SUPREME COURT COPY

COPY

No. S051968

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VALDAMIR FRED MORELOS, Defendant and Appellant.	(Santa Clara County Sup. Ct No. SC169362)

SUPREME COURT
FILED

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APPELLANT'S REPLY BRIEF

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Appeal from the Judgment of the Superior Court of the State of California for the County of Santa Clara

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DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CONSTITUTIONS

TABLE OF AUTHORITIES

STATE STATUTES

COURT RULES

TABLE OF AUTHORITIES

Page(s)

TEXT AND OTHER AUTHORITIES

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S051968
v.	)	(Santa Clara County, Sup. Ct. No. SC169362)
VALDAMIR FRED MORELOS,	)	
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant replies to contentions by the State that require an answer in order to present the issues fully to this Court. However, he does not reply to arguments that are adequately addressed in the opening brief. In particular, appellant does not present a reply on Arguments VI and XIII.

The failure to address any particular argument, sub-argument or allegation made by the state, 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, 1071, 1075), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.[1]

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[1] All statutory references are to the Penal Code unless stated otherwise. As in the opening brief, the clerk's transcript is cited as "CT," the Supplemental Clerk's Transcript as "SCT" and the reporter's transcript as "RT." For each citation, the volume number precedes, and the page number follows, the transcript designation. Other shorter transcripts that are not part of a Reporter's Transcript volume are referred to by the date of the proceeding, followed by the page number.

ARGUMENT

I.

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR ADVISORY COUNSEL

Appellant argued, and the record establishes, that had the court recognized it had discretion to grant appellant's request for advisory counsel, it would have done so. (AOB 34-46.) Respondent acknowledges this Court's holding that a court's failure to recognize that California law permits it to appoint advisory counsel is error (RB 58, citing *People v. Bigelow* (1984) 37 Cal.3d 731, 743), but answers that (1) appellant only requested help with expert witnesses, and then withdrew his request, and (2) the court's denial of the request would not have been an abuse of discretion. (RB 58-62.) For the reasons set forth below and in the opening brief, this Court should reject respondent's arguments. Under the circumstances, the court's failure to appoint advisory counsel constitutes reversible error.

Appellant's withdrawal of his request for assisting counsel would have been futile as he did so only after the court repeatedly told him it did not have the authority to grant it, and instead urged appellant to give up self-representation. (12/20/95 RT 1-6, 8; AOB 40-41; see *People v. Chism* (2014) 58 Cal.4th 1266, 1291 [on appeal, defendant may raise claim his codefendant made at trial even though defendant did not join in the objection, where defendant reasonably believed doing so would be futile]; *People v. Hill* (1998) 17 Cal.4th 800, 820 [defendant will be excused from making timely objection and/or request for admonition to prosecutorial misconduct if either would be futile]; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 237 [futility may arise when the trial judge errs by

overruling proper objections].) Respondent's argument that the court never precluded further consideration of appellant's request (RB 62), fails, as additional requests by appellant would have been in vain.

Respondent argues without a citation to the record that appellant withdrew his request when he found out that his application for an attorney in a support role would involve delay and threaten his complete control in the courtroom. (RB 60, 61.) No record support for this assertion exists. (See 12/20/95 RT 1-8.) Although at other times appellant expressed a wish for a speedy trial, that consideration played no role here.

Respondent also argues that appellant withdrew his motion once the court helped appellant realize that what he was really asking for was investigative assistance to help track down mental health experts. (RB 60-62.) Again, the record does not support this contention. The court did not tell appellant he needed investigative help; rather, it distinguished between appellant's requests for experts, which were properly before Judge Hastings, and his application for attorney assistance, which Judge Hastings had sent to the court. (12/20/95 RT 4.)

The topic of expert witnesses came up twice during the hearing on appellant's request for advisory counsel. After the court told appellant that he "need[ed] a lawyer to tell [him] what to do," but that it lacked the "legal ability" to appoint one, the following exchange took place:

DEFENDANT:	Really I would like to have someone in the capacity of an advisor in --
COURT:	That's – you used exactly the right word.
DEFENDANT:	Not really with the court though. I'm asking Judge Hastings for expert witnesses and psychologists and psychiatrists and - -

COURT: Well, you see, those applications are properly before Judge Hastings,[2] and this, of course, came to Judge Hastings and he sent it back to me because I granted your *Faretta* motion, and he thought it was appropriate – and I agreed with him – that I would hear this application and try to explain to you what's involved.

Because *Keenan* counsel is not a synonym for expert witnesses or investigation or anything of that nature. It is solely limited – none of these are involved in your case. This is our next case, Mr. Morelos – so I'm in a spot, and I don't want to put you in a spot.

(12/20/95 RT 3-4.) The court continued to urge appellant to abandon self-representation, and indicated it might continue the matter to bring in the public defender, appellant's former counsel. (12/20/95 RT 3-5.) It was then that appellant stated, "I would like to have it withdrawn, then, withdraw the motion, if it's –." (12/20/95 RT 5.) The court responded that it was "trying to plead" with him to accept counsel. (*Ibid.*) The colloquy continued:

DEFENDANT: Well, everything's going fine in my preparations, except this (sic) new expert witnesses. I'm not really – I could kind of, you know, work it around, you know but --

COURT: Well, I – again I just hope it's going fine for you, because I just think it's so important that you have representation, and I – I'm so hesitant to have granted your motion, which you have the absolute right to bring, but – I've discussed this matter with you on the record before, and I

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[2] Judge Hastings was assigned to handle the section 987.9 motions. (11/17/95 RT 1-3.)

don't want to plough any ground we've already ploughed, but I – You don't want me to call Mr. Cavagnaro [appellant's former counsel] for you.

DEFENDANT: No. No. No, thank you.

(12/20/95 RT 6.) These are appellant's only statements about expert witnesses during the hearing.

Thus, appellant never stated that he needed help with tracking down expert witnesses and the record does not suggest appellant had a problem doing so. (See, e.g., 1 RT 128 [appellant has new psychiatrist]; 2 RT 388-389 [appellant describes using superior court list to obtain a mental health expert].) Later, when appellant planned to have the competency examiners testify at the penalty phase, there was a discussion about whether the district attorney, defense investigator or court should contact them (2 RT 390-391, 450), but nothing in the record suggests that appellant's problem was tracking down experts.

Rather, as discussed *post*, in section G.2. of this argument, the record indicates that appellant's problem was that he did not understand the appropriate expert or experts for purposes of a penalty phase mitigation case. Determining the appropriate mental health expert or experts for a capital trial is the responsibility of the attorney, not an investigator. (See, e.g., American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003 rev.), guidelines 5.1., Qualifications of Defense Counsel, § B.2.e.; 10.11, The Defense Case Concerning Penalty, § F.2 and commentary thereto at p. 1061 ["Counsel should choose experts who are tailored specifically to the needs of the case. . . ."].)

In summary, the court erroneously believed it lacked authority to appoint advisory counsel for appellant, whether it was to help appellant in general, or for the specific purpose of working with mental health experts.

Respondent argues that in any case, it would not have been an abuse of discretion to deny the application for advisory counsel. (RB 61-62.) Respondent claims that "appellant managed his trial preparations actively and effectively," citing to appellant's requests for supplies, a legal runner, an opportunity to contact witnesses, and asking the court for help when he had trouble getting these things. (RB 59.) Respondent does not address appellant's specific argument and record citations showing that while appellant was able to discuss concrete matters such as supplies and phone privileges, appellant's participation in legal discussions during hearings on pretrial matters was minimal. (AOB 43-44.) Thus, for example, unlike the defendants in *People v. Clark* (1992) 3 Cal.4th 41, 111-112, abrogation on another ground recognized by *People v. Pearson* (2013) 56 Cal.4th 393, 462, and *People v. Crandall* (1988) 46 Cal.3d 833, 864-866 (*Crandall*), abrogated on other grounds in *People v. Clayton* (2002) 28 Cal.4th 346, 364-365, appellant never demonstrated any abilities regarding arguing motions or examining witnesses. (AOB 42-45.)

People v. Sullivan (2007) 151 Cal.App.4th 524, 554-555 (*Sullivan*), cited by respondent (RB 61), supports appellant's position. There, the trial court's refusal to appoint advisory counsel for the trial was not an abuse of discretion, because unlike appellant, the defendant had acted as his own attorney many times in the past and had demonstrated his legal abilities pre-trial when he brought "a plethora of motions that related to admission of evidence, presentation of defenses, [and] discovery." (*Ibid.*) In addition, the *Sullivan* court pointed out that the court had exercised its discretion by

appointing advisory counsel for the limited purpose of investigating and presenting mental defenses. (*Sullivan, supra,* 151 Cal.App.4th at p. 554.) This demonstrated that the trial court understood how to exercise discretion. (*Ibid.*) Following *Sullivan*, the court minimally should have appointed advisory counsel to assist appellant in working with a mental health expert or experts for purposes of presenting mitigating evidence at the penalty phase.

G. Reversal Is Required Under Any Standard of Prejudice

1. The Per Se Reversal Standard

Respondent has not addressed appellant's argument that under the per se reversal standard of *People v. Bigelow, supra,* 37 Cal.3d at p. 744 (*Bigelow*), appellant's conviction and death sentence must be vacated. (AOB 46.) Respondent suggests in a footnote without development that this per se reversal standard may have been impliedly overruled by *Crandall, supra,* 46 Cal.3d at p. 863, which found no error in failing to appoint advisory counsel and then applied the test of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (RB 58-59, fn. 3.) Respondent seems to suggest that because there is no federal constitutional right to advisory counsel, only the *Watson* test is applicable. (*Ibid.*)

However, while this Court in *Bigelow* recognized that there was no federal constitutional right to advisory counsel, it nevertheless applied a per se standard of reversal where a court's failure to appoint advisory counsel (because it failed to recognize its authority to do so), would have been error. (*Bigelow, supra,* 37 Cal.3d at p. 744.) The Court chose this standard because of "the impossibility of assessing the effect of the absence of counsel upon the presentation of the case." (*People v. Good Willie* (2007)

147 Cal.App.4th 695, 715, quoting *Bigelow, supra,* 37 Cal.3d at pp. 744-745.)

In *Crandall*, where, had the court understood it had the authority to appoint counsel and its refusal to do so would not have been an abuse of discretion, this Court held that "a rule of per se reversal is unnecessary and unwarranted." (*Crandall, supra,* 46 Cal.3d at p. 864.) In that circumstance, the *Watson* standard for state law error applied. (*Ibid.*) This was not an implied overruling of *Bigelow*; rather, the Court there applied different prejudice tests to different factual and legal scenarios.

Bigelow is also consistent with California's "miscarriage of justice" standard under Article VI, section 13 of the state Constitution as applied to procedural errors under state law that may or may not have affected the outcome. (See *People v. Blackburn* (2015) 61Cal.4th 1113 [2015 DAR 9457, 9465].) In this regard, "it may be impossible, or beside the point, to evaluate the resulting harm by resort to the trial record, ..." (*Id.* at p. 9466.) *Bigelow* discussed analogous case scenarios on the impossibility of assessing prejudice. (*Bigelow, supra*, 37 Cal.3d at p. 745, citing *In re William F.* (1974) 11 Cal.3d 249, 256 [no realistic measure of prejudice from counsel's nonparticipation in argument is possible where record does not reflect different directions proceedings might have taken and what different results might have obtained] and *People v. Horner* (1975) 15 Cal.3d 60, 70 [denial of free transcript of prior trial does not just taint one piece of evidence but infects all evidence offered at later trial; no way of knowing how transcript could have assisted defense].)

In determining that the per se reversal standard applied in *Bigelow*, the Court found that while the trial judge occasionally offered advice and assistance to the defendant, and his prior counsel helped with getting family members in to testify, no one explained to the defendant how to select a

jury, to object to certain evidence, or how to attack the special circumstances. (*Bigelow, supra*, 37 Cal.3d at p. 744.) Similarly, as explained *post*, advisory counsel could have helped in a variety of respects to assure a more "'orderly legal procedure'" (*People v. Cahill* (1993) 5 Cal.4th 478, 501, citation omitted), and it is impossible to know how the penalty phase result might have differed had one been appointed.

Moreover, "what we know from the record is that . . . this trial . . . could rightly be described as a farce or a sham." (*Bigelow, supra,* 37 Cal.3d at p. 745, internal quotations and citation omitted.) The reason for this in *Bigelow* was that the defendant was incompetent as a defense attorney. (*Ibid.*) The reasons here are explained in Arguments II, III, IV and VII of the opening brief and *ante*, which appellant incorporates by reference herein: due to many errors of the court and prosecutor, and appellant's own attempts to hijack the proceedings in order to get a death sentence, the proceedings were nonadversarial and unreliable. Although appellant points out, *post*, instances where advisory counsel might have advised appellant to do something different, attempting to assess prejudice here "would amount to speculation running riot." (*Id.* at pp. 745-746, internal quotations and citation omitted.)

2. The *Watson* Standard

Respondent argues that there was no prejudice because appellant was only asking for help in tracking down his mental health experts and at trial appellant submitted the reports of experts who had previously examined him.[3] (RB 60-62.) Assuming that respondent is using the *Watson* standard,

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[3] Respondent also states, without citation to the record, that appellant actually used an investigator to track down mental health experts.

(continued...)

reversal also is required. (RB 58, fn. 3 [discussing standards of prejudice but not specifically arguing which standard is applicable here]; *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837 [reasonable probability that error contributed to the outcome]; see also AOB 34, 38.)

As argued above, the record is devoid of evidence that appellant had problems tracking down experts. However, even if this was the case, or assuming that appellant only wanted advisory counsel to assist with presenting psychological or psychiatric expert testimony at the penalty phase, respondent's argument that the admission into evidence of three pre-trial evaluations of appellant was sufficient to show lack of prejudice is incorrect. Appellant told the court during the penalty phase that he had wanted to hire a psychiatrist or other mental health expert for the penalty phase in order to "make sure there wasn't no grounds" for appeal. (2 RT 512.) However, the prior examinations were done to determine appellant's competency and whether there was evidence to support an insanity plea or mental state defense.[4] (AOB 66-68 & fns. 17-19; 2 RT 459-463.) In particular, Dr. Harper's evaluation, done pursuant to Evidence Code section 1017 and initially sent only to defense counsel, was limited and did not encompass appellant's social history. (1 SCT 153, Sealed Court Ex. 32, 12/14/92 Report of Douglas M. Harper, M.D.) None of these prior examiners evaluated appellant for penalty phase purposes, and therefore

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[3](...continued)
(RB 60-61.) Appellant is unable to find this in the record.

[4] Drs. Burr and Echeandia were appointed pursuant to section 1368 to evaluate competency to stand trial. (1 SCT 121, 4 SCT 150.) Dr. Harper was appointed pursuant to Evidence Code section 1017. (1 SCT 107.)

could not have assisted him in covering potential grounds for appeal in that regard.

Moreover, appellant did not understand the relevant legal grounds for, or legal significance of, mitigation, and was unable to navigate the legal thicket needed to obtain and present an appropriate expert or experts. For appellant, the three reports done about him were "all the same." (2 RT 461.) Without advisory counsel, appellant instead received legal advice from a psychiatrist whom the court appointed. (3 CT 525-526.) According to appellant, this psychiatrist "entrapped" himself by talking to lawyers, who advised him not to take the case so appellant would get reversed on appeal because "a bunch of psychiatric points or whatever weren't covered." (2 RT 386-387.) The psychiatrist then told appellant that he needed a full "diagnosement (sic)," which would cost $90,000 for psychiatric, medical and neuropsychological evaluations, investigation, and a social history assessment prior to testifying. (2 RT 387-388.) Further, appellant recounted, the psychiatrist told him it would be grounds for reversal on appeal if the county refused the funds. (2 RT 388.)

With this advice in hand, and wanting to eliminate grounds for appeal, appellant proposed instead that the doctors who previously examined him and issued reports regarding competency, insanity and guilt phase mental state, testify instead. (3 CT 562; 2 RT 386-391.) Ultimately, however, appellant merely submitted the three reports and told the court that his history, including his father's abuse of him, was not "directly related" or significant and that "the psychology of it, . . . is bullshit." (2 RT 459-463, 513.)

Advisory counsel could have helped appellant to determine the kind of expertise that was "reasonably necessary" (§ 987.9 (a)), at the penalty

phase, and then obtain that help. Advisory counsel also could have explained to appellant the imperative of mitigation at a capital sentencing. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [only through process requiring sentencer to "consider[] in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind," can capital defendants be treated "as uniquely individual human beings"].) Counsel could have helped appellant understand why his personal history most likely was related to his criminal acts and that, in any case, a direct relationship was not required. (See, e.g., *California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.) [evidence about defendant's background and character is relevant because of society's belief that defendants who commit criminal acts that are attributable to disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse]; *Eddings v. Oklahoma* (1982) 455 U.S.104, 112; *Tennard v. Dretke* (2004) 542 U.S. 274, 289.)

Advisory counsel could have explained all this along with the reasons why such evidence would contribute to a fairer and more reliable outcome, and thus be more likely to be upheld in postconviction proceedings. Advisory counsel in this situation would not be in the conflicted situation of counsel who is asked simply to help a defendant get the death penalty. (See, e.g., *People v. Alfaro* (2007) 41 Cal.4th 1277, 1298 [defense counsel feared "irreconcilable" conflict where he refused to consent to defendant's desire to enter unconditional guilty plea].) Rather, counsel could have helped appellant obtain and present a penalty phase mitigation case, contributing to a fairer trial and more reliable outcome,

which also would go along with appellant's stated goal of preventing a reversal later down the line.

Advisory counsel may also have played a role in educating the court on the proper way to assess mitigating evidence, such that the court would not have misapplied several statutory mitigating factors, transformed them into aggravating factors, conflated the standard for sanity with those for mitigating factor (d), thus holding appellant to the higher standard of the former; and otherwise relied upon nonstatutory aggravating evidence in reaching its verdict. (See Argument IV.C.2.b., *post*, which appellant incorporates by reference herein.)

While there are various reasons why this may not have come to pass, resolution of such potential issues is not required under the *Watson* test. Rather, all that is required is a reasonable probability that appellant could have been prejudiced in the manner described. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.) That is, had advisory counsel been appointed to assist appellant, including with mental health experts at the penalty phase, thereby also likely educating the court about the correct functioning of mitigating evidence, it is reasonably probable that appellant's trial would have been fairer and more reliable, and the outcome different.

For all the reasons above and in the Opening Brief, appellant's conviction, the special circumstances findings and death sentence must be reversed.

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II.

ALLOWING APPELLANT TO REPRESENT HIMSELF, WAIVE A JURY TRIAL AND JOIN THE PROSECUTION TEAM TO ACHIEVE A DEATH SENTENCE WAS TANTAMOUNT TO ACCEPTING A GUILTY PLEA, IN VIOLATION OF PENAL CODE SECTION 1018 AND STATE AND FEDERAL CONSTITUTIONAL LAW

Appellant argued that by waiving counsel and his right to a jury trial on guilt and penalty, testifying extensively against himself and otherwise joining forces with the prosecutor to assure a guilty verdict, true findings on the special circumstances and a death sentence, appellant was allowed to do what section 1018 prohibits for defendants charged with capital offenses, i.e., plead guilty without the consent of counsel, in violation of the Sixth, Eighth and Fourteenth Amendments and art. I, sections 7, 15 and 17 of the California Constitution. Respondent's arguments to the contrary should be rejected.

Noting that this is an "unusual case," respondent concedes that the trial "shared certain attributes with a 'slow plea.'" (RB 63.) Respondent argues nevertheless that it was not a slow plea submission on the preliminary hearing transcript, because the People were put to their proof and appellant actively participated. (RB 63.) However, respondent has not countered appellant's discussion of the applicable case law and relevant facts. (See AOB 55-69.) Moreover, respondent's conclusory statement does not address the point that what is tantamount to a slow plea is determined by what happened at trial, rather than by broad labels. (AOB at 55-57, discussing, inter alia, *People v. Wright* (1987) 43 Cal.3d 487, abrogated on another ground in *People v. Mosby* (2004) 33 Cal.4th 353.) Similarly, it is not the fact that appellant participated, but how he

participated that determines whether the trial was tantamount to a guilty plea. (*Ibid.*; AOB 55-69.)

Appellant did not assert that he should have been provided counsel to prevent him from committing state-assisted suicide. (RB 69.) Rather, he argued that the record shows that his attempts to plead guilty were in the service of getting sentenced to death, rather than to gain a tactical benefit at the penalty phase. (AOB 69-70, citing *People v. Alfaro, supra*, 41 Cal.4th 1277, 1302.) This Court has held that the policy against state-aided suicide is not contravened when, despite the fact that the defendant seeks the death penalty, the death judgment meets the constitutional standard for reliability as described in *People v. Bloom* (1989) 48 Cal.3d 1194, 1228. (See, e.g, *People v. Stansbury* (1993) 4 Cal.4th 1017, 1063-1064, overruled on other grounds in *Stansbury v. California* (1994) 511 U.S. 318; *People v. Bradford* (1997) 15 Cal.4th 1229, 1371.) However, as argued in Arguments III and IV of the Opening Brief and *post*, which appellant incorporates by reference herein, the state – in the form of the prosecutor and court – did in fact assist appellant in reaching his goal of a death sentence. Thus, the state failed to assure that the death sentence transcended appellant's suicidal desires because it collaborated with appellant to achieve it.

Respondent argues that the "many attempts" in automatic capital appeals to create rules requiring reversal after a self-represented defendant has elected to proceed in a manner different from an attorney have all failed. (RB 63.) Respondent does not spell out what these attempts were, but regardless, the law of the state for over thirty years has been that a defendant cannot avoid section 1018 by discharging his attorney in order to represent himself and enter a plea without the consent of counsel, even if found legally competent to do so. (*People v. Massie* (1985) 40 Cal.3d 620,

625; *People v. Mai* (2013) 57 Cal.4th 986,1055, citing *People v. Chadd* (1981) 28 Cal.3d 739, 747-748, and *People v. Alfaro, supra,* 41 Cal.4th at pp. 1299-1302; see also *People v. Boyce* (2014) 59 Cal. 4th 672, 702-703.) Here, appellant represented himself because his lawyer stood in the way of his desire to plead guilty, and as soon as he gained pro per status, he called the district attorney to ask him to agree to a guilty plea. (7/6/93 RT 8; 7/19/95 RT 10-11, 13; 7/27/95 RT 29-30; see generally AOB 48-50.)

Moreover, unlike the situation in *People v. Mai, supra,* 57 Cal.4th 986, 1055, where defense counsel consented to a slow plea as a "competent and reasonable" tactical decision, appellant "waive[d] his trial rights for the purpose of inviting a death judgment." (*Ibid.*) And at the proceedings that followed there was a far greater risk of "erroneously imposing a death sentence" (*Chadd, supra,* 28 Cal.3d at p. 751), than if counsel *had* consented to a guilty plea, because appellant actively assisted the prosecution in making its case, including supplying questionable evidence of the intent element of the torture special circumstance and testifying to much irrelevant and/or unreliable aggravating evidence at the guilt phase. (AOB 60-63; Argument III and IV of the opening brief and *post.*)

This case also differs from *People v. Cunningham* (2015) 61 Cal.4th 609, where the defendant claimed that his counsel's concession of guilt as to all charges and failure to present affirmative witnesses, evidence and defenses was the functional equivalent of a "slow plea." (*Id.* at p. 637.) The Court held that the defendant's stipulation to a bench trial for the guilt phase was not tantamount to a plea of guilty even though he waived a jury, because during the court trial, the defendant exercised various other rights in that he confronted, cross-examined, attempted to impeach prosecution witnesses, and exercised his right against self-incrimination by not

testifying. (*Id.* at pp. 638-639.) Additionally, counsel did not concede guilt, but required the prosecution to prove every element of every crime, and tried to raise reasonable doubt in various areas. (*Id.* at p. 639.) Appellant's actions were dissimilar: in addition to waiving a jury, he waived cross-examination, or cross-examined to enhance the prosecution's case and strengthen, rather than impeach, the credibility of its witnesses; he conceded every charge and the special circumstances; and he incriminated himself at every opportunity. (AOB 59.)

Respondent also contends that even if the trial was a slow plea, there was no error because the requirements of a plea pursuant to *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, were met in appellant's petition to represent himself. (RB 63-64, citing 2 CT 404-413;[5] see *Bunnell v. Superior Court, supra,* 13 Cal.3d at p. 605 [when defendant agrees to submission procedure, i.e., guilty plea or submission on preliminary hearing transcript, record must reflect he has been advised of and personally waived rights to jury trial, confrontation and privilege against self-incrimination].) However, whether appellant waived trial rights is irrelevant to the issue at hand, because section 1018 prohibits a self-represented defendant from pleading guilty to a capital offense and this Court has declined to recognize any exceptions to the plain language of the statute. (See AOB 52-55 and cases cited therein; *People v. Mai, supra*, 58 Cal.4th at p. 1055.)

Citing *Faretta v. California* (1975) 422 U.S. 806, 835-836, *People v. Clark* (1990) 50 Cal.3d 583, and *People v. Bloom* (1989) 48 Cal.3d 1194, respondent suggests that appellant merely chose self-representation, and

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[5] See AOB pages 58-59 for the record references to appellant's waivers.

then declined to present a mitigation case, as was his right. (RB 62-64.) This bare characterization does not describe what in reality occurred below. (AOB 58-68; see also Argument IV., C.2., *post*, which appellant incorporates by reference herein.)

As the trial court recognized, appellant's trial was a "slow plea." (2 RT 533.) A capital conviction obtained in violation of section 1018 must be reversed without reference to prejudice. (*People v. Massie, supra*, 40 Cal.3d at p. 625.) Because appellant's actions effectively undermined his counsel's unequivocal withholding of consent to his guilty plea to a capital offense (10/4/93 RT 4-5), the murder conviction and special circumstance findings must be reversed. As a result, the death judgment predicated on those convictions must also be reversed.

Just as section 1018 furthers the state's interest in reliable, nonarbitrary capital sentencing determinations (AOB 51-52, citing *People v. Chadd* (1981) 28 Cal.3d 739, 750), under the Eighth Amendment appellant had a right to a reliable, nonarbitrary sentencing determination. (See, e.g., *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330; *People v. Chadd, supra*, 28 Cal.3d at p. 750.) Reliability in a capital case is served by counsel's consent to a guilty plea as well as the adversary process itself, through cross-examination and the presentation of defense evidence and argument. (*United States v. Cronic* (1984) 466 U.S. 648, 655-656.) The absence of these protections in this case undermines the reliability of appellant's convictions and the death judgment, in violation of the Eighth Amendment and the Sixth and Fourteenth Amendments. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [because of the "significant constitutional difference between the death penalty and lesser punishments," Supreme Court will invalidate procedural rules that diminish the reliability of the

guilt determination in a capital case]; *United States v. Cronic, supra*, 466 U.S. 656-657 ["When a true adversarial criminal trial has been conducted . . . the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."].)

For the reasons above and in the opening brief, appellant's conviction, the special circumstances findings and death sentence must be reversed.

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III.

THE COMPLETE BREAKDOWN IN THE ADVERSARY PROCESS AT APPELLANT'S TRIAL VIOLATED DUE PROCESS AND REQUIRES REVERSAL

Respondent has not disputed that the Court can address these claims. (See AOB 104-111.)

Respondent argues that appellant's right to waive certain procedural rights, present no defense, and take the stand to confess guilt and request imposition of the death penalty, controls the results here. (RB 64-65, 70.) Appellant elsewhere takes on these points, and he incorporates by reference herein those arguments, i.e., Arguments II, IV, V, and VI of the opening brief and *post.* In this argument, however, appellant described the constitutional principles underlying the adversary system, heightened need for reliability in a capital trial, and role of the judge and prosecutor. (AOB 74-79.) Appellant then showed how, under these principles and the specific facts of this case, the proceedings lacked the heightened degree of reliability demanded of death verdicts and the adversary system broke down, leading to a fundamentally unfair trial.

Respondent argues, in a circular fashion, that while adversarial testing and reliability in death penalty determinations are both "positive social good[s]," they are not jeopardized where a defendant "who is actually guilty and deserving of the death penalty," testifies and explains his motivations. (RB 65.) Of course, adversarial testing and reliability are more than social goods; they are bedrocks of our criminal justice system and capital jurisprudence. (AOB 74-76.) In addition, respondent's argument that appellant only testified about his motivations, which could otherwise be inferred from the circumstantial evidence, is incorrect.

Appellant's testimony was necessary for the mental state element of the torture special circumstance, which otherwise could not be proved beyond a reasonable doubt based upon appellant's confessions. Appellant's testimony also supplied significant additional factor (a) evidence (AOB 87-89, 95-96; 2 RT 273-274, 275-276, 278, 286-287, 309, 312, 313-314, 315-316), including some relied upon by the prosecutor during argument (AOB 102; 2 RT 522, 524).

Respondent argues that appellant had an "absolute right" to control his case. (RB 65.) Defendants do generally have a right to testify in their own defense. (See *Rock v. Arkansas* (1987) 483 U.S. 44, 51-53, 55 [recognizing right under due process and compulsory process guarantees to present evidence in one's defense under the Fifth, Sixth, and Fourteenth Amendments]; *People v. Robles* (1970) 2 Cal.3d 205, 215 [recognizing right under California law].) But, even assuming that right encompasses testifying *against* oneself, it is not absolute. Rather, it encompasses only "the right to present *relevant* testimony." (*Rock v. Arkansas, supra*, at p. 55, italics added; see also, e.g., *People v. Lancaster* (2007) 41 Cal.4th 50, 101-102 [trial court properly precluded defendant from testifying to irrelevant matter at penalty phase without violating constitutional right to testify].)

Thus, appellant's right to testify did not include irrelevant testimony solicited by the prosecution. (AOB 94-96, 116, 118, and Argument IV, *post*.) This includes appellant's testimony on lack of remorse (2 RT 314; *People v. Jones* (1998) 17 Cal.4th 279, 307 [remorse irrelevant at guilt phase unless door opened during defense case-in-chief]); and prior uncharged misconduct (2 RT 275-276 [carried gun day before murder in case he had to shoot it out with police]; 278 [asking appellant why he had

not kidnaped someone else previously]; Evid. Code, §§ 761, 1101, subd. (a)); *People v. Whisenhunt* (2008) 44 Cal.4th 174, 203 [§ 1101 prohibits admission of other-crimes evidence for purpose of showing defendant's bad character or criminal propensity].)

Appellant's right to testify also did not cover his irrelevant and noncriminal fantasies about violence he wanted to inflict on others, which the prosecution elicited at both phases of trial (2 RT 274, 505; Evid. Code, § 422 [defining a criminal threat]); appellant's testimony that he wanted to kill the individuals whose names were marked with an "X" in his phone book (2 RT 278, 313); or other testimony that the prosecutor solicited through leading questions about appellant's "inten[t]" to kill Cota as part of his "unfinished business." (1 RT 60.) This testimony was improper, both as evidence on the circumstances of the crime under factor (a), and as other crimes evidence under factor (b). (See *People v. Phillips* (1985) 41 Cal.3d 29, 73-74 [defendant's admissions months earlier that he wanted to swindle people and then kill them not admissible as evidence of casual attitude toward, and readiness to commit, murder under factor (a) or prior criminal activity under factor (b), where murder conviction based upon defendant conning two people to give him money, and then killing one and attempting to kill the other].)

Furthermore, the right to present even relevant testimony is "not without limitation" and "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" (*Rock v. Arkansas*, *supra*, 483 U.S. at p. 55, quoting *Chambers v. Mississippi* (1973) 410 U.S. 295.) The other interests at issue here, e.g., the adversary system, due process, Eighth Amendment requirements for heightened procedural reliability and the duties of the court and prosecutor, should all have served

to limit appellant's actions and testimony as appellant has argued in the opening brief and *post*.

Respondent also argues that appellant relied upon ineffective assistance of counsel cases to make his due process argument (RB 65), but this ignores the underlying point of appellant's citations, i.e., that a criminal defendant must be afforded a bona fide and fair adversary adjudication. (*People v. McKenzie* (1983) 34 Cal.3d 616, 626, abrogated on other grounds in *People v. Clayton* (2002) 28 Cal.4th 346, 365; AOB 74-75.) Although appellant waived his right to counsel, he did not waive his rights to due process, fundamental fairness and a fair trial. (AOB 104-108.) The Court should also reject respondent's bald assertion that because a defendant is guilty, deserves the death penalty, confessed, and testified he would continue to commit crimes if not executed, there can be no issues regarding adversarial testing and reliability underlying the conviction and sentence. (RB 65.)

C. The Adversary System Broke Down When the Prosecutor Improperly Gave Appellant a Road Map for His Guilt Phase Testimony That Led Appellant to Change His Earlier Statements and Testify to Fill in Evidentiary Gaps in the Prosecution's Favor

Appellant argued that at trial, the prosecutor improperly prepared him to testify, and as a result, appellant changed his pretrial statements, instead testifying to dubious and untrustworthy information so as to fill in evidentiary gaps necessary for the torture murder special circumstance. (AOB 81-90.) Respondent counters that the colloquy that preceded appellant's testimony covered only the scope and manner of it (RB 67), but it is the content of the colloquy which is at issue. Appellant specifically stated that he wanted the prosecutor to question him regarding "a line of

questioning that we both more or less agreed [] would cover issues not already covered." (2 RT 268-269.) The prosecutor then clarified that he had told appellant that "there are certain areas I would like to cover concerning the torture aspects of the case" as well as factors regarding the crime. (2 RT 269.) The colloquy ended with appellant identifying "the torture of Mr. Anderson" as a point that needed to be covered, specifically that appellant had stated earlier that he tied up Anderson to keep him from escaping. (2 RT 269; see 2 SCT 62 [during first interrogation, asked if had injured Anderson at the hotel, appellant replied only that "he might have had a small puncture wound"]; see also 1 RT 49 [appellant tells Picklesimer he pricked victim with a knife to let him know he was still there].)

Appellant then testified in narrative form for less than two pages, to support the intent element of the torture special, which was lacking in his pretrial confessions (AOB 87-89; 2 RT 269-270), his intent to kill Anderson and that he raped Anderson despite saying otherwise during his interrogation. (2 RT 270.) Respondent's argument (RB 67), that appellant's trial narrative was neither elicited nor manipulated but based upon appellant's own view of what needed attention, simply does not hold water.[6]

Respondent argues that at the preliminary hearing, defense counsel only sought to clarify certain "snippets." (RB 67.) However, the record shows that defense counsel conducted cross-examination and argument so as to undermine the special circumstances. (AOB 81-84.) Respondent next

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[6] For the same reason, appellant disagrees with respondent's characterization of the facts that appellant began his testimony by filling in gaps "*he* perceived to remain" after other witnesses testified. (RB 26, italics added.)

argues generally that appellant took "selective snippets" from appellant's lengthy pretrial statements out of context (RB 66-68) "in a way that does not advance the truth-finding function of trial or appeal." (RB 67.) Appellant disagrees; he has shown a clear trail from the facts and issues in dispute at the preliminary hearing to changes in appellant's account of events at trial. Respondent never refutes, via record citations, the specific comparisons appellant made between his pretrial statements and trial testimony regarding the facts underlying the robbery, sodomy and torture special circumstances. (RB 66-68; AOB 81-90.) The Court therefore should reject respondent's argument that the prosecution had "precious few 'needs'" once appellant confessed. (RB 68.)

The speculative argument that at the time of trial appellant was simply being more honest with himself (RB 68), must be rejected for these same reasons, and because the prosecution itself thought that appellant's statements made near the time of the crime more accurately reflected his mental state at the time of the crime than later ones would. (AOB 89-90; 2 CT 307-308.)

Respondent appears to have misunderstood appellant's arguments when it states, without citation to the opening brief, that "distaste for the result is causing represented appellant to ascribe undeserved motives to officers of the court who supported his exercise of the right to represent himself at trial." (RB 70.) Assuming "officers of the court" refers to the prosecutor below, appellant did not ascribe motives to him. Rather, appellant (1) pointed out the bedrock principle that a prosecutor, who exercises the sovereign power of the state in its interest to see that justice is done, must attempt to win fairly (AOB 78-79, 97-98); (2) argued that the prosecutor erred in certain respects (AOB 91-92, 102-103; see *People v.*

Centeno (2014) 60 Cal.4th 659, 666-667 [prosecutorial error is more apt term than misconduct because latter suggests prosecutor must act with a culpable state of mind]); and (3) argued that the prosecutor's actions contributed to the breakdown in the adversary system at appellant's trial. (See, e.g., AOB 73-74, 86, 92, 98, 104, 112.) These are not ad hominem attacks, but proper arguments on appellant's behalf.

What is at issue is the prosecutor's position as a party opponent. For this reason, the prosecutor should not have conferred, nor been permitted to confer, with appellant off the record about waiving the right to a jury trial and to compulsory process and then announce the results, or shape appellant's testimony to fit the prosecution's needs. (AOB 61-62, 81-92.)

D. The Breakdown in the Adversary System Meant the Evidence Was Not Tested

1. The Prosecutor Presented Misleading Evidence

At trial, the pathologist testified only about bruising; the prosecutor asked no questions about the overlap of lividity and bruising; and the prosecutor pressed the pathologist to opine that the bruising was extensive and painful. (1 RT 83-84, 87-92.) Based upon changes to the same pathologist's preliminary hearing testimony, appellant argued that the prosecutor presented misleading evidence to support the torture special circumstance. (AOB 91-92.)

Respondent argues that the prosecutor properly focused on relevant testimony regarding bruising, rather than lividity, which though also present, was irrelevant and not inconsistent. (RB 68-69.) Appellant disagrees. At the preliminary hearing, the pathologist testified that there appeared to be bruise marks on the victim's genitals, which were partially superimposed by postmortem lividity, and he could not determine what was

caused by lividity and what was caused by bruising. (AOB 91; 1 CT 45-47.) He did not perform further testing that would have allowed him to make this determination. (1 CT 42-44, 48.) Without knowing how much of what looked like bruising might instead have been lividity (1 CT 42, 44-48), it is not possible to know whether the prosecutor's characterization at trial of the bruising as "extensive" was accurate. (1 RT 90-91.) The pathologist's preliminary hearing testimony that the bruising he saw could have been caused in as little time as seconds (1 CT 28), also undercut the prosecutor's premise that the "extensive injury" demonstrated the intent to cause pain. (1 RT 91-92.)

Thus, contrary to respondent's argument, the prosecution, which had the burden of proof, failed to obtain and present evidence that would have determined the extent of bruising on the victim, ignored relevant evidence and elicited testimony that was at least misleading. Nevertheless, this testimony became a key component of the prosecutor's argument at trial that the torture special circumstance was established by the intentional infliction of extreme pain to Anderson for the period of time that appellant was out of the room "for the purpose of inflicting the pain" as well as to persuade Anderson not to yell out and to give appellant his ATM pin number. (2 RT 323.)

2. The Court Failed to Impose Statutory Controls During the Prosecutor's Questioning of Appellant

Appellant and the prosecutor had the same goals below: a guilt verdict, true findings in the special circumstances, and a death sentence. Appellant argued that the court's failure to utilize its authority permitted the prosecutor to examine appellant outside the scope of direct examination and elicit irrelevant and unreliable testimony as to factor (a) permitted appellant

to make dubious admissions to fill in the evidentiary gaps for the torture special circumstance. (AOB 94-96; Evid. Code, §§ 761, 352.)

Appellant argued that the court, using its authority under the Evidence Code and case law, therefore should have disallowed the prosecutor's leading questions when questioning appellant. Respondent recognizes that the purpose of leading questions on cross-examination is to "probe the weaknesses in the adverse party's position," but not that the interests of appellant and the prosecution were not adverse. (RB 69.) However, even where a defendant "voluntarily offer[s] himself as a prosecution witness," the prosecutor should not be able "to elicit the information from him by means of leading questions and similar forms of cross-examination." (*People v. Robinson* (1964) 61 Cal.2d 373, 393; see also Evid. Code, § 773, subd. (b); AOB 94.) Notably, even respondent recognizes that appellant's answers were shaped by, inter alia, the questions he was asked. (RB 67.)

Respondent's argument that the trial court complied with the rules of evidence when it permitted appellant to testify by narrative followed by cross-examination (RB 69), misses the point. The court had the ability and duty to control the proceedings to make them effective for the ascertainment of the truth. (AOB 93; *People v. McKenzie, supra*, 34 Cal.3d at p. 626; accord, *People v. Sturm* (2006) 37 Cal.4th 1218, 1237 [court has duty to see that justice is done; under § 1044, court has statutory duty to control trial proceedings, including limiting introduction of evidence and argument to relevant and material matters].) Moreover, even though, as respondent argued (RB 71), the court stated it did not consider appellant's testimony regarding prior bad acts where the prosecution did not present a witness (2

RT 540), it did not discount the irrelevant and unreliable speculative factor (a) evidence it heard. (AOB 95-96, 102-103.)

For instance, appellant initially could not recall whether Anderson was reluctant to give appellant his pin number. (2 RT 287-288.) But in response to the prosecutor's questions about whether appellant inflicted pain after tying Anderson up, appellant testified that he "might have" inflicted pain to make sure Anderson gave him the pin number, and then assented to the prosecutor's suggestion that he intended to inflict "extreme pain" on Anderson to make sure he gave the right PIN number. (2 RT 298, lines 2-4, 5-10.) Similarly, appellant went from testifying that he "might" have had his knife drawn during oral copulation, to "believes" he had, and then was "very sure" he had. (2 RT 289, lines 17-21.) Also, through leading questions, the prosecutor elicited appellant's testimony that "in my mind I was taunting" Anderson (2 RT 285, lines 25-27), that he was angry at Anderson (2 RT 286), and then that Anderson would have died if he had struggled and fallen off the bed. (2 RT 296-297.)

Appellant also speculated that he might have backhanded Anderson, might have punched him "or something," and might have yanked on the bindings and probably cussed at him. (2 RT 303-304.) And despite initial lack of recall, appellant agreed with the prosecutor that Anderson spoke during the sex acts; appellant then told him to "shut up." (2 RT 290, lines 23-28.)

Appellant's memory of events was frequently poor. Nevertheless, appellant was permitted to testify that although it had been many years, he "believe[d]" he showered and put on work clothes before leaving his motel room for the bar, and "believe[d] he did this so he would not get blood on his good clothes if there was a struggle. (2 RT 276-277.) Appellant also

"believe[d]" he had all his weapons and extra ammunition when driving to Mt. Hamilton in case he was pulled over, or had to hide out and have a shoot-out. (2 RT 306, line 3-5.) Appellant was uncertain about whether or when he took "crank" (2 RT 279, line 7; 285, lines 5-7), and about events or the sequence of events with Anderson in the hotel room. (See, e.g., 2 RT 284, lines 11-12, 16-17, 23, 27; 285, lines 10-13; 288, lines 6, 19-27; 291, lines 6-7; 295, lines 4, 7; 302, lines 8-11; 304, lines 2-5.)

This and other speculative testimony from appellant about what might have happened was irrelevant at both phases of trial. Evidence based on conjecture or speculation is irrelevant because it has no tendency in reason to resolve questions in dispute. (*People v. Chatman* (2006) 38 Cal.4th 344, 382; see also *People v. Stitely* (2005) 35 Cal.4th 514, 549-550 ["speculative inferences, are of course, irrelevant"].) Further, the evidence should have been inadmissible. (See, e.g., *People v. Gonzales* (2012) 54 Cal.4th 1234, 1259 [speculative, weak evidence to show possible third party culpability inadmissible]; *People v. Loker* (2008) 44 Cal.4th 691, 727-731 [trial court properly limited mitigation testimony that was irrelevant, speculative or inadmissible].)

Respondent further argues without citation to the record that the prosecutor did not elicit anything that was not "touched upon" in appellant's taped confessions and at the preliminary hearing. (RB 67.) This Court should reject this argument and the assumptions behind it.

First, respondent incorrectly assumes that if something was mentioned during appellant's confessions or the preliminary hearing, that evidence was relevant, admissible and reliable. As just described *ante*, and in the opening brief, this assumption is incorrect.

Second, respondent assumes that appellant's trial testimony always confirmed his prior statements. This is also incorrect. Appellant's immediate recollections regarding significant matters during his confessions were sometimes different than his later ones and trial testimony. For instance, appellant told the officers during his first confessions that he tied up Anderson very tightly so that he could go leave the motel room, but he could not recall why he left; perhaps it was to get something to eat. (2 SCT 78 [Ex. 11A] .) Though he later said he left to go to the ATM machine (2 SCT 142 [Ex. 12AA]; 2 CT 302, 331), appellant next told his sister that he tied the man's genitals because the man was making fun of him. (1 RT 185.) Finally, as stated above, appellant testified at trial that he tied the ligatures to torture the victim. (2 RT 269-270.)

Appellant also told his interrogators that as soon as he saw Anderson in the bar, as well as when he showed Anderson his gun there, he intended to kill him, "kinda for the fact that if he burned me once, he'll definitely do it again." (2 SCT 150 [Ex. 12AA].) This differed considerably from appellant's trial testimony. (See, e.g., 2 RT 271-272 [intent when taking Anderson from bar was to rob and kill him].)

The court did not exclude consideration of this unreliable testimony from appellant (see 2 RT 532-540), and in fact noted when rendering its penalty phase decision that in addition to admitting his crimes, the enhancement, and the special circumstances, appellant gave "testimony to justify the finding for the court to impose the death penalty." (2 RT 533.)

Appellant had the fundamental constitutional right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution. (*United States v. Agurs* (1976) 427 U.S. 97, 107; *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 205.) "It was the duty of the

court . . . to see that . . . [appellant was] denied no necessary incident of a fair trial." (*Powell v. Alabama* (1932) 287 U.S. 45, 52.) The trial court had both the duty and the discretion to control the conduct of the trial. (*People v. McWhorter* (2009) 47 Cal.4th 318, 373.) The court below failed to follow specific relevant authority or to exercise discretion to comply with its responsibility to assure that appellant's trial was reliable and fundamentally fair.

J. The Breakdown in the Adversary Process Constituted Structural Error

Respondent contends that no error occurred but has not disputed or addressed appellant's prejudice arguments. (See RB 70-71.) Appellant does not yet have the benefit of this Court's opinion in *People v. Grimes*, No. S076339, rehg. granted March 11, 2015, but urges this Court to find that as to prejudice for federal constitutional error, the state's failure to brief the matter constitutes an implicit concession that prejudice exists. (See, e.g., *United States v. Pablo Varela-Rivera* (9th Cir. 2002) 279 F.3d 1174, 1180; see also *People v. Johnson* (1980) 26 Cal.3d 557, 574 [holding that defendant's silence on the issue of prejudice in a speedy trial claim on appeal conceded its absence].)

As for state law error, this Court must comply with the mandate of the California Constitution that no judgment be set aside unless there has been a "miscarriage of justice" (Cal. Const., art. VI, § 13), which this Court has read to mean that defendants typically need to show there exists a reasonable probability that they would have obtained a more favorable result if the error had not occurred. (*People v. Blackburn* (2015) 61 Cal.4th 1113 [2015 DAR 9457, 9465].) Appellant submits that the proper approach is that envisioned by the Rules of Court. That is, in the absence of

respondent contesting appellant's prejudice argument, the Court should limit its role to assessing appellant's argument in light of record of the case, to determine if it demonstrates a miscarriage of justice. (See Cal. Rules of Court, rule 8.360 (c)(5)(B).)[7]

2. Under Any Standard, Appellant's Conviction and Death Sentence Must Be Reversed

Appellant argued that together, the errors here fall within the class of fundamental constitutional errors that defy analysis by harmless error standards. (AOB 111-113, citing *People v. Anzalone* (2013) 56 Cal.4th 545, 554; *Never v. United States* (1999) 527 U.S. 1, 8-9.) Such errors affect the framework within which the trial proceeds, rather than being errors in the trial process itself, even if they do not "*always* or *necessarily* render a trial fundamentally unfair and unreliable . . . ." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149, fn. 4 (collecting cases), original italics.) As such, unlike trial errors, they cannot be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless. (*Id.* at p. 148; *People v. Anzalone, supra,* 56 Cal.4th at pp. 553-554 [trial errors add or subtract from the record so are amenable to harmless error analysis].)

Here, appellant, the prosecutor and court all worked hand in hand to reach a death sentence. This nullified appellant's constitutional rights to a fair trial conducted by a prosecutor who should have made "certain that the truth is honored to the fullest extent possible during the course of the

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[7] Rule 8.360 (c)(5)(B) provides that if respondent fails to timely file a brief even after receiving 30 days notice, "the court will decided the appeal on the record, the opening brief, and any oral argument by the appellant."

criminal prosecution and trial" (*In re Sakarias* (2005) 35 Cal.4th 140, 159, citation omitted), and presided over by an impartial judge within a functioning adversary system. (*People v. McKenzie, supra,* 34 Cal.3d at pp. 626-627.) These were rights that appellant never waived. (AOB 104-111.) The pervasive nature of the constitutional violations went to "the very reliability of [] [appellant's] criminal trial as a vehicle for determining guilt or innocence" and as such, are reversible per se. (*People v. Anzalone, supra,* 56 Cal.4th at p. 554.)

Harmless error analysis in this context "would be a speculative inquiry into what might have occurred in an alternate universe." (*United States v. Gonzalez-Lopez, supra,* 548 U.S. at p. 150.) For example, where a defendant was barred from his counsel of choice, the high court found that "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceeding." (*Ibid.*) The court found that assessing prejudice in that situation was much more difficult than when counsel's effectiveness was questioned. (*Id.* at pp. 150-151.) For instance, different counsel might cross-examine with a different style or questions, and intangibles such as the relationship with the prosecutor or appeal to the jury could play a role. (*Id.* at p. 151.)

Similarly, here, one would need to reconstruct appellant's trial as taking place in an alternate universe to assess prejudice, one where the prosecutor had not solicited and presented misleading testimony as to the torture special circumstance (AOB 91-92, 81-90), the court had enforced evidentiary rules (AOB 94-96), and the court, rather than ignoring the fact that appellant apparently decided not to call his own witnesses at the penalty phase after the conferring with the prosecutor (2 RT 326, 328), had

exercised the "the serious and weighty responsibility" to determine "whether there is an intelligent and competent waiver by the accused" (*Johnson v. Zerbst* (1938) 304 U.S. 458, 465; see also *People v. Fuiava* (2012) 53 Cal.4th 622, 720 [assuming without deciding that the 6th Amend. right to confrontation applies at the penalty phase].)

Moreover, the court did try to assist appellant when he proposed a plan to eliminate appeal issues and asked for a speedy sentence. (2 RT 391, 451.) Would it have made a difference if instead the judge had taken all steps necessary to insure the fullest protection of appellant's right, appearing pro se, to a fair trial at every stage of the proceeding? (*Von Moltke v. Gillies* (1948) 332 U.S. 708, 722.) Under these circumstances, this Court cannot divine how the trial would have proceeded, or the final outcome, without the pervasive unfairness and lack of reliability of appellant's entire trial. This is especially true given research findings that "judges are generally unable to avoid being influenced by relevant but inadmissible information of which they are aware." (Wistrich, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding* (2005) 153 U. Pa. L.Rev. 1251, 1251; see also Chortek, *The Psychology of Unknowing: Inadmissible Evidence in Juries and Bench Trials* (2013) 32 Rev. Lit. 117, 130-134 [discussing reasons why judges may be worse than juries at ignoring inadmissible evidence].)

Similarly, under the California constitutional harmless-error provisions, some errors are not susceptible to the *Watson* "reasonably probable" standard, "and may require reversal of the judgment notwithstanding the strength of the evidence contained in the record in a particular case." (*People v. Cahill* (1993) 5 Cal.4th 478, 493; AOB 113.) This is especially true where the errors involve a lack of counsel or a partial

adjudicator. (See *People v. Anzalone, supra*, 56 Cal.4th at p. 554.) Here, the difficulty of harmless error analysis described above also deprived appellant of "the constitutionally required 'orderly legal procedure'" (*ibid.*, citation omitted), and constituted a miscarriage of justice such that reversal is required under state law.

The result is the same if the Court treats the federal constitutional errors herein as errors in the trial process and applies the *Chapman* harmless error rule. (*Chapman v. California* (1967) 386 U.S. 18.) The *Chapman* burden of proof rests on respondent who must show beyond a reasonable doubt, that the verdict actually rendered "was surely unattributable to the error[s]." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; see also *People v. Jackson* (2014) 58 Cal.4th 724, 802, conc. & dis. opn. of Liu, J. ["silence in the record with respect to actual prejudice does not dispel a reasonable possibility of prejudice"].)

Respondent cannot show under the *Chapman* standard that at least the torture murder special circumstance would not have been set aside, given, inter alia, the discrepancy between appellant's trial testimony described above and the lack of an intent to torture evident in appellant's pretrial statements described *ante*. (AOB 84-88; see also 2 CT 302 [appellant told interrogator he tied up Anderson to keep him from getting away when appellant went to ATM; 321-322 [during interrogation, appellant never used the word torture to describe any of his actions towards Anderson]; 330-332 [defense closing argument at preliminary hearing]; and 10/20/92 Interrogation Transcripts, 2 SCT 62 [Ex. 11A] [regarding whether appellant had injured Anderson, he might have a "a little small puncture wound," inflicted when he resisted having his hands tied up]; 2 SCT 139 [Ex. 12AA] [appellant ran knife over him, drew a little blood liked getting

pricked by a needle to make sure he got ATM PIN number]; 141 [tied Anderson so that if he moved he would be in serious pain]; 148 ["almost instantaneous" with telling Anderson he was going to kill him, appellant shot him]; with 2 RT 269-270, 286-287, 309.)

Respondent also cannot show beyond a reasonable doubt that the result at the penalty phase would not have been different had the court enforced evidentiary rules, such that appellant would not have filled in factual gaps regarding the special circumstances (AOB 87-90), or testified to significant, irrelevant, speculative and unreliable testimony at the guilt phase, which lightened the prosecution's burden of proof at the guilt phase and prejudiced appellant at both phases of trial as described *ante* and in the opening brief. (AOB 93-96; Argument IV.C.2.a., *post*, which appellant incorporates by reference herein.) The errors of the court and prosecutor also led to incomplete, misleading evidence on remorse (AOB 102-103), and other irrelevant, speculative, inadmissible and unreliable aggravating evidence. (AOB 94-99.)

For the same reasons, even if analyzed under the state's Watson standard for reversal, an examination of the entire cause demonstrates that there is a reasonable probability, i.e., a reasonable chance, more than an abstract possibility, that the results would have been different at the guilt phase (*People v. Wilkins* (2013) 56 Cal.4th 333), and a reasonable possibility at the penalty phase. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

For all the reasons above and in the Opening Brief, appellant's conviction, the special circumstances findings and death sentence must be reversed.

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IV.

BECAUSE APPELLANT'S TRIAL WAS FUNDAMENTALLY UNFAIR, THE PROSECUTION DID NOT PROPERLY DISCHARGE ITS BURDEN OF PROOF, AND STATUTORY AND CONSTITUTIONAL PROCEDURES WERE NOT FOLLOWED, THE RESULT WAS SO UNRELIABLE THAT APPELLANT'S CONVICTION AND SENTENCE MUST BE OVERTURNED UNDER *PEOPLE v. BLOOM*

Appellant argued in the opening brief that his death verdict was not returned under the reliability standards required by *People v. Bloom* (1989) 48 Cal.3d 1194 (*Bloom*). (AOB 114-120.) Respondent argues that the trial court adhered to the *Bloom* reliability standards; the rules of evidence were followed; and the trial was reliable as the court did not consider prior offenses appellant claimed to have committed if there was no independent evidence, and insisted that the aggravating evidence be proved beyond a reasonable doubt. (RB 71-74.) Appellant disagrees.

First, respondent is incorrect as to both Eighth Amendment reliability requirements in general and as laid out in *Bloom*. That is, the failures of the court and prosecutor described herein and in Argument III[8] of the opening brief and *ante*, created a substantial risk that appellant's death sentence was imposed in an arbitrary and capricious way without the heightened degree of reliability in all stages of a capital proceeding required

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[8] In Argument III, appellant argued that due process was violated when the adversary system broke down during appellant's trial, which also failed to satisfy the heightened reliability necessary for capital proceedings, and described the relevant record facts. (AOB 79-96, 99-103.) In Argument IV of the opening brief, appellant referenced the facts from Argument III. For the convenience of the Court, appellant now includes those record facts in Argument IV herein.

by the Eighth Amendment. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411; accord, *Oregon v. Guzek* (2006) 546 U.S. 517, 525.)

C. Because the Requirements of *Bloom* Were Not Met at Appellant's Trial, the Reliability Demanded by the Eighth Amendment Was Never Satisfied

1. Contrary to Respondent's Argument, Significant Factual Differences in *Bloom* Distinguish Appellant's Case

Pointing to the court's invocation of the *Bloom* case prior to announcing its death verdict, respondent argues that it adhered to *Bloom*. (RB 71, 73.) However, that the court cited *Bloom* (2 RT 533), is hardly determinative; the standards must be applied to the facts of each case and to "the particular problem involved." (*Grunwald-Marx, Inc. v. Los Angeles Joint Board* (1959) 52 Cal.2d 568, 577.) Thus, the Court's *Bloom* reliability standards must be related to the facts of that case; here, similarities between Bloom's and appellant's trials (RB 71-72), are dwarfed by the significant differences. (AOB 117-119)

Consider, for instance, Bloom's refusal to present mitigating evidence at the penalty phase. He testified in his own defense at the guilt phase, and the guilt phase defense mitigated the murders, presented a mitigating account of Bloom's life, and was echoed in his penalty phase closing argument. (AOB 117-118; *Bloom, supra,* 48 Cal.3d at pp. 1206-1207, 1209, 1216-1217.) Accordingly, Bloom proffered "a basis for a sentence less than death." (*Id.* at p. 1229.) Appellant, in contrast, sought to aggravate his actions, mental states, and life as shown in Arguments II and III of the opening brief and *ante*, which appellant incorporates by reference herein. (AOB 57-68, 85-90, 94-96, 99-103.)

Moreover, while Bloom admitted he sought the death penalty to obtain a reversal by expediting his appeal (*Bloom, supra,* 48 Cal.3d at p. 1217), appellant strove to eliminate one. During his penalty phase narrative testimony, appellant gave a largely aggravating account of his life (2 RT 463-469), with a brief reference to his alcoholic father who threatened his mother with a knife. (2 RT 463.) Responding to the prosecutor's question, appellant testified that his father beat him badly, but refused to talk about it further. (2 RT 496-497.) Appellant told the court he did not present a psychiatrist to testify about his life, because his past was irrelevant to his adult decisions, and he had only wanted the testimony to remove grounds for appeal. (2 RT 512-513.)

The prosecutor, apparently on the same page as appellant as to eliminating issues for appeal, argued that he, the prosecutor, had brought out the childhood abuse, but characterized it as severe discipline that was not mitigating. (2 RT 523-524.) The trial court seemingly agreed; when announcing the verdict, it stated that appellant had not offered mitigation, instead giving testimony to justify a death verdict. (2 RT 533.) In remarking upon factor (k), "the other circumstances," the court stated that appellant testified that he was raised in a dysfunctional family with a father he described as an abusive alcoholic, displayed respect for his mother, was raised under the supervision of the juvenile court, had served time in juvenile hall, the California Youth Authority (CYA) and prison, and had not done well on parole. (2 RT 239.)

This Court should not credit as mitigating the evidence the court cited under factor (k), because some of it was aggravating as explained in subsection 2.b., *post*, and because appellant's motivation in presenting it – to eliminate appellate issues – raises questions about its reliability. (Cf.

Kyles v. Whitley (1995) 514 U.S. 419, 444 [evolution over time of eyewitness's description can be fatal to its reliability]; Gershmann, *Witness Coaching by Prosecutors* (2002) 23 Cardozo L.Rev. 829, 844, 848 [noting enormous incentive of prosecution's cooperating witnesses to falsify or embellish testimony and their vulnerability to suggestive interviewing techniques].) In addition, the Court should discourage attempts such as this to circumvent the meaningful appeal mandated both by California statute and the Eighth Amendment. (See *Pulley v. Harris* (1984) 465 U.S. 37, 52-53 [because of, inter alia, automatic appeal provision, California death penalty statute does not violate Eighth Amendment despite lack of proportionality review; *Parker v. Dugger* (1991) 498 U.S. 308, 321, and authorities cited therein ["we have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally"].)

Further, procedural differences between *Bloom* and appellant's case occurred after the death verdicts. Bloom presented family members who asked that his life be spared, and the court heard his motions for a new trial and modification of sentence. In contrast, appellant reminded the court of his earlier request for a "speedy sentence" and transfer, and made no posttrial motions. (*Bloom, supra,* 48 Cal.3d at p. 1217; 2 RT 532, 541, 545, 547.)

2. The Proceeding Below Did Not Satisfy the "Vigorous Standards" of *Bloom*

In *Bloom*, the Court held that a defendant's failure to present mitigation does not violate the Eighth Amendment where the "the required reliability" has been attained through the prosecution's discharge of its burden of proof at the guilt and penalty phases pursuant to the rules of

evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered any relevant mitigating evidence that the defendant has chosen to present (hereinafter "*Bloom* reliability requirements"). (AOB 115; *Bloom, supra*, 48 Cal.3d at p. 1228.) Contrary to respondent's argument, these standards were not met below, regardless of the trial court's "committ[ment] to the concept of proof beyond a reasonable doubt." (RB 74.) This is so because *Bloom* recognizes that in order to assure reliability under the Eighth Amendment, boundaries must be set when a defendant does not present mitigation and/or requests the death penalty. (See *Bloom, supra*, 48 Cal.3d at p. 1228.)

a. The prosecution did not discharge its burden of proof at appellant's trial pursuant to the rules of evidence.

The prosecution overstepped the bounds of zealous advocacy during appellant's trial because its questioning violated substantive rules of evidence as well as procedural rules for introducing evidence. (AOB 86, 93, 112.)

The prosecutor cross-examined appellant in violation of the Evidence Code, as described in Argument III of the opening brief and *ante*, which appellant incorporates by reference as though fully set forth herein. (AOB 93-96, 116; Argument III. D., *ante*.) The prosecutor did this in several ways. (AOB 93-95.)

First, the prosecutor's extensive cross-examination went beyond the scope of the direct examination, contrary to Evidence Code section 761. (AOB 94-95.) Appellant's brief, 40-line narrative testimony on direct examination addressed his intent in tying Anderson up, his intent to kill and

hurt him, and that he raped Anderson and had used excessive force to subdue him. (See 2 RT 269-271.) The prosecutor's extensive cross-examination elicited irrelevant and prejudicial testimony beyond the scope of the direct examination or indeed any guilt phase issues. (See Argument III, *ante*; and see, e.g., 2 RT 273-274 and 313-314 [appellant's thoughts about killing others]; 275-276 [carried firearms when he went out earlier so if stopped by police, he would have another murder under his belt]; 278 [prior bad act]; 314 [whether appellant felt remorse about killing Anderson].)

Second, the prosecutor asked appellant leading questions, contrary to Evidence Code section 773, subdivision (b), which prohibits them when a witness is friendly to the cross-examiner as appellant was. (AOB 94.) The danger is that leading questions will create unreliable testimony. (Tanford, *The Ethics of Evidence* (2002) 25 Am. J. Trial Advoc. 487, 540- 541, 555 (Tanford).) For example, the prosecutor asked leading questions and elicited testimony to prove the torture special circumstance. (See, e.g., 2 RT 286 [to torture him did you hit him, beat him, cut him up], 298 [did you tie ligatures tight to purposely to inflict pain], 300 [did you tie them tight so that pain would be excruciating].) Through leading questions, the prosecutor also sought to provide factor (a) evidence on the circumstances of the crime (see, e.g., 2 RT 285 [were you taunting the victim], 294 [is sexual control or power important to you]), some of which also was irrelevant, inadmissible and/or unfairly prejudicial. (See, e.g., 2 RT 274 [why did you want to kill Cota and Terry], 313 [did you intend to kill those whose names you marked with an "X" in your phone book because they had not done what you wanted]; Argument III, *ante.)*

Third, the prosecutor elicited irrelevant and unfairly prejudicial testimony in violation of Evidence Code section 352, including testimony irrelevant to any guilt phase issue. This is true of various of the questions referenced above, e.g., those on lack of remorse, prior misconduct, and violence against others. (AOB 95; 2 RT 273-274, 313-314, 275-276, 278; Argument III, *ante*.)

Fourth, some of the prosecutor's questions were improper because they were contrary to procedural rules that govern the proper form of the questions and answers that make up examinations. (Tanford, *supra*, 25 Am. J. Trial Advoc. at pp. 521-524.) An attorney should have a legal basis for offering evidence and should not offer improper evidence on the chance that the opponent will not object. (*Id.* at pp. 503, 521-523.) The prosecutor did not propose any theories of admissibility for introduction of evidence at the guilt phase of appellant's remorse[9] (2 RT 314), or prior uncharged misconduct.[10] (2 RT 274, 275-276, 278.)

In addition, through questioning of its pathologist, the prosecution presented selective and misleading evidence on the amount and significance of any bruising that was present on the victim's genitals, further undermining the reliability of the evidence of the torture special

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[9] Compare *People v. Bell* (2007) 40 Cal.4th 582, 605-607 [evidence of lack of remorse relevant at guilt phase where introduced to counter defense theory that defendant killed victim in a blind rage and wanted to get caught].)

[10] The prosecutor did not proffer any evidence under Evidence Code section 1101, subdivisions (a) and (b), which provides that with certain exceptions, evidence of a person's character, including specific instances of misconduct, are inadmissible when offered to prove his/her conduct on a certain occasion.

circumstance. (AOB 82-84, 91-92.) It was not the court's responsibility, but the prosecution's, to present the facts, because its function is "to serve as a public instrument of inquiry and, pursuant to the tenets of the decisions, to expose the facts." (*People v. Franklin* (1961) 194 Cal.App.2d 23, 29-30; see also *People v. Sherrick* (1993) 19 Cal.App.4th 657, 660-661 [as People's representative and moving party, prosecutor had obligation to assist court and correct erroneous information regarding sentencing]; *People v. Daggett* (1990) 225 Cal.App.3d 751, 757-758 [prosecution may argue all reasonable inferences from the record but may not mislead jury].)

Finally, the prosecutor enlisted appellant to help prove the prosecution's case, thereby violating Evidence Code section 520.[11] As demonstrated *post* in subsection b., and in Argument III. C. of the opening brief (AOB 87-90, 101-103), and *ante*, the prosecutor improperly prepared appellant to testify, then elicited unreliable testimony that was contrary to, or at least pointedly different from, appellant's pre-trial statements and the preliminary hearing evidence. Thereafter, the prosecutor used appellant's testimony to argue, inter alia, the intent element of the torture special circumstance (2 RT 323); factor (a) evidence that appellant intentionally tortured Anderson (2 RT 522), enjoyed inflicting fear, terror and pain (2 RT 523); and that appellant had no remorse[12] with respect to Anderson's relatives (2 RT 531).

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[11] Evidence Code section 520 states: "[t]he party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."

[12] Picklesimer testified at the preliminary hearing that appellant got emotional and choked up when talking about feeling bad for the victim's parents. (AOB 102-103; 1 CT 159, 186, 189-190.)

Respondent argues that to the extent that appellant's penalty testimony might be exaggerated or uncorroborated, the court expressly limited its consideration to evidence presented by victim witnesses. (RB 71, see also RB 73-74 [same].) In fact, the court's position was not the one urged by the prosecutor below. Regarding the other incidents about which only appellant testified, the prosecutor argued that the court should decide whether as to some of them, he believed appellant's judicial admissions (2 RT 529) or whether a crime occurred (2 RT 531). The prosecutor also argued that the court should use various of the incidents as evidence of appellant's lack of remorse, depraved state of mind, or as reflecting his state of mind as to the crimes. (2 RT 529-531.)

The court never explained why it discounted appellant's aggravating testimony regarding the six incidents for which the prosecutor presented witnesses, but not other unreliable testimony appellant gave. For example, at the guilt phase, the prosecutor elicited from appellant through leading questions testimony that appellant tortured Anderson, found it exciting to be in control, and meant to inflict extreme pain. (Section 2.b. *post*, and 2 RT 286-287, 293, 298, 300.) Despite the fact the disparity between that testimony and appellant's statements right before and after his arrest (Ex. 11A, 2 SCT 78; Ex. 12AA, 2 SCT 142; 2 CT 302, 331;1 RT 185), the court found while sentencing appellant that appellant tortured Anderson "for his own personal pleasure." (2 RT 539.) Further, the court did not exclude consideration of other unreliable, speculative and inadmissible factor (a) aggravating evidence. (AOB 114, 116; Argument III. D & C, *ante*, which appellant incorporates by reference herein; see also 1 RT 188 [after listening to Ex. 11, one of appellant's confessions, court excludes from guilt

phase consideration appellant's statements regarding a San Jose police officer, his prior record and crimes and Oregon activities].)

In fact, the court clearly found credible and relied on some of this testimony when he sentenced appellant. For instance, the court gained "insight" from appellant's testimony that the only reason he did not kill the inmate he stabbed in the California Youth Authority was that he lacked experience. (2 RT 537.) However, the prosecutor did not present witnesses on this incident, which was introduced as a prior conviction under sections 667, subdivision (a), and 1192.7. (2CT 443-445; 3 RT 217; Ex. 30, 3 CT 538H-AA.) The also court considered and apparently relied upon appellant's testimony that he would kill again if he did not get the death penalty, regretted not killing Cota and Terry, and that appellant had expressed no remorse. (2 RT 539.)

b. The death verdict was not returned under proper procedures and instructions.

The court failed to exert reasonable control over the prosecutor's questioning of appellant, contrary to its statutory duty under Evidence Code section 765. (AOB 93-96.) The court never put any brakes on either the prosecutor's questioning just described, or appellant's responses. Neither the court nor the prosecutor sought to limit appellant's testimony that something might or could have happened, or that he believed something happened, or that it must have happened, etc., which occurred repeatedly. (AOB 114, 116; Argument III.D.2., *ante*, which appellant incorporates by reference herein.) This violated the court's duty under Evidence Code section 765, whereby "[t]he court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as . . . effective for the ascertainment of the truth, as may be . . . ." That appellant

was unable to state as fact so much testimony undermined its credibility and reliability at least as to matters not provable by other means. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1292 [witness's equivocal responses relevant to jury's assessment of credibility].)

The prosecutor improperly prepared appellant to testify. (AOB 79-90) When appellant called the prosecutor to discuss whether or not he should testify, the prosecutor told appellant that it was his decision, but that if he did so, the prosecutor wanted to cover "the torture aspects of the case . . . and various factors about the crime itself." (2 RT 268-269.) Prior to testifying at the guilt phase the next day, appellant asked the prosecutor to examine him using "a line of questioning" that the prosecutor had discussed with him "that would cover issues not already covered." (2 RT 269.) Appellant then began his testimony by stating that "one point that I don't think was thoroughly discussed was the torture of Mr. Anderson" (2 RT 269), and then embellishing his pretrial statements so as to supply the intent element of the torture special circumstance. (AOB 79-89.)

There are several problems with this method of proceeding. First, while it is not improper for an attorney to prepare a witness by reviewing the questions and answers so that the witness will be ready and effectively give his testimony (*State v. McCormick* (N.C. 1979) 259 S.E.2d 880, 882-883, superseded by Rule on another ground in *State v. Squire* (N.C. 1988) 364 S.E.2d 354), appellant should not have been the prosecution's witness, even given their mutual goal of securing a death sentence for appellant. (*People v. McKenzie, supra*, 34 Cal.3d at p. 626 [criminal defendant is due a bona fide and fair adversary adjudication].) The prosecutor co-opted appellant as his witness, that is, he "divert[ed] to or use[d] [appellant] in a role different from the usual or original one."

(Oxford Dictionaries <http://www.oxford dictionaries.com/us/definition/ american_english/ co-opt> [as of Sept. 9, 2015].)

Second, appellant's story changed based on his discussion with the prosecutor. That is, although he told his interrogators that he tied up Anderson so that *if* he moved, he would feel serious pain in order to keep him from escaping, and there was no indication Anderson had moved and felt pain (AOB 83-84; 2 CT 302; 2 SCT 141), appellant testified that he tied the ligatures to inflict "extreme pain" and Anderson was in pain. (AOB 87-88; 2 RT 298.) As the record shows that the prosecutor's discussion with appellant was conduct that altered appellant's account of the events in question, the prosecutor coached him. (See Wydick, *The Ethics of Witness Coaching* (1995) 17 Cardozo L.Rev 1, 2.) Whether or not an attorney's actions in this respect are intentional or unintentional is not germane here, because either can influence a witness and taint his testimony to the point that it becomes unreliable. (*State v. Earp* (Md. 1990) 571 A.2d 1227, 1234-1235; Tanford, *supra,* 25 Am. J. Trial Advoc. at pp. 536-537, 540-541.)

The prosecution itself understood that such methods might produce unreliable testimony when it called in Dr. Missett to evaluate appellant right after the appellant made his video and audio-taped statements. The interrogators wanted appellant evaluated "while he was still in a mental state . . . similar to the mental state he was in at the time of the crime . . . ," to counter later changes in his attitude or account of his mental state. (AOB 64; 2 CT 307-308.) Thus, the prosecution's earlier position was that appellant's uncounseled statements shortly after his arrest more accurately reflected his mental state at the time of the crime than later ones would.

The procedure for selecting the trial judge was improper. About a week after appellant's motion for self-representation was granted (2 CT 416; 7/19/95 RT 3-14), the prosecutor announced that he and appellant had talked on the phone for about a half-hour, and decided that they wanted to waive a jury at all phases of trial. (7/27/95 RT 29-30.) The prosecutor explained that he wanted to avoid voir dire with a pro. per. (7/27/95 RT 30.) The parties and court then discussed what department would hear the case. Judge Ball had been tentatively assigned to preside over the trial. (7/27/95 RT 29; 8/2/95 RT 36.) However, after "consider[ing] the matter long and hard," Judge Ball "determined that the interest of justice [could] best be served by a waiver of a jury as to the guilt phase and a selection of a jury for purposes of the penalty phase," because this was "consistent both with the law and the interest of justice." (7/27/95 RT 30-31.) Judge Ball then offered to and did, initiate an effort to find a judge willing to hold a court trial for all phases of appellant's trial. (8/2/95 RT 36-37, 8/9/95 RT 45.)

Judge Ball discussed the matter with the supervising judge, and after off-the-record discussions, learned that Judge Creed apparently was "the only department willing to accept both waivers." (8/9/95 RT 45-46.) The court was prepared to assign the matter to Judge Creed, but appellant refused to waive time and the matter was again continued to check on Judge Creed's schedule. (8/9/95 RT 45-46.)

At the next hearing, the prosecutor announced that he and appellant had talked for one and a half hours, and appellant now agreed to waive time. Appellant thereafter waived time and his right to a jury trial on the conditional basis that Judge Creed preside over the trial. (8/11/95 RT 47-50; 11/17/95 50.) Appellant's trial started almost five months later, on

January 3, 1996. (3 CT 528; 1 RT 1.) Judge Creed presided, and appellant waived a jury for both phases of trial. (1 RT 2; 2 RT 329.)

The method by which the judge was chosen for appellant's case was highly improper. "The 'promise' to a defendant that a particular judge will handle any particular matter in the future is improper. This type of arrangement encourages 'judge-shopping,' an evil that should be prevented." (*People v. Preciado* (1978) 78 Cal.App.3d 144, 149.) However, that is exactly what happened below. The court offered the parties "the option of being able to select" a judge who would preside over the penalty phase without a jury, the supervising judge found the only judge willing to do so, and the parties selected that judge. (8/2/95 RT 44; 8/9/95 RT 45046; 8/11/95 RT 47-50.)

The prosecutor's improper role was another flaw in the process. It was the prosecutor who wanted to try the case without a jury. (7/27/95 RT 30.) The prosecutor represented that appellant wished to waive a jury and waive time only after lengthy, off-the-record conversations with appellant. (7/27/95 RT 29-30; 8/11/95 RT 47.) Appellant's participation in these proceedings was limited to his brief agreement with the prosecutor, and to affirming the waivers. (7/27/95 RT 30; 8/2/95 RT 37; 8/11/95 RT 48-51.) Thus, the record does not show that appellant independently wished to proceed without a jury; appellant had been willing to proceed with a penalty phase jury and Judge Ball (8/2/95 RT 37), and in fact appellant had moved to represent himself in part because his attorneys stood in the way of his desire for a speedy trial. (2 RT 509, 511.)

Improper procedures led up to appellant's jury waiver. The above-described process by which appellant waived a jury was peculiar in itself, and the prosecutor's role in it adds to the reliability concerns.

Improper procedures led to appellant's decision not to present witnesses at the penalty phase. (AOB 99-100.) After the guilt phase verdict, appellant was not sure if he would be ready to start the penalty phase the next day; he had not sent out any subpoenas and wanted to talk to the prosecutor. (2 RT 326-327.) After the two conferred, the prosecutor stated that appellant wanted to proceed to penalty immediately, which is what transpired. (2 RT 327, 329.) Although the content of the conversation is not in the record, appellant made a decision as a result of it, which the prosecution announced.

This was an unreliable method by which to secure appellant's decision to proceed without penalty phase witnesses and waiver of his right to compulsory process.[13] That appellant wanted a death verdict and was working with the prosecutor to secure one does not negate the point: appellant made a major decision about how to conduct his trial via an improper process, contrary to the *Bloom* requirements. Moreover, appellant had thought about sending out subpoenas, calling witnesses, and had discussed getting witnesses from Oregon where family members lived (2 CT 419; 11/17/95 RT 4-5, 1 RT 5-6, 184), but changed his mind after he learned that the prosecutor would not be calling any of his family members as witnesses. (1 RT 6-7, 133.) Appellant said he would present his sister as a penalty phase witness (1 RT 133, 186), but never did. Indeed, appellant had indicated he intended to present mental health experts. (2 RT 386-388, 391.) Although his reason for doing do was to appeal-proof his case, this

[13] Appellant did recall prosecution witness John Epling, from whom he elicited more aggravating evidence. (2 RT454-456.)

does not diminish the fact that appellant decided not to call these witnesses only after conferring with the prosecutor.

The court improperly gave appellant legal advice. According to appellant, a psychiatrist told him that unless the court furnished funds for a social history investigation; psychiatric, neuropsychological, and medical evaluations; and the psychiatrist's testimony at the penalty phase, there would be grounds for a reversal. (AOB 66-68; 2 RT 386-389.) Appellant proposed instead that the doctors who examined him pre-trial testify. (2 RT 389-391.) Appellant then asked the court whether this would "cover that whole issue this other doctor is trying to raise about the appeal?" (2 RT 391; see also 2 RT 512-513 [appellant had considered having psychiatrist testify to make sure there were no grounds for appeal.) The court responded "it should." (*Ibid.*) Appellant ultimately submitted the three reports as exhibits at trial and never called any mental health witnesses at trial. (3 CT 567-568; 2 RT 459, 462-463.)

Trial courts have discretion to advise pro per defendants regarding trial procedures. (See, e.g., *Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1005 [approving trial court's advising self-represented litigant of right to subpoena witnesses]; *Lombardi v. Citizens National Trust and Savings Bank of Los Angeles* (1951) 137 Cal.App.2d 206, 209-210 [approving practice of trial judge making suggestions to pro. per. defendant on introducing evidence].) The court below went beyond this, however, instead advising appellant whether certain evidence would support appellant's position, which is beyond the realm of the court's duties and discretion. (See Commission on Judicial Performance (2003) *Inquiry Concerning Judge D. Ronald Hyde, No. 166*, 48 Cal.4th CJP Supp. 329,

349 [judge not permitted to act as counsel or advocate for pro. per. litigant].)

The court's advice was also incorrect, because the prior examinations were done to determine appellant's competency and whether there was evidence to support an insanity plea or mental state defense. (See AOB 66-68, which appellant incorporates by reference herein.) The scope of a psychological or psychiatric examination done to determine whether aspects of a defendant's mental health might provide mitigating evidence is much broader. (See, e.g., *Estelle v. Smith* (1981) 451 U.S. 454, 467 [competency examiner testifying at penalty phase plays a different role, as issue there is whether defendant should be sentenced to death]; *In re Gay* (1998) 19 Cal.4th 771, 807-808 [where defense expert was asked only to determine whether defendant suffered from mental illness at time of crime, referral question was unreasonably limited for purposes of discovering potential mitigation evidence at 1983 trial]; *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1043-1044 [noting different legal standards for mental health issues at guilt and penalty phases, with the latter being broader]; National Conference of State Trial Judges et al., Capital Cases Bench Book (1994) National Criminal Justice Service Reference Service 148216, 1-6 & 7; 6-72 <https://www.ncjrs.gov/pdffiles1/Digitization/148216NCJRS.pdf> [as of Sept. 9, 2015] [recommending judges fund a defense penalty phase mental health expert in addition to any required on the issues of competency or insanity].) None of the reports encompassed appellant's social history. (See Argument I, *ante*, which appellant incorporates by reference herein.)

Moreover, by advising appellant that his method of presenting mental health evidence "should" help him avoid an appeal, the court undermined California's statutory scheme, which requires an automatic

appeal to safeguard the rights of those upon whom the death penalty is imposed. (See *People v. Stanworth* (1969) 71 Cal.2d 820, 833.) The court's willingness to help appellant meet his goal of an appeal-proof death verdict was improper. (See also 2 RT 451 [after appellant told court he would be moving for a speedy sentence, court responded that it "could probably accommodate" him and would "hit the books to see what has to be done"].)

The court had an incorrect understanding of mitigating factors, including factors (d) and (j). The verdict was not returned under proper instructions, as the court misapplied several mitigating factors, and also used them as aggravating factors. In doing so, the court relied upon the three pretrial reports appellant submitted as exhibits at the penalty phase. One could assume that the court believed that it was following *Bloom*. (See *Bloom, supra,* 48 Cal.3d at p. 1228 [sentencer must "duly consider[] the relevant mitigating evidence, if any, which the defendant has chosen to present"].) This assumption is not justified, however, because as noted *ante*, the reports were written to determine competency, sanity and guilt phase mental state defenses, the standards for which are far narrower than for mitigating evidence. The three reports therefore could not substitute for factor (k) evidence extenuating the gravity of the crime.

The court's error went beyond that, however, because it misapplied three statutory mitigating factors; transformed them into aggravating factors; conflated the standard for sanity with those for mitigating factor (d), thus holding appellant to the higher standards of the former; and otherwise relied upon nonstatutory aggravating evidence in reaching a death verdict.

As to factor (d), the court stated it had "carefully reviewed the psychiatric reports" of Drs. Harper, Burr and Echeandia, and found that appellant was competent, knew "the nature and qualify of his acts, and . . . [that] such act was wrong,[14] and had the "capacity to justify his behavior" based upon his own sense of fair play. (2 RT 537-538.) These three findings were error under the statutory definition of factor (d).[15] In addition, insanity and incompetency are not necessary for a determination of reduced culpability under the Eighth Amendment. (See, e.g., *Atkins v. Virginia* (2002) 536 U.S. 304, 318 [intellectually disabled persons categorically exempt from the death penalty, despite the fact that they "frequently know the difference between right and wrong and are competent to stand trial"].) For this reason, the court could not consider them as a circumstance of the crime under factor (a), either.

Regarding factor (j),[16] rather than merely finding that the factor did not apply, the court stated that appellant was the actual killer, had premeditated, deliberated, robbed, tortured and sexually assaulted the victim "for his own personal pleasure." (2 RT 539.)

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[14] The court appears to refer to the test for legal insanity, whether or not the defendant was unable either to understand the nature and quality of the criminal act, or to distinguish right from wrong when the act was committed. (§ 26, par. 2; *People v. Elmore* (2014) 59 Cal.4th 121, 140.)

[15] Factor (d) is a mitigating factor that permits the sentencer to consider whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. (*People v. Holt* (1997) 15 Cal.4th 619, 698.)

[16] Factor (j) requires the sentencer to consider, if relevant, whether or not the defendant was an accomplice and his participation relatively minor. (§ 190.3 (j).)

The court's inclusion of appellant's time in custody and failure on parole as factor (k) evidence (2 RT 539), was also error. (*People v. Boyd* (1985) 38 Cal.3d 762, 778 [error to admit evidence of defendant's failures on parole and in other programs as it is irrelevant to aggravating and mitigating factors]; *People v. Young* (2005) 34 Cal.4th 1149, 1219 [evidence of defendant's background and character admissible only as mitigation pursuant to § 190.3, factor (k)].)

The court thus applied legally incorrect standards, considered nonstatutory aggravation, and erred because factors (d) and (j) can only mitigate and the absence of any of these factors may not be considered aggravating. (*People v. Morrison* (2004) 34 Cal.4th 698, 728; but see *People v. Proctor* (1992) 4 Cal.4th 499, 553 [noting the numerous prior decisions indicating that factor (j) can only be mitigating, but finding question undecided because of one opinion approving application of factor (j) as aggravating]; *People v. Coffman* (2004) 34 Cal.4th 1, 109 [noting that issue is still undecided].)

Assuming that the court's sentencing statement was also his ruling on an automatic motion to modify the verdict, an assumption appellant rejects in Argument VII, the court's erroneous understanding of the law again contributed to the lack of reliability in that proceedings as well.

c. The trier of fact has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present.

The trial court stated that appellant had not presented mitigation, and also described, under factor (k), aspects of appellant's testimony that were both mitigating (e.g., abusive alcoholic father), and aggravating (e.g., appellant served time in CYA and prison and did poorly on parole). (2 RT

533, 539.) Given the trial court's apparent support of appellant's goal of achieving a death sentence, and its misapplication of sentencing factors to its decision, it is questionable whether or not the court was able to "duly consider" any mitigating aspects of appellant's presentation. Notably, the court never considered appellant's acceptance of responsibility for his actions as the significant mitigating factor that it was. (See, e.g., *Bradshaw v. Stumpf* (2005) 545 U.S. 175, 186 [finding a defendant's plea of guilty could be used as evidence of acceptance of responsibility and used during mitigation]; *Williams v. Taylor* (2000) 529 U.S. 362; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1306 [finding that the jury appropriately considered defendant's acceptance of responsibility during penalty phase]; *People v. Wharton* (1991) 53 Cal.3d 522, 592 [defendant's admission of guilt could lead jury to infer that his moral culpability was reduced].) The court cited appellant's trial testimony that he had no remorse about killing Anderson (2 RT 539), but never mentioned appellant's early and repeated confessions and admissions prior to and right after his arrest. (See AOB 79; 1 RT 48-52, 148-150, 160-161, 163-164, 167, 179-180, 185, 187-189, 197-198, 203, 251-252.) Nor did the court credit other aspects of appellant's cooperation with the authorities, e.g., his request that his interrogation be taped (Ex. 11A, 2 SCT 56), leading the police to the victim almost immediately (1 RT 165), or giving them the names and contact information for individuals they asked about. (2 SCT 40, 42, 47, 64, 121-122, 127-128, 182, 188-189.)

As all these examples show, the strictures imposed by *Bloom* designed to assure that the death penalty was imposed with the "reasonable consistency" (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112) necessary to meet constitutional commands, were not met in appellant's trial.

3. The Court's Post *Bloom* Cases Are Distinguishable

Appellant's proceedings are distinguishable from those in cases that followed *Bloom* where the Court relied in whole or in part on the "death-verdict-reliability requirement[s]" of *Bloom*. (See *Bloom, supra*, 48 Cal.3d at p. 1228.) The Court has done so in the context of claims involving a defendant's failure to present mitigation, self-representation, the right to counsel, or a combination of these. In these cases, as exemplified by those described below, the Court considered various factors before uniformly concluding that the proceedings were reliable under the Eighth Amendment. These factors include whether a defendant withheld mitigating evidence at the penalty phase; contested all or part of the prosecution's case; waived counsel for all or part of his trial; had advisory counsel; and/or testified or argued in favor of a death verdict. However, as the next section demonstrates, the Court has never found a trial proceeding reliable under *Bloom* where the facts were like those in appellant's trial.

a. Failure to present mitigation during contested proceedings.

Respondent states that the court below had *People v. Clark* (1992) 3 Cal.4th 41 (*Clark*), before it when it conducted appellant's trial (RB 71), but does not otherwise discuss the case.[17] There, the defendant argued that the trial court erred by granting his mid-trial motion for self-representation, on the ground that by that point, the state's interest in a reliable death verdict will always outweigh the defendant's right to self-representation. (*Id.* at p. 109.) The Court rejected this claim, holding that under *Bloom*'s "rigorous standards," granting the motion did not violate Eighth

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[17] Appellant has found only the trial court's citation of *People v. Bloom, supra,* 48 Cal.3d 1194, in the record. (2 RT 533.)

Amendment reliability standards given that the defendant and his attorney "vigorously contested" both phases of trial. (*Id.* at pp. 109-110, citing *People v. Bloom, supra*, 48 Cal.3d 1194, 1228.)

In the contested proceedings in *Clark*, two attorneys represented the defendant, except for certain portions of the guilt phase. (*People v. Clark, supra,* 3 Cal.4th at pp. 93-96.) Counsel presented mitigating evidence over defendant's objection, i.e., his parents' and psychiatric testimony (*id.* at pp. 152-153, 160); the defendant testified about his upbringing, family, educational background and employment history; and he denied committing the murders. (*Id.* at pp. 154-155.) Given these differences between the trial in *Clark* and appellant's trial, *Clark* is not helpful to respondent.

That adversarial proceedings contribute to a trial's reliability is also illustrated by *People v. Howard* (1992) 1 Cal.4th 1132. After a contested guilt phase, the defendant wanted a death sentence (*id.* at pp. 1152, 1186), and no penalty phase evidence or argument. (*Id.* at pp. 1181- 1184.) Defense counsel complied, but also excluded almost all aggravating evidence, conducted cross-examination, limited the prosecution's penalty phase argument and made a motion to modify the verdict. (*Id.* at pp. 1181, 1185, 1193-1194.) In this context, the Court rejected defendant's claim that the lack of mitigating evidence and argument made the verdict unreliable. (*Id.* at p. 1186.)

The penalty phase in *People v. Lang* took place after a contested guilt phase where the defendant testified on his own behalf. (*People v. Lang* (1989) 49 Cal.3d 991, 1008-1013, 1018, 1021, 1028, overruled on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.) Defense counsel did not present defendant's grandmother as a mitigation witness at his request, but did present a correctional officer who testified to the

defendant's good conduct in jail. (*Id.* at pp. 1008, 1059.) The Court rejected defendant's claim that his counsel was thereby ineffective, and the proceeding made unreliable. (*Id.* at pp. 1030-1033.) Notably, defense counsel made a penalty phase closing argument (*id.* at p. 1068 (conc. & dis. opn. of Mosk, J.), and a 190.4, subdivision (e), motion. (*Ibid*; see also *People v. Guzman* (1988) 45 Cal.3d 915, 928, 931-933, 959-960-963, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [contested guilt phase; at defendant's request, counsel did not present third party mitigation witnesses; sentencing proceeding not unreliable where despite defendant asking for death, the prosecutor did not rely on that testimony during closing argument; and defendant gave detailed account of his troubled background in order to explain and mitigate his behavior].)

In *People v. Blair* (2005) 36 Cal.4th 686, rejected on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-920, where the defendant refused advisory counsel's advice to present mitigation witnesses, presenting instead only college transcripts, the Court relied on *Bloom* to reject defendant's argument that allowing him to preclude the investigation and presentation of mitigation violated his Eighth Amendment right to a reliable penalty trial. (*Id.* at pp. 736-737.) However, both phases of trial were contested (*id.* at p. 697), and advisory counsel made closing arguments and argued the automatic motion to modify the verdict. (*Id.* at p. 722.)

Counsel in *People v. Sanders* (1990) 51 Cal.3d 471, did not present mitigating evidence, cross-examine prosecution witnesses, nor make a closing argument at the penalty phase; the defendant felt that both life without the possibility of parole and a death sentence were unacceptable. (*Id.* at pp. 524-525.) Sanders argued on appeal that his counsel was

therefore ineffective, and the penalty verdict unreliable. (*Id.* at pp. 525-526.) The Court rejected both claims. (*Id.* at p. 526, quoting *Bloom, supra*, 48 Cal.3d at p. 1228.) In contrast to appellant's case, the lack of a penalty defense "did not amount to an admission that [the defendant] believed death was the appropriate penalty," defense counsel lodged some objections during examination of the prosecution witnesses (*id.* at p. 527), and there was a contested guilt phase. (*People v. Sanders, supra*, 51 Cal.3d at pp. 509, 512, 514; see also *People v. Snow* (2003) 30 Cal.4th 43, 62-65, 112-118 [defendant testified in own defense at contested guilt phase; where record showed defense counsel did not present mitigation or closing argument at the penalty phase pursuant to defendant's wish, counsel not ineffective]; *People v. Diaz* (1992) 3 Cal.4th 495, 518, 566 [contested guilt phase defense; where counsel presented no mitigation evidence for reasons unexplained on the record, Court relies on *Bloom* to hold that defendant's right to effective assistance of counsel and constitutionally reliable result not violated].)

These cases, where at least one or both phases of trial were contested, are distinct from appellant's case. As argued in Arguments II and III of the opening brief and *ante*, appellant made no opening statement and closing argument at either phase of trial (1 RT 22-23, 2 RT 323-324, 329, 454, 532); waived cross-examination of all guilt phase witnesses (1 RT 76, 105, 128, 150, 169, 173, 186, 251, 260); and his Fifth Amendment privilege. (2 RT 268) Appellant testified against himself at all phases of trial, admitting the only charge, Count 1, and all enhancements, special circumstances and aggravating evidence. (See, e.g., 2 RT 310-311, 269-272, 316-317, 472, 478-479, 482, 486-489, 495-496.)

b. Testifying or arguing for a death verdict.

Closer to appellant's case are those in which a defendant presents no mitigation and also testifies or makes an argument in favor of a death sentence. Nevertheless, appellant has not located such a case where this Court found the requisite reliability under conditions resembling those at appellant's trial. Thus, in *People v. Brown* (2014) 59 Cal.4th 86 (*Brown*), the defendant had counsel and contested guilt, but waived mitigation, cross-examination and argument at the penalty phase. (*Id.* at pp. 97, 108-109, 113.) However, he testified, claiming innocence and contesting some of the aggravating evidence, but telling the jurors his preference was for a death sentence. (*Id.* at pp. 91, 98.) Citing *Bloom* and later cases, the Court rejected the defendant's argument that his counsel was ineffective for acquiescing in his decision to forego mitigation, cross-examination and argument at the penalty phase. (*Id.* at pp. 107, 110-112.) The presence of counsel and contested proceedings, among other things, differentiate appellant's trial from that in *Brown*.

In *People v. Bradford* (1997) 15 Cal.4th 1229, 1261 (*Bradford*), after a contested guilt phase trial (*id.* at p. 1369), the defendant represented himself during portions of the penalty phase. (*Id.* at pp. 1369-1371.) He presented no mitigation, conducted an adversarial cross-examination of one prosecution witness, and made a brief closing argument: "Think of how many you don't even know about. You're so right. That's it." (*Id.* pp. 1284, 1371.) After quoting the *Bloom* reliability standards, the Court held that "[u]nder those conditions, despite a defendant's avowed intent not to present available evidence in mitigation, the state's interest in ensuring a reliable and fair penalty determination has been met." (*Id.* at p. 1372) In contrast to appellant however, Bradford had counsel through much of the trial,

contested guilt, did not testify and the court independently reviewed the jury's death verdict. (*Id.* at p. 1381.)

In *People v. Mai* (2013) 57 Cal.4th 986 (*Mai*), the defendant stipulated that the court would determine the outcome of the guilt phase based upon the preliminary hearing transcript. (*Id.* at p. 994.) Appellant then presented no mitigation and briefly testified that he believed in "two eyes for every eye" and that a death penalty verdict was the right thing to do. (*Id.* at p. 1002.) Under these conditions, the Court found the *Bloom* standards were met. (*Id.* at pp. 1055-1056.) But unlike appellant, the defendant did not otherwise aggravate the state's case or work with the prosecutor; assisted with jury selection for the penalty phase; and had counsel and a section 190.4, subdivision (e) proceeding. (*Id.* at pp. 994, 1002, 1005, 1037.)

Despite their relatively brief arguments urging or requesting a death sentence, the defendants in *Brown, Bradford* and *Mai* nevertheless "'put the state to its proof'" (*People v. Chadd* (1981) 28 Cal.3d 739, 750, fn. 7), at both phases of trial, rather than working to aggravate the crime, special circumstances and prior acts evidence, and working in tandem with the prosecutor as appellant did.

In summary, despite their factual differences, the Court's cases considering reliability under *Bloom* all have one commonality, i.e., each defendant enjoyed significantly more protection at trial than did appellant.

c. The out-of-state cases cited in *Bloom* are distinguishable.

Respondent cites to this Court's discussion in *Bloom* of *People v. Silagy* (1984) 101 Ill.2d. 147 [461 N.E.2d 415, 431] (*Silagy*). (RB 72, citing *People v. Bloom, supra,* 48 Cal.3d at p. 1224.) The Court cited *People v.*

Silagy, supra, 461 N.Ed.2d 415, and three other cases from other states in support of its holding that the Eighth Amendment death-verdict-reliability requirement is not violated if the *Bloom* reliability standards are met. (*Bloom, supra,* 48 Cal.3d at p. 1228, citing *Hamblen v. State* (1988) 527 So.2d 800, 804; *State v. Harding* (1983) 137 Ariz. 278 [670 P.2d 383, 400]; *Bishop v. State* (1979) 95 Nev. 511 [597 P.2d 273, 276].) However, in all these cases, although the defendants waived the presentation of mitigation, the sentencer heard mitigating evidence and/or the defendants enjoyed procedural protections that appellant did not.

The defendants in both *Bloom* and *Silagy* had advisory counsel for the penalty phase trial. (*Bloom, supra*, 48 Cal.3d at p. 1224; *People v. Silagy, supra,* 461 N.E.2d 415, 430, 432.) In addition, the jury in *Silagy* heard expert evidence that Silagy could not control his conduct, had had a difficult childhood and stressful military service in Viet Nam, and was remorseful. (*Id.* at p. 432.) Similarly, a report before the sentencing judge in *State v. Harding*, *supra*, 670 P.2d at p. 400, fn. 1] indicated that the defendant had an unstable childhood, was first institutionalized at age 10, and diagnosed at age 14 with a seizure disorder and low IQ. In *Hamblen v. State, supra*, 527 So.2d at p. 804, the defendant proceeded pro per with the intention of pleading guilty, but had standby counsel. (*Id.* at p. 801.) He told the court that death was the appropriate punishment. (*Id.* at p. 802.) However, the psychological reports considered by the sentencing court contained mitigating factors such as family background, work history and the absence of criminal history. (*Id.* at p. 804.) In *Bishop v. State*, *supra*, 597 P.2d at p. 276, the defendant, who refused to present mitigation, waived counsel but had standby counsel. Prior to affirming the sentence, however, the court conducted proportionality review. (*Ibid.*)

Thus, in the cases the Court cited in *Bloom*, the defendants had advisory or standby counsel, the sentencer heard mitigating evidence despite the defendant's waiver of it, or the court conducted proportionality review. These factual differences appreciably distinguish them from appellant's case with regard to the reliability required by the Eighth Amendment.

For the reasons argued above and in the opening brief, appellant's conviction, the special circumstances and death sentence must be reversed.

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V.

THE TRIAL COURT ERRED WHEN IT PERMITTED APPELLANT TO REPRESENT HIMSELF AT HIS CAPITAL TRIAL

In his opening brief, appellant argued that the trial court erred when it granted his motion to represent himself at his capital trial. (AOB 121-136.) Appellant's argument was based upon the recognized limits of the *Faretta*[18] decision, and the Eighth Amendment, under which the right to self-representation must be limited to noncapital cases. (AOB 123-130.) Appellant further argued that, because *Faretta*'s reasoning does not support the right to self-representation at the penalty phase, the trial court erred when it continued to allow him to represent himself there. (AOB 130-135.) Appellant recognizes that this Court has previously rejected these arguments (AOB 122; see also *People v. Taylor* (2009) 47 Cal.4th 850, 865-866), but again urges the Court to reconsider its prior case law on this point. In addition, appellant argued that in the singular circumstances of this case, the court should have denied appellant's motion for self-representation, or revoked it prior to the penalty phase. (AOB 135-136.)

While acknowledging that *Faretta* is not unlimited (RB 76), respondent argues that "the restrictions placed on self-representation are limited to controlling the factors that threaten to proceed with a fair trial at all." (RB 78) However, as explained in the opening brief, the exceptions to *Faretta* have a variety of rationales (AOB 124-127), including whether a defendant's conduct "threatens to compromise the court's ability to conduct a fair trial." (*People v. Carson* (2005) 35 Cal.4th 1, 7; see also *People v. Lynch* (2010) 50 Cal.4th 693,721-722, abrogated on another ground in

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

People v. McKinnon (2011) 52 Cal.4th 610, 637-643 [bottom line concern with obstreperous defendant is with behavior that "seriously threatens the core integrity of the trial"].) That concern is also at issue here. That is, because the prosecutor overstepped his proper role in the adversary system by presenting unreliable evidence and joining forces with a willing defendant to secure a conviction and death sentence, the fairness, integrity and reliability of appellant's trial was seriously threatened, and the court should not have granted appellant's *Faretta* motion. (AOB 135-136.)

For the reasons argued above and in the opening brief, appellant's conviction, the special circumstances and death sentence must be reversed.

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VII.

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 under the state and federal constitutions. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17.) The Court should remand this case for such a review.

Respondent contends that appellant forfeited any claim regarding the motion to modify the death verdict by failing to object below. (RB 83.) Respondent further argues that appellant was not entitled to separate review by a different judge at the trial court level because no statute or authority specifically provides for such (RB 82, 83, 95); the legislative history does not compel the conclusion that trial level review of bench trials was even contemplated (RB 92-96); and appellant received what was required, i.e., a reviewable statement of reasons for the court's sentencing decision. (RB 83, 90, 96.) As appellant demonstrates below, respondent's contentions are incorrect.

C. *People v. Weaver* Does Not Foreclose Appellant's Argument

Respondent incorrectly contends that, because appellant waived a jury trial and later declined the court's offer to consider a motion to modify the verdict, his claim that he was denied an independent review of his automatic motion to modify the verdict is not cognizable on appeal. (RB 83, 85-86,

citing *People v. Weaver* (2012) 53 Cal.4th 1056, 1090-1091 (*Weaver*). *Weaver* is not dispositive. 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 an objection 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.) Here, no mechanism exists to provide an independent review for defendants tried by a judge, so neither an objection, nor a request for the court to reconsider its own verdict, nor for an independent review could have cured the trial court's error. Because any contemporaneous objection or request for an independent modification hearing would have been futile and could not have "easily corrected or avoided" the trial court's 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).

In addition, *Weaver* is distinguishable from this case because the court below failed to warn appellant prior to his jury waiver that he would thereby lose the right to an independent trial court review of the penalty imposed by a jury. (8/11/95 RT 48-49; 1 RT 1-2, 2 RT 329.) In contrast, Weaver was admonished, expressly acknowledging before trial that he would not receive such a hearing due to his jury waiver. (*People v. Weaver, supra*, 53 Cal.4th at pp. 1056, 1090-1091.)

Appellant's argument is also cognizable on appeal for the reasons argued in subsection F of the opening brief (AOB 165-168), which respondent has not specifically addressed.

D. All Defendants Sentenced to Death in California, Whether by Judge or by Jury, Are Entitled to a Trial-Level, Independent Review of the Death Verdict

1. Independent Review of the Sentencing Verdict at the Trial Court Level Provides a Critical Safety Valve Necessary to Ensure the Reliability and Fairness Required by the United States and California Constitutions in Death Penalty Cases

Appellant argued that independent review of the sentencer's penalty phase decision is central to the constitutionality of California's death sentencing scheme, pursuant to *Pulley v. Harris* (1984) 465 U.S. 37, 51, 52-53 (*Pulley v. Harris*). (AOB 150-153.) Respondent argues that while the legislature recognized that independent review was a constitutional requirement for jury sentencing, it saw no similar requirement after a bench trial. (RB 82-83.) According to respondent, because the legislature did not set up such a specific requirement (RB 83), appellant's rights are sufficiently protected by this Court's review of the trial court's reasons for its sentencing decision. (RB 83, 88, 89-91, 96.) Appellant disagrees with each of these contentions.

First, the courts, not the legislature, determine the constitutionality of statutes. (*Oppenheimer v. Ashburn* (1959) 173 Cal.App.2d 624, 631.) Thus, even if the legislature did not contemplate independent review of a death verdict in a bench trial, the constitutionality of a statute without that feature is still an issue.

Second, respondent's interpretation of the statute is incorrect. Respondent argues that the statute is not ambiguous, because it covers only jury-sentenced defendants without mentioning review of a court's findings. (RB 86-87, 92-93.) To the contrary, this Court has stated that the statute is ambiguous with respect to whether the provision applies to judge-sentenced

capital defendants as well as jury-sentenced defendant. (*People v. Diaz, supra,* 3 Cal.4th at p. 575, fn. 34.)

Third, the cases that respondent cites in support of its argument that a court's stated reasons for its findings provide the protection necessary for thoughtful appellate review are not on point. (See RB 88, 90.) Rather, they discuss the application of section 190.4, subdivision (e), to jury trials (*People v. Arias* (1996) 13 Cal.4th 92, 190-191; *People v. Davenport* (1995) 11 Cal.4th 1171, 1233-1234; *People v. Memro* (1995) 11 Cal.4th 786, 883-886) or other contexts (*People v. Frierson* (1979) 25 Cal.3d 142, 176; *Bonin v. Vasquez* (C.D. Cal. 1992) 807 F.Supp. 589, 623-624), but not to bench trials.

Fourth, this Court's discussion of the issue in the cases respondent cites (RB 85-86, citing *People v. Horning* (2004) 34 Cal.4th 871, 912 (*Horning*); *People v. Diaz, supra,* 3 Cal.4th 495 (*Diaz*)), is grounded in dictum. In *Diaz,* the defendant argued that his attorney had done such a poor job of presenting his modification motion after a bench trial that the trial court should have demanded more substantial argument and briefing. (*Id.* at p. 575.) This Court noted that it had never decided whether a defendant who waives a penalty phase jury is entitled to a modification hearing under section 190.4, subdivision (e). (*Ibid.*) Assuming there is such an entitlement, the trial court has no duty to demand written briefs. (*Ibid.*) The Court then stated in dictum 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." (*Id.* at p. 575, fn. 34.)

In *People v. Horning*, *supra*, 34 Cal.4th at page 912, the Court held that defense counsel had waived a modification motion after a bench trial. It also again noted that it had never decided whether such review was required for a bench trial, and quoted the dictum in footnote 34 of the *Diaz* opinion in finding that a modification motion would have been superfluous because the trial court had already given detailed statements when it originally rendered its verdict. (*Ibid.*, citing *People v. Diaz*, *supra*, 3 Cal.4th at p. 575.)

Respondent also relies on *People v. Weaver*, *supra*, 53 Cal.4th at pp. 1090-1091 (RB 84-86), but the Court there again recognized it had never decided the issue, and went on to cite 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). In doing so, this Court noted that the trial court had 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 reasoning does not take into account the underpinning of the high court's reasoning in *Pulley v. Harris*. In holding that California's statute adequately guarded against arbitrariness despite the absence of proportionality review, the high court focused on three components of section 190.4, subdivision (e). (*Pulley v. Harris, supra,* 465 U.S. at pp. 52-54.) These were: (1) the judge's independent determination as to whether the weight of the evidence supports the jury's verdict and findings; (2) the requirement that the judge state the reasons for its finding on the record; and (3) this Court's review of the trial court's decision, including review of the evidence relied upon by the judge. (*Id.* at pp. 52-53.) If there is no *independent* review in the trial court of the factfinder's penalty decision,

then a crucial component, which is foundational to the statute and the high court's reasoning, is lacking.

The dicta in *Diaz* and *Horning* (*People v. Diaz*, *supra*, 3 Cal.4th at p. 575, fn. 34; *People v. Horning*, *supra*, 34 Cal.4th at p. 912), also should be disapproved because in those cases, other than finding the statutory language ambiguous (*ibid.*), this Court did not address the legislative history of section 190.4, subdivision (e), or the constitutional rights at stake where a defendant does not receive an independent review of the court's death verdict in a bench trial.

Respondent also relies upon the Court's rejection of 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." (RB 86; *People v. Weaver*, *supra*, 53 Cal.4th at p. 1091.) The Court reasoned 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.*) Appellant contends that he has cited sufficient case law for this Court to determine the issue in his favor. (See AOB 151-153, citing *Pulley v. Harris* (1984) 465 U.S. 37, and other cases.) But even if the Court were to find the cases appellant relies on inapplicable, this is not fatal to his argument. Proper presentation of it does not require citation to on-point authority if there is none. (Rule 8.204 subd. (a)(1)(B) [appellate brief must "support each point by argument and, if possible, by citation of authority"].) Further, the Court has the authority and duty to decide the constitutional cases before it. (*People v. Anderson* (1972) 6 Cal.3d 628, 640, superceded by constitutional amendment on other grounds; *Robb v. Connolly*

(1884) 111 U.S. 624, 637; accord, *Trainor v. Hernandez* (1977) 431 U.S. 434, 443; *Burt v. Titlow* (2013) __ U.S. __, 134 S.Ct. 10, 15-16.)

As stated above, the issue of whether section 190.4, subdivision (e), applies when defendant, whether or not represented by counsel, waives a penalty phase jury remains unresolved. Appellant requests that the Court now go beyond its reliance on dicta and its assumption that all the statute requires in a bench trial is a statement of the court's reasons for its decision for this Court to review. (See *People v. Diaz, supra,* 3 Cal.4th at pp. 575-576, fn. 34; *People v. Weaver, supra,* 53 Cal.4th at p. 1091.)

In particular, the Court should address the unstated assumption that while a trial court must review a jury's decision to guard against it being arbitrary and capricious, the same is not true for a trial court's findings in a bench trial. In fact, a trial court also can be arbitrary, as demonstrated by, inter alia, the frequent use of the abuse of discretion standard. (See, e.g., *People v. Foster* (2010) 50 Cal.4th 1301, 1328-1329 [stating abuse of discretion standard, whereby trial court's ruling can be reversed on appeal if it is arbitrary or capricious and results in a manifest miscarriage of justice]; *People v. Suff* (2014) 58 Cal.4th 1013, 1038 [applying abuse of discretion standard to decision to disqualify an attorney]; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1180-1181 [same, to appoint second counsel]; *id.* at p. 1172 [to denial of a severance motion]; *id.* at p. 1181 [to motion for continuance]; *People v. Fuiava* (2012) 53 Cal.4th 622, 667-668 [to rulings on relevance and admission or exclusion of evidence under Evidence Code, §§ 352 and 1101, respectively].)

The essential nature of section 190.4, subdivision (e), is also demonstrated by looking at the other three checks on arbitrariness as to California's statutory scheme listed in *Pulley v. Harris.* These are the

requirements that the jury find any special circumstances beyond a reasonable doubt; that the jury determines whether death is the appropriate punishment guided by a list of aggravating and mitigating factors; and that there is an automatic appeal. (*Pulley v. Harris, supra*, 465 U.S. at pp. 51-53.)

A defendant may not waive any of these essential protections. That is, a defendant may not plead guilty to the underlying charges and the alleged special circumstances without the consent of counsel (*People v. Robertson* (1989) 48 Cal.3d 18, 61, citing *People v. Chadd, supra*, 28 Cal.3d 739, 746); stipulate to the death penalty and waive a penalty trial (*People v. Teron* (1979) 23 Cal.3d 103, 115, fn. 7, and authorities cited therein, overruled on other grounds in *People v. Chadd, supra*, at p. 750, fn. 7; or waive the mandatory, automatic appeal from a death judgment. (*People v. Massie (Massie II)* (1998) 19 Cal.4th 550, 566, 570-572; *People v. Stanworth, supra*, 71 Cal.2d at p. 834.) The inclusion of section 190.4, subdivision (e), as one of these key components of California's death penalty statutes suggests it is also essential and nonwaivable.

2. The Legislature Intended to Provide Independent Review at the Trial Level for Judge-Sentenced Defendants

Respondent argues that because one of the checks on wanton application of the death penalty is to have judges review the penalty determinations of jurors, the legislature did not intend that it also apply to a trial level review of a judicial determination, but does not explain the link between the premise and conclusion. (RB 95.)

This Court has warned of the constitutional dangers of respondent's approach. Although not stated in the context of review of a bench trial, the

Court has reasoned that: "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.) As argued herein and in the opening brief, the same logic applies to independent review of a bench trial. Thus, 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."].)

Hence, a statement on the record by a judge who explains her own verdict is not an independent review of that verdict, and does not satisfy section 190.4, subdivision (e). (AOB 159-163.) Based on the language, purpose, and legislative history of the statute, as well as the constitutional rights at stake, 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.

E. The Denial of an Independent, Trial Level Review of Appellant's Death Verdict Deprived Him of His Rights Under the United States and California Constitutions

In his opening brief, appellant argued that, even if automatic and 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 and state Constitutions. (AOB 158-165; U.S. Const., 5th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17.)

With respect to appellant's due process claim, respondent asserts that the dictum in *Weaver* should be considered persuasive authority for the constitutionality of section 190.4, subdivision (e). (RB 96, citing *People v. Weaver, supra*, 53 Cal.4th at pp. 1091-1093.) However, appellant respectfully argues, as he did above in section D.1., that the Court's reliance on Weaver's failure to cite on-point authority is an insufficient reason to deny the claim.

Respondent 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, because appellant waived a jury but will ultimately receive equal treatment when this Court reviews the trial court's penalty phase findings. (RB 96-97.) Because, as argued above and in the opening brief (AOB 152-153, 163-165), appellant did not receive the independent review at the trial court level to which he was entitled, respondent's argument fails.

G. The Denial of Independent Review in this Case Requires Remand for a Hearing Conducted by a Different Judge

Appellant argued that appellant must be granted a remand so that a judge different than the trial judge can conduct a hearing on an automatic application to modify the verdict. (AOB 168-169.) Respondent appears to misinterpret appellant's argument when it contends that "requiring two judges to hear a trial" so that one could review the other's penalty determination would violate the rule against courts of equal stature revisiting each other's ruling. (RB 88-89.) Respondent's argument also fails because the Court has held repeatedly that a different judge may preside over a 190.4,

subdivision (e), hearing when the original judge is not available to do so. (AOB 168-169 and cases cited therein.) Moreover, a judge so doing does not make a de novo penalty determination, but rather independently reweighs the aggravating and mitigating evidence to decide whether in the judge's independent judgment, the weight of the evidence supports the jury verdict. (*People v. Espinoza* (1992) 3 Cal.4th 806, 830.)

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 under the state and federal constitutions. (U.S. Const., 5th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17.) 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.

For all the reasons argued above and in the opening brief, appellant requests that the Court vacate his death verdict and remand his case to the trial court for a hearing on an application for modification of the verdict by an independent judge.

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IX.

THE CONVICTION, DEATH ELIGIBILITY FINDINGS AND DEATH VERDICT IN THIS CASE ARE UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 1, 7, 15, 16 AND 17 OF ARTICLE I OF THE CALIFORNIA CONSTITUTION AND MUST BE SET ASIDE

As discussed in the opening brief, the state and federal Constitutions protect not only individual rights but also our community's independent interests in the fairness and integrity of its criminal proceedings and the reliability of death judgments. (AOB 177-192) California's death penalty scheme reflects those independent interests. (AOB 181-183.) When those interests conflict with a particular defendant's desire for execution, the state's interests win out. (AOB 183-190.) Here, appellant's death penalty trial was an instrument to achieve his own execution, which violated the state's independent interests in the fairness and integrity of its proceedings, the appearance of fairness, and the reliability of its death judgments. (AOB 179-180; 183, 184, 191-192.) The conviction, special circumstance and death judgment must be reversed. Respondent's opposing argument boils down to two main points.

First, respondent asserts that, due to evidence supporting the verdict, special circumstances and aggravating evidence, appellant could "reasonably be found to warrant the death penalty." (RB 100.) This position ignores two basic principles. First, the sentencer may consider sympathy, mercy, and compassion in mitigation. (*People v. Ervine* (2009) 47 Cal.4th 745, 801.) In other words, the sentencing process is not based upon a sufficiency of the evidence