting guilt." (*People v. Wright, supra*, 43 Cal.3d at p. 497.)

As noted above, respondent contends that appellant did not enter a slow plea or engage in conduct tantamount to a guilty plea because: (1) the case did not involve an "agreed-upon disposition," "a finding of guilt on an anticipated charge," or a "promised punishment" (RB 89, citing *People v. Tran supra*, 152 Cal.App.3d at p. fn. 2); and, (2) appellant did not enter a slow plea or engage in conduct tantamount to a guilty plea because he did not surrender any constitutional rights in consequence of any negotiated agreement, and therefore his conduct was not "a bargained-for submission" on the transcripts from prior proceedings constituting a slow plea or conduct tantamount to a guilty plea (RB 90, citing *People v. Wright, supra*, 43 Cal.3d at p. 496).

However, appellant already has demonstrated that, even if he did not *formally* enter a slow plea, his actions and inaction in the trial court were tantamount to a guilty plea. (AOB 78-84.) It was clear even before the court trial began what appellant intended to do. For instance, he had attempted to plead guilty several times earlier in the proceedings and attempted to do so again before Judge Long. (1 RTS 48.) Before appellant waived jury, the court had been informed by the prosecutor that he contemplated doing so. (1 CT 255.) In agreeing to the court trial, appellant did not reserve the right to present witnesses or any other evidence, declined the court's offer to appoint an investigator or advisory counsel (1 RTS 47-78), and did not request time to prepare for the guilt trial, which was scheduled to begin just ten days later. (1 RTS 78.) The court knew that

appellant did not have discovery or any other materials with him in court, and when it inquired, appellant said he did not want to bring them. (1 RTS 62-63.)

Appellant's failure to participate in his trial further demonstrated that his intent was to plead guilty. He did not contest the facts or law in any way. He did not cross-examine any of the prosecution witnesses, nor did he present any witnesses, any evidence or any argument.

Therefore, contrary to respondent's position, appellant did not "defend himself by nonparticipation." (RB 90.) He did not defend himself at all. Moreover, because appellant did not defend himself, he effectively surrendered his constitutional rights to, at the very least, jury trial and confrontation. Under these circumstances, the court knew or reasonably should have known that it was almost certain to reach verdicts of guilt and findings of true as to the special circumstance allegations, notwithstanding the prosecution's burden of proving appellant's guilt beyond a reasonable doubt. Similarly, after the court read its verdicts and special circumstance findings, appellant again waived his right to counsel and to a jury trial for the penalty phase, and declined the district attorney's offer of assistance in bringing witnesses to court. (2 RTS 315, 317.) Therefore, the trial court knew or should have known that it was very likely to reach a death verdict, and to this extent the case involved what amounted to a "promised punishment."

The cases cited by respondent stand in stark contrast to the instant case because they involved sufficiently "substantial" defenses that they did not involve submissions or the surrender of constitutional rights. For instance, in *People v. Hendricks* (1987) 43 Cal.3d 584, 592 (cited at RB 86-87), this Court rejected the defendant's claim that the defense presented on

his behalf amounted to no defense at all and was therefore tantamount to a guilty plea, and hence that the court should have obtained from him a *Boykin-Tahl* waiver. In reaching its holding, this Court pointed out that, among other things: the defendant was deemed to have been informed of his rights by counsel; the case was tried to a jury, prosecution witnesses were cross-examined; and, the defendant declared on the record that he had several discussions about the conduct of the trial with counsel and expressly stated his agreement that he should not testify, that no other witnesses should take the stand, and that closing argument should not be presented. (*Ibid.*) In sum, the case did not involve a submission by virtue of which defendant had surrendered his rights. (*Id.* at pp. 592-593.)

In *People v. Murphy* (1972) 8 Cal.3d 349, 365-366 (cited at RB 87), this Court rejected the defendant's argument that if defense counsel's strategy was to present a "minimal defense" to gain the sympathy of the jury, it was tantamount to a plea of guilty, and that the trial judge therefore was required to obtain from him a waiver of his rights in accordance with *In re Tahl, supra*, 1 Cal.3d 122. In so doing, this Court pointed out that such a waiver was not required because the defendant, through counsel, exercised his right of confrontation by cross-examining prosecution witnesses, and took advantage of his right against self-incrimination by not taking the witness stand. (*Id.* at p. 366.) Moreover, this Court concluded that the evidence presented by defense counsel could be described as "minimal" not because of counsel's incompetence, but was instead the concomitant of being faced with compelling evidence of the defendant's guilt and the possibility that any additional evidence would further weaken his case; in short, the record clearly indicated that the decision not to present additional evidence was tactical. (*Id.* at p. 367 & fn. 16.)

In *People v. Griffin* (1988) 46 Cal.3d 1011, 1029 (cited at RB 87), this Court rejected the defendant's contention that his murder conviction must be reversed because the trial court permitted defense counsel to enter what was tantamount to a guilty plea without obtaining a *Boykin-Tahl* waiver of the constitutional rights he was giving up. In reaching its holding, this Court reasoned that the defendant had not surrendered his rights since he had a jury trial with the opportunity to cross-examine, call witnesses, and testify, counsel presumably advised the defendant of his rights, and there was no indication that the defendant disagreed with his attorney's tactical approach. (*Ibid.*) In this regard, appellant further notes that the defense in *Griffin* employed forensic experts, moved to suppress forensic evidence, and moved to exclude photographic evidence. (*Id.* at pp. 1019-1020, 1023, 1028.)

In *People v. Memro* (1995) 11 Cal.4th 786, 857-858 (cited at RB 87), this Court rejected the defendant's claim that counsel implicitly entered a plea of guilty to the murder of Carl Carter, Jr. (one of three murder victims in the case) when they conceded at closing argument that he killed him. This Court concluded that defense counsel had simply conceded the obvious, i.e., that the defendant had killed Carter, which was a reasonable tactical decision for the following reasons: the defendant's confession would have made any argument that he did not kill Carter wholly unpersuasive, and counsel were wise to maintain credibility with the jury by acknowledging the obvious. (*Id.* at p. 858.) In addition, appellant observes that the defendant presented a defense at both the guilt and penalty phases of his trial: during the guilt phase, an alibi defense was presented as to the other two murders, and although counsel conceded that the defendant killed Carter, he argued that the killing did not amount to first degree murder;

during the penalty phase, defense counsel summoned a witness, the defendant's sister, and, at closing argument, emphasized his mental problems, his cooperation with the police, lingering doubt regarding the special circumstance in light of his alibi defense, the grimness of life imprisonment, his lack of a prior felony conviction, the likelihood that he would not be dangerous in prison, and positive aspects of his background and character, including his remorse when he was discovered. (*Id.* at pp. 815-817.)

In *People v. Cook* (2006) 39 Cal.4th 566 (cited at RB 87), this Court rejected the defendant's argument that when his counsel in opening argument conceded that the defendant had confessed to killing victim Bettancourt (one of three murder victims in the case), counsel effectively pleaded him guilty to that murder, even though he received no formal admonitions and gave no express personal *Boykin-Tahl* waiver. (*People v. Cook, supra*, 39 Cal.4th at pp. 573, 590.) This Court reasoned that the defendant was present at jury selection, during argument on pretrial motions, and when the prosecution stipulated that it would not seek to admit into evidence his unwarned confession to killing a second victim, Sadler. Therefore, the defendant knew before defense counsel's opening statement that he was about to have a jury trial at which he would be represented by counsel and would not have to testify. The defendant then exercised each of the three constitutional rights at his trial, where he argued that his killing of Bettancourt was at most second degree murder, or possibly not murder but involuntary manslaughter. (*Id.* at pp. 590-591.)

Appellant further notes that, although the defense conceded that the defendant had shot Bettancourt, the defense focused on the similarity of the witnesses' statements as evidence they had been coached by the police.

Moreover, Teresa Beasley, who had given a statement in June 1992 identifying the defendant as the shooter, testified that her statement had been coerced and reflected what the police wanted her to say. Finally, in an effort to establish that the killing was at most second degree murder, the defense presented expert testimony by a private criminalist and a psychiatrist with expertise in the effects of alcohol and drugs. (*People v. Cook*, *supra*, 39 Cal.4th at p. 577.)

Respondent's reliance on cases applying the requirements of *Boykin-Tahl* to a penalty phase tried without a jury is similarly misplaced. (RB 87-89.) For instance, in *People v. Robertson*, *supra*, 48 Cal.3d at p. 28, the defendant was found guilty of two special-circumstance murders and the penalty was fixed at death. On appeal, this Court reversed the penalty judgment. (*Ibid.*) On retrial, the defendant waived jury trial and defense counsel stipulated that the court could read and consider the former testimony of 21 specified witnesses relating to the circumstances of the crimes, the background to his statements to the police, the special hearing on the admissibility of his confession, and his first trial. (*Id.* at pp. 38-39.) The parties called three of those witnesses, as well as 20 additional witnesses. (*Id.* at p. 39.)

On appeal from the penalty-phase retrial, this Court rejected the defendant's contention that the trial court erred in failing to advise him and obtain *Boykin-Tahl* waivers. (*People v. Robertson*, *supra*, 48 Cal.3d at p. 39.) In rejecting the defendant's argument, this Court stated that he had no constitutional right at the penalty phase to a jury trial. (*Id.* at p. 40.) This Court observed that his waiver of his statutory right to a jury trial was not a consequence of his stipulation to admission of the witnesses' former testimony, but preceded it. (*Ibid.*) Finally, this Court concluded that

counsel's conduct was not tantamount to a guilty plea requiring a *Boykin-Tahl* waiver because the defendant had the opportunity in the prior proceedings to confront and cross-examine the witnesses whose former testimony was admitted and he exercised that right. Moreover, he preserved the opportunity – by reserving the right to call the witnesses – in the penalty trial. Under those circumstances, counsel's choice ultimately to exercise Robertson's right of confrontation in only a limited manner was not a "submission," but rather a tactical decision. (*Ibid.*) In short, defense counsel "offered a complete and skillful defense." (*Id.* at p. 40.)

Finally, in *People v. Sanders* (1990) 51 Cal.3d 471, 527 (cited at RB 88-89), this Court rejected the defendant's argument 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 his counsel in violation of section 1018." This Court explained that it found the defendant's

> 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. [Footnote omitted.] 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.

(*Id.* at p. 527.)[13]

Respondent also takes issue with appellant's argument that: (1) the trial court should have inquired into appellant's intentions before commencing the trial to determine if he was attempting to effectively plead guilty; and, (2) that if the parties had 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. (RB 90-91; see also AOB 81-84.) According to respondent, the trial court had no authority to overrule the consent of the parties to waive trial by jury. (RB 90, citing *People v. Terry* (1970) 2 Cal.3d 362, 378, overruled on another ground in *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382.) Citing *People v. Scott* (1997) 15 Cal.4th 1188, 1209, respondent further asserts that once a defendant has knowingly and voluntarily waived jury trial, and both parties have consented, the court must accept the waiver. (RB 90.)

However, the portion of the *Terry* opinion cited by respondent is inapplicable to this case because it relates to not to Terry himself, but to his co-defendant, a juvenile who was ineligible for the death penalty. (*People v. Terry*, *supra*, 2 Cal.3d at p. 378; see also Pen. Code, § 190.1; *In re Colar* (1970) 9 Cal.App.3d 613, 616.) The trial court in *Terry* could not have run afoul of section 1018 in that case, as the pertinent language of that provision – namely, the requirement that defense counsel consent to any plea of guilty (Pen. Code, § 1018) – did not apply to Terry's co-defendant. Similarly, *Scott* is distinguishable in that the defendant was not only represented by counsel, but both he and defense counsel agreed that the

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[13] During the guilt phase, the defense presented evidence in support of an alibi defense. (*People v. Sanders*, *supra*, 51 Cal.3d at p. 488.)

waiver was in his best interests "in terms of trial tactics." (*People v. Scott*, *supra*, 15 Cal.4th at p. 1208.) Therefore, respondent has failed to adequately address appellant's argument that the constitutional and policy interests reflected in section 1018 were not served by the truncated, non-adversarial proceedings in this case. (AOB 83-84.)

Respondent is also incorrect in dismissing appellant's argument that, before commencing the trial, the court could have reappointed counsel to consult with and advise him about how to proceed. (RB 91-93; see also AOB 81-82.) Appellant has demonstrated at length that a defendant's right to self-representation is not absolute, and that, under the circumstances present in this case, the trial court had the authority and duty to interfere. (AOB 82-84; see also Argument I, incorporated by reference as if fully set forth herein.) Respondent implicitly acknowledges as much. (RB 93, citing *People v. Stansbury* (1993) 4 Cal.4th 1017, 1041-1047.)

Respondent's reliance upon *People v. Teron* (1979) 23 Cal.3d 103, overruled on another ground in *People v. Chadd* (1981) 28 Cal.3d 739, 750, fn. 7, is misplaced. (RB 92.) There, the defendant represented himself but questioned no witnesses and presented neither evidence nor argument on his own behalf. (*Id.* at p. 108.) On appeal, the defendant contended that the trial court erred in permitting him to represent himself. (*Id.* at p. 112.) In rejecting his claim, this Court stated that a defendant "bears no duty to present a defense." (*Id.* at p. 115.) This Court further stated that, "having put the state to its proof, [the defendant] has no obligation to try to rebut it." (*Ibid.*)

However, *Teron* is inapposite because it did not address the argument raised here: that the defendant's action and inaction in the case was tantamount to a guilty plea, in violation of Penal Code section 1018. It

is axiomatic, of course, that cases are not authority for propositions not considered therein. (See, e.g., *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.) In addition, *Teron* was overruled insofar as it stated that a capital defendant "has the right to plead guilty, even against the advice of counsel." (*People v. Chadd*, *supra*, 28 Cal.3d at p. 750.)

In light of the circumstances described above and in appellant's opening brief, respondent's contention that appellant was properly exercising his right to force the state to its proof must be rejected. (RB 92-93.) To pretend otherwise would require, as appellant has pointed out (AOB 71), that this Court elevate form over substance in a manner that cannot be countenanced by section 1018 and this Court's interpretation of it.

### C. A Death Judgment Based on a Slow Plea of Guilty Violates the Eighth and Fourteenth Amendments

In his opening brief, appellant argued that the absence of certain critical protections – in particular, the assistance of counsel and the adversary process itself (i.e., cross-examination and the presentation of defense evidence and argument) – undermined the reliability of appellant's convictions and the death judgment, in violation of the Eighth Amendment and the Sixth and Fourteenth Amendments. (AOB 85-87.)

Respondent incorrectly contends that appellant's argument is meritless because the constitutional standards for the reliability of a death judgment have been satisfied. (RB 93-95.) Appellant submits that he has sufficiently set forth his argument in the opening brief, and that he needs only to express his disagreement with respondent's claim that the court considered evidence of appellant's drug use as a potentially mitigating circumstance. (RB 95.) In this regard, appellant incorporates by reference

Argument IV, in which he argues that at the penalty phase the trial court did not properly consider evidence relating to his drug use as evidence in mitigation, as if it were fully set forth herein.

### D. The Denial of Independent Review in This Case Was Prejudicial

For the reasons set forth in appellant's opening brief and in the instant brief, the death judgment must be reversed. (AOB 131-132.)

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## IV.

## THE TRIAL COURT'S ERRONEOUS REFUSAL TO CONSIDER APPELLANTS DRUG USE IN MITIGATION VIOLATED APPELLANT'S RIGHTS UNDER STATE LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS, AND COMPELS REVERSAL OF THE DEATH JUDGMENT

In his opening brief, appellant argued that the trial court erred by (1) limiting its consideration of his drug use to his state of mind at the time of the capital crimes, despite evidence of appellant's history of repeated and substantial drug use for years prior to the capital crimes (including at the time of prior robberies considered in aggravation), and (2) refusing to fully consider appellant's impairment at the time of the crime, thereby violating his rights under state law and the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 88-110.)

Respondent contends that (1) appellant's claim is premised on the erroneous assumption that the voluntary ingestion of illegal drugs is per se mitigating; (2) that the trial court did not refuse to consider mitigating evidence, but determined that appellant's drug use was not mitigating; and, (3) that to the extent the court erred, the error was harmless beyond a reasonable doubt. (RB 96-105.) Appellant submits that he has sufficiently demonstrated that the trial court erred in refusing to consider his drug use in mitigation, but here addresses respondent's claim that appellant's "contention is premised on the faulty assumption that voluntary and repeated ingestion of illegal drugs is per se mitigating." (RB 97-98.)

Respondent's claim betrays a basic misunderstanding of appellant's argument. Whether or not drug use is "per se mitigating" is beside the point. Instead, appellant argued that the trial court *could have* considered

evidence of his repeated and substantial drug use as mitigating in and of itself under section 190.3, subdivision (k), but did not do so. (AOB 91-98.)

As the Ninth Circuit Court of Appeals has pointed out,

> [u]nder clearly established [United States] Supreme Court authority, a state court may not treat mitigating evidence of a defendant's character or background "as irrelevant or nonmitigating as a matter of law" simply because it does not have a causal connection to the crime. *Towery v. Ryan*, 673 F.3d 933, 946 (9th Cir. 2012) (per curiam); see also *Penry v. Lynaugh*, 492 U.S. 302, 318, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (citing *Eddings* [*v. Oklahoma* (1982)] 455 U.S. [104,] 114, 102 S.Ct. 869 and holding that a state cannot, "consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty"), abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). On the other hand, the sentencer may consider "causal nexus . . . as a factor in determining the weight or significance of mitigating evidence . . . ." *Lopez v. Ryan*, 630 F.3d 1198, 1204 (9th Cir. 2011) (citing Eddings, 455 U.S. at 114–15, 102 S.Ct. 869) (footnote reference omitted).

(*Murray v. Schriro* (9th Cir. 2014) ___ F.3d ___, 2014 WL 998019, *31.)

In *Murray*, the Ninth Circuit Court of Appeals rejected the petitioner's argument that the trial court misapplied *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 115, and its progeny by requiring a nexus between the mitigation evidence (i.e., evidence relating to his dysfunctional childhood, head injuries, hyperactivity, and alcohol/drug use) and commission of the crimes. (*Murray v. Schriro*, *supra*, ___ F.3d ___, 2014 WL 998019, *32.) On appeal, the Arizona Supreme Court had concluded that although the petitioner's dysfunctional childhood, head injuries, hyperactivity, and alcohol/drug use were mitigating factors, they had negligible mitigating

force because the petitioner had not shown how they affected his behavior on the night of the murders. (*Ibid.*) The Ninth Circuit held that, taken in the full context of the Arizona Supreme Court's "exhaustive analysis," there was no clear indication in the record that its statement that the petitioner "fail[ed] to show how this [family] background impacted his behavior at [the crime scene]" amounted to an impermissible screening mechanism under *Eddings*. (*Ibid.*)

By contrast, the trial court in this case stated that appellant's drug use did not prevent him from "understand[ing] the nature and criminality of his actions." (2 RTS 468.) In effect, the trial court used a causal nexus analysis – specifically, whether appellant was "able to understand the nature and criminality of his actions" – as an "impermissible screening mechanism" to disregard critical mitigating evidence. (See *Murray v. Schriro*, *supra*, ___ F.3d ___, 2014 WL 998019, *31.) Significantly, the trial court's analysis was much more strict and narrow than that of the Arizona state court in *Murray* (i.e., whether the petitioner's family background "impacted his behavior at [the crime scene]").

Respondent's reliance upon *People v. Scott* (1997) 15 Cal.4th 1188 is misplaced. (RB 98.) There, the trial court found "that even though there was drug use, that he was not impaired by the effects of intoxication." (*People v. Scott*, *supra*, 15 Cal.4th at p. 1222.) Therefore, the court found the defendant's drug use to be "not mitigating." (*Ibid.*) On appeal, this Court rejected the defendant's contention that the trial court erroneously "refused to consider" in mitigation the evidence of his cocaine use shortly before the crime. (*Ibid.*) In so holding, this Court explained that the trial court considered the defendant's cocaine use, but simply "found that [the] evidence did not, in fact, mitigate." (*Ibid.*)

Respondent's reliance upon *People v. Kennedy* (2005) 36 Cal.4th 595, 639, is similarly misplaced. (RB 99.) There, the trial court stated that, after considering every possible mitigating factor, including any circumstances extenuating the gravity of the crime, it found "nothing except the possibility that there was testimony that Mr. Kennedy used some narcotics prior to the commission of this offense, this killing." (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 639.) With respect to Kennedy's use of drugs, the court commented that the "particular evidence [of his drug use at the time of the crime] is un—unmoving to this Court and is unconclusive [sic] as the evidence stands at this time." (*Ibid.*) That is, the trial court expressly considered the defendant's drug use, but simply found it to be unmoving and inconclusive.

Finally, respondent's reliance upon *People v. Gaston* (1999) 74 Cal.App.4th 310, 322, and *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511, each of which discusses the concept of a "mitigating factor" in a non-capital context, is misplaced. (RB 99.) *Gaston* involved an appeal by the People of a trial court's order vacating a prior conviction finding under the three strikes law. (*People v. Gaston*, *supra*, 74 Cal.App.4th at pp. 312-313.) In *Martinez*, the defendant, who had pleaded no contest to several drug- and alcohol-related offenses, unsuccessfully argued that his sentence to life imprisonment under the three strikes law was unconstitutionally cruel or unusual. (*People v. Martinez*, *supra*, 71 Cal.App.4th at pp. 1506-1507.) That is, neither *Gaston* nor *Martinez* involved the concept of "mitigation" within the meaning of section 190.3 and the Eighth Amendment. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 188 (lead opn. of Stewart, J.) ["the penalty of death is different in kind from any other punishment imposed under our system of criminal justice"].) Respondent does not cite any

opinions holding that, in the context of a capital case, drug addiction cannot constitute a mitigating circumstance when the defendant has failed to make efforts to "root out" the dependency. Indeed, an expansive body of capital case law demonstrates otherwise. (See, e.g., *Cone v. Bell* (2009) 556 U.S. 449, 473-475.)

Thus, for the reasons set forth in appellant's opening brief and in the instant brief, the death judgment must be reversed.

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## V.

## APPELLANT WAS DENIED AN INDEPENDENT REVIEW OF HIS AUTOMATIC MOTION FOR MODIFICATION OF THE DEATH VERDICT, IN VIOLATION OF STATE LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS

### A. Introduction

In his opening brief, appellant argued that Penal Code section 190.4, subdivision (e), requires an independent, trial-level review of every death verdict, even when the penalty phase was tried by way of a court trial. Appellant did not receive the independent review of the penalty phase to which he was constitutionally entitled. Accordingly, appellant argued, this Court must either read into the statute a mechanism for independent review of a trial court's penalty verdict and remand this case so that the review can take place, or the Court must declare the statute unconstitutional as applied to cases in which a jury trial has been waived. In either event, this Court should vacate appellant's death sentence. (AOB 111-132.)

Respondent contends that appellant has forfeited any claim regarding the motion to modify the death verdict by failing to object in the trial court. Respondent further argues that appellant was not entitled to separate review by a different judge at the trial court level, and that appellant received a proper modification hearing under the statute "when giving the plain language its most expansive reading." Finally, respondent contends, appellant forfeited his due process and equal protection claims by failing to object, and, in any event, the claims are meritless. (RB 105-117.) As appellant demonstrates below, respondent's contentions are incorrect.

### B. Appellant's Argument is Cognizable on Appeal

Respondent incorrectly contends that, because appellant failed to make a specific objection at the modification hearing, his claim that he was denied an independent review of his automatic motion to modify the verdict is not cognizable on appeal. (RB 110, citing *People v. Weaver* (2012) 53 Cal.4th 1056, 1090-1091, *People v. Horning* (2004) 34 Cal.4th 871, 912, and *People v. Riel* (2000) 22 Cal.4th 1153, 1220.) Respondent further contends that, by failing to object in the trial court, appellant has forfeited his due process challenge (RB 114, citing *People v. Monterroso* (2004) 34 Cal.4th 743, 759) and his equal protection challenge (RB 115, citing *People v. Carpenter* (1997) 15 Cal.4th 312, 362, superceded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106). Respondent's contentions are incorrect.

The purpose of the forfeiture rule is to bring errors to the trial court's attention so that, if feasible, the court may cure them at the earliest opportunity. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) However, where counsel's objections would have been futile, the forfeiture rule does not apply. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1126, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

In *Weaver*, the trial court advised the defendant, before accepting his waiver of a jury trial, that it would not "conduct a separate, independent review of the evidence" under section 190.4, subdivision (e), "because the judge has made the decision." (*People v. Weaver*, *supra*, 53 Cal.4th at p. 1090.) The court explained that "the automatic, independent review of the evidence and the way the law was applied by the court will not take place in a jury waiver because there is no jury performance for [the trial judge] to review." (*Ibid.*) The defendant stated that he understood, and both defense

counsel stated they agreed. (*Ibid.*) On appeal, this Court held that the defendant's contention that he did not receive a proper hearing under section 190.4, subdivision (e), was not cognizable on appeal because he not only failed to object at trial, but expressly acknowledged before trial that he would not receive such a hearing due to his jury waiver. (*Id.* at p. 1091.)

In *Horning*, during a discussion of whether the court should entertain a motion to modify the verdict, defense counsel suggested that the court "may just want to refer to [its verdict]," adding that he did not "want to waive anything." (*People v. Horning*, *supra*, 34 Cal.4th at p. 912.) The judge subsequently refused to rule on the motion for modification, believing it was unnecessary to repeat the reasons for the verdict. Defense counsel responded, "Okay." (*Ibid.*) On appeal, Horning argued that the court had erred in failing to rule on the motion. (*Ibid.*) However, this Court held that "[b]ecause defendant did not object . . . the issue is not cognizable on appeal." (*Ibid.*; citations omitted.) Significantly, this Court recognized that, although defense counsel might not have wanted to "waive anything," he did so when he suggested that the court might refer to its earlier ruling and responded, "Okay," after the court expressed the belief that it did not have to state its reasons again. (*Ibid.*)

In *Riel*, a jury returned a verdict of death, and the trial court imposed that sentence. (*People v. Riel*, *supra*, 22 Cal.4th at p. 1172.) On appeal, the defendant contended that the trial court made a number of errors in denying the automatic motion to modify the death verdict. (*People v. Riel*, *supra*, 22 Cal.4th at p. 1220.) This Court held his claims were waived for failure to object. (*Ibid.*)

Neither *Weaver*, *Horning*, nor *Riel* is dispositive. No mechanism exists to provide independent review for defendants tried by a judge, so no

objection could have cured the trial court's error. Because any contemporaneous objection would have been futile and could not have "easily corrected or avoided" error (see *People v. Stowell, supra*, 31 Cal.4th at p. 1114), this Court should reach the merits of appellant's challenge to section 190.4, subdivision (e).

Moreover, each of those cases is distinguishable from the instant case in critical respects. First, as respondent concedes (RB 73-74), Judge Long failed to warn appellant that a consequence of his jury trial waiver would be the loss of the right to an independent trial court review of the penalty imposed by a jury. Weaver, on the other hand, was admonished in that regard, and expressly acknowledged before trial that he would not receive such a hearing due to his jury waiver. (*People v. Weaver, supra*, 53 Cal.4th at pp. 1090-1091.) Similarly, in contrast to the defense in *Horning*, appellant did not expressly waive an independent review of the verdict. (See *People v. Horning, supra*, 34 Cal.4th at p. 912.)

Second, unlike appellant, the defendant in *Riel* was tried by a jury, and therefore the trial court's review of the penalty verdict constituted an independent review of the verdict within the meaning of section 190.4, subdivision (e). (*People v. Riel, supra*, 22 Cal.4th at pp. 1172, 1220.) That is, *Riel* did not involve the complete denial of an independent review of the penalty verdict, and therefore it has no relevance to the instant case.

Third, unlike appellant, Weaver, Horning and Riel were all represented by counsel. (*People v. Weaver, supra*, 53 Cal.4th at p. 1090; *People v. Horning, supra*, 34 Cal.4th at p. 912; *People v. Riel, supra*, 22 Cal.4th at pp. 1175-1177, 1209-1210.) Because appellant was not represented by counsel, and the record does not establish that his waiver of the right to counsel was knowing, intelligent and voluntary (see Argument I,

incorporated by reference as if fully set forth herein), it cannot be assumed that he understood the consequences of his waiver of his right to a jury trial, including the fact that the trial court would effectively rule on the correctness of its own verdict.

In the event this Court finds that appellant's failure to object is significant, the issue is still cognizable on appeal because the trial court's error implicates fundamental constitutional rights. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277, abrogated on another ground, as recognized by *People v. French* (2008) 43 Cal.4th 36, 47, fn. 3.) A lack of timely objection in the trial court does not forfeit the right to raise a claim asserting the deprivation of certain fundamental, constitutional rights for the first time on appeal. (*Ibid.*) As discussed below, the denial of an independent review of appellant's death verdict under section 190.4, subdivision (e), violated appellant's rights to due process, equal protection, and a reliable sentencing determination. Therefore, the issue is cognizable on appeal, even in the absence of a specific objection.

Respondent's reliance upon *People v. Monterroso*, *supra*, 34 Cal.4th at p. 759, and *People v. Carpenter*, *supra*, 15 Cal.4th at p. 362, is misplaced. (RB 114.) In *Monterroso*, this Court rejected the defendant's contention that comments made by the trial court during death-qualification voir dire had the effect of encouraging the jury to return a death verdict in violation of his state and federal rights to due process, a fair trial, an unbiased jury, and a reliable guilt and penalty phase determination. (*People v. Monterroso*, *supra*, 34 Cal.4th at p. 759.) In *Carpenter*, the trial court denied the defendant's motion to sever certain counts, finding that "these cases are so connected because of that ballistics issue that, in my opinion, there really is no serious issue here." (*People v. Carpenter*, *supra*, 15

Cal.4th at p. 362.) Both of those cases involved matters which could have been cured if they had been brought to the court's attention (see *People v. Stowell, supra*, 31 Cal.4th at p. 1114), while, as noted above, no objection could have cured the denial of an independent review of the trial court's death verdict.

### C. Penal Code Section 190.4, Subdivision (e), Entitles All Capital Defendants to Independent, Trial-Level Review

As respondent acknowledges, this Court has recognized that the language of section 190.4, subdivision (e), is ambiguous with respect to whether the provision applies to judge-sentenced capital defendants as well as jury-sentenced defendants. (RB 111, citing *People v. Diaz* (1992) 3 Cal.4th 495, 575, fn. 34.) However, respondent asserts, 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 section 190.4, subdivision (e), was designed to provide and protect. (RB 113-114, citing *People v. Frierson* (1979) 25 Cal.3d 142, 179.) Therefore, respondent suggests, there was no error. (RB 114.) Respondent's position is incorrect.

Respondent's argument is grounded in dicta in *People v. Diaz, supra*, 3 Cal.4th at p. 575, fn. 34. (RB 112.) There, this Court stated in dicta that, "[a]lthough at first glance a modification motion after a penalty phase court trial appears to be an exercise in futility," "[t]he 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. 575, fn. 34.) Respondent further relies on *People v. Horning, supra*, 34 Cal.4th at p. 912, in which

this Court quoted footnote 34 of the *Diaz* opinion in holding that no error resulted from the trial court's failure to rule on Horning's automatic motion to modify the sentence, since such motion would have been superfluous because the trial court had already given detailed statements when it originally rendered its verdict. (RB 112-113.)

Finally, respondent relies on *People v. Weaver*, *supra*, 53 Cal.4th at pp. 1090-1091, in which this Court cited the *Diaz* and *Horning* dicta in rejecting the defendant's contention that the trial court did not conduct a proper hearing on his automatic application to modify the death verdict under section 190.4, subdivision (e). (RB 113.) In doing so, this Court noted that the trial court stated its reasons twice – once when it imposed the death penalty and a second time when it denied the automatic motion to modify the verdict. (*People v. Weaver*, *supra*, 53 Cal.4th at p. 1091.)

This Court also rejected Weaver's argument that, because section 190.4, subdivision (e), does not logically apply to a court trial, the California death penalty scheme is "unconstitutional in that it fails to provide a mechanism for an independent review of a trial court's penalty phase verdict." (*People v. Weaver*, *supra*, 53 Cal.4th at p. 1091.) In so holding, this Court stated that the defendant had cited no authority holding that a defendant who waives a jury has a constitutional right to an independent review of the court's verdict, and declined to so hold. (*Ibid.*) Moreover, this Court pointed out that the defendant fully understood that he would not receive an independent review of the court's verdict when he waived his right to a jury trial. (*Ibid.*)

None of the cases cited by respondent is dispositive. The dicta in *Diaz* and *Horning* (*People v. Horning*, *supra*, 34 Cal.4th at p. 912; *People v. Diaz*, *supra*, 3 Cal.4th at p. 575, fn. 34) should be disapproved because

this Court did not consider the plain language and purpose of the statute, legislative history, nor the constitutional rights at stake. (AOB 113-120.) For the same reasons, appellant's claim is not defeated by this Court's rationale in *Weaver*, i.e., its conclusion that the defendant in that case had cited no authority holding that a defendant who waives a jury has a constitutional right to an independent review of the court's verdict. (*People v. Weaver, supra*, 53 Cal.4th at p. 1091.)

First, the purpose of section 190.4, subdivision (e), is to provide *independent* review of the death verdict, not simply to ensure that a statement of the judge's findings appears on the record. (AOB 118, fn. 37.) Penal Code sections 190.4, subdivision (e), and 1181, subdivision (7), trigger an automatic application for modification of the verdict in every case in which a death verdict is returned. Section 190.4, subdivision (e), imposes two obligations upon the trial court: (1) to independently review the verdict to determine whether it was contrary to the law or evidence by reweighing the aggravating and mitigating factors presented at trial; and, (2) to state reasons for its findings on the record. If the trial court only states findings justifying the death verdict and fails to independently reweigh the evidence, the statute is not satisfied. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 793-794 [vacating death verdict because it was not clear from the face of the trial court's ruling whether or to what extent the ruling was based on an independent review of the evidence].)

Second, the Legislature intended that section 190.4, subdivision (e), provide independent review for all capital defendants. (AOB 115-120.) In his opening brief, appellant explained that, although the language of that statute is ambiguous, the legislative history shows that the statute applies equally to both to judge-sentenced defendants and jury-sentenced

defendants. (*Ibid.*) As appellant argued, section 190.4, subdivision (e), is itself rooted in another California statute, Penal Code section 1181, subdivision (7), which states that the trial court may modify the verdict "in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed." (AOB 119-120.) Moreover, as appellant has pointed out, the protections afforded by section 190.4, subdivision (e), apparently were created by the Legislature as a substitute for appellate-level proportionality review by providing independent, trial-level review of all death verdicts, not just those of defendants tried by juries. (AOB 116-118.) There is no evidence in the legislative history that the Legislature intended to exempt defendants who waived jury trial. (AOB 129.) If the Legislature had wished to limit section 190.4, subdivision (e), to defendants tried by juries, it would have done so.

Third, independent review under section 190.4, subdivision (e), is a constitutionally-required element of California's death penalty scheme and an important "safeguard" for adequate appellate review. (AOB 113-115; *People v. Rodriguez, supra*, 42 Cal.3d at p. 794 [holding that failure to specify reasons for denying modification motion prevents the assurance of "thoughtful and effective appellate review"].) Both this Court and the United States Supreme Court have emphasized that the independent review guaranteed by section 190.4, subdivision (e), is necessary to ensure that the death penalty is not arbitrarily imposed. (AOB 113-115.) This Court has also warned of the constitutional dangers of respondent's approach: "if subdivision (e) were construed as precluding independent review of the death verdict by the trial judge, questions of federal constitutionality might arise." (*People v. Rodriguez, supra*, 42 Cal.3d at p. 794, citing *People v.*

*Frierson*, *supra*, 25 Cal.3d at pp. 178-179.) Respondent's view must be rejected in order to preserve the constitutionality of the statute. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224, 237-238; *United States v. Jin Fuey Moy* (1916) 241 U.S. 394, 401 ["A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."].)

Contrary to respondent's contention, a statement on the record by a judge who explains his own verdict is not an independent review of that verdict, and does not satisfy section 190.4, subdivision (e). Based on the language, purpose, and legislative history of the statute, as well as the constitutional rights at state, this Court should reject respondent's argument and interpret section 190.4, subdivision (e), as mandating independent review of all death verdicts at the trial level. To the extent that the dicta in *Diaz* and *Horning*, and/or this Court's reasoning in *Weaver*, suggest otherwise, this Court should disapprove those cases.

### D. The Failure to Provide a Separate and Independent Review Constituted Violated Appellant's Rights to Due Process and Equal Protection

In his opening brief, appellant demonstrated that, even if independent trial court review is not otherwise constitutionally required, the denial of that review to appellant violated his rights to due process and equal protection under the federal Constitution. (AOB 113, 127-130.)

With respect to appellant's due process claim, respondent asserts that in *People v. Weaver*, *supra*, 53 Cal.4th at p. 1091, this Court rejected the same constitutional claim that appellant presents here, and that appellant fails to offer any persuasive reason why this Court should vary from its decision in *Weaver*. (RB 114.) Respondent further asserts that appellant's equal protection claim fails because he has not demonstrated that he is

"similarly situated" to capital defendants whose penalty phases were tried to juries. (RB 115-116.) Respondent's contentions are incorrect.

It is true that Judge Long stated his reasons for denying appellant's automatic motion to modify the death verdict. (2 RTS 464-469.) However, as appellant has pointed out (AOB 113), the hearing that the court conducted was simply a reaffirmation of its own penalty phase verdict. The failure to provide appellant with the independent review guaranteed by section 190.4, subdivision (e), denied him a reliable sentencing determination and violated his due process and Eighth Amendment rights. (AOB 113, 127-130.) Because appellant was deprived of a statutorily- and constitutionally-required layer of review guaranteed to all capital defendants by section 190.4, subdivision (e), this Court does not have a record from which it can properly review appellant's death sentence.

Moreover, respondent misses the point of appellant's equal protection argument. California's death penalty scheme provides for automatic, independent review at the trial level for all capital defendants by way of section 190.4, subdivision (e). (AOB 113-120, 128-130.) This statewide classification scheme affects the fundamental rights of all capital defendants, regardless of whether they waived any right to a jury trial. (*Ibid.*) Therefore, for equal protection purposes, appellant is similarly situated to all other capital defendants. If this Court reads section 190.4, subdivision (e), as creating separate classifications for judge- and jury-sentenced defendants, then this disparate treatment is arbitrary and violates appellant's right to equal protection under the federal Constitution. (AOB 128-130.) The State has no compelling interest that would justify depriving judge-sentenced defendants of independent review at the trial level, and respondent does not show otherwise. (*Ibid.*)

### E. Conclusion

For the reasons set forth in appellant's opening brief and in the instant brief, his death judgment must be reversed. (AOB 131-132.)

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## VI.

## REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Appellant has argued that the cumulative effect of the errors at trial require reversal of the convictions and sentence of death even if any single error considered alone would not. (AOB 133-134.) Respondent simply contends no errors occurred, and that any errors which may have occurred were harmless. (RB 117.) The issue is therefore joined, and no further reply to respondent's contentions is necessary. Should this Court find errors which it deems non-prejudicial when considered individually, it should reverse based on the cumulative effect of the errors.

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## VII.

## CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Appellant argued in his opening brief that many features of California's capital sentencing scheme violate the United States Constitution. (AOB 135-142.) Appellant recognizes that this Court has previously rejected these arguments, but urges the Court to reconsider them. Respondent relies on the Court's previous precedents without any substantive new arguments. (RB 117-125.) Accordingly, no further reply to respondent's contentions is necessary .

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## VIII.

## THE SENTENCE OF DEATH IMPOSED IN CONNECTION WITH APPELLANT'S CONVICTION OF SECOND DEGREE MURDER MUST BE VACATED

In his opening brief, appellant argued that the trial court erred when it found true the multiple murder special circumstance attached to Count 21 (charging the murder of LaTanya McCoy), and when it imposed a death sentence on that count. The legally unauthorized sentence of death must therefore be vacated. (AOB 143.)

Respondent concedes that appellant's position is correct, and that the sentence of death imposed on that count must be vacated. (RB 125-126.) The issue is therefore joined, and no further reply is needed.

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## CONCLUSION

For all the aforementioned reasons, the judgment in this case must be reversed in its entirety.

DATED: April 28, 2014

Respectfully submitted,

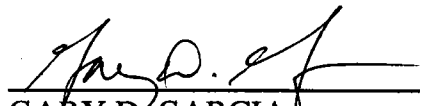
MICHAEL J. HERSEK
State Public Defender

GARY D. GARCIA
Senior Deputy State Public Defender

Attorneys for Appellant

## CERTIFICATE OF COUNSEL
## (CAL. RULES OF COURT, RULE 8.630(b)(1), (2))

I, Gary D. Garcia, am the Senior Deputy State Public Defender assigned to represent appellant David Daniels in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 18,315 words in length.



GARY D. GARCIA
Attorney for Appellant

## DECLARATION OF SERVICE

Re: *People v. David Scott Daniels*

Sacramento Superior Ct No.99F10432
Supreme Court No. S095868

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a copy of the attached:

**APPELLANT'S REPLY BRIEF**

on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the Attorney General
Attn: Larenda Delaini
P.O. Box 944255
Sacramento, CA 94244-2550

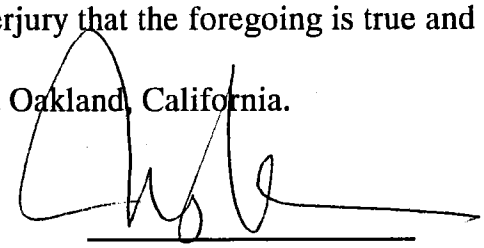
Habeas Corpus Resource Center
303 Second Street, Suite 400
San Francisco, CA 94105

David Scott Daniels
P.O. Box K-90141
San Quentin State Prison
San Quentin, CA 94974

Each said envelope was then, on April 28, 2014, sealed and deposited in the United States mail at Oakland, California, in Alameda county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on April 28, 2014, at Oakland, California.



DECLARANT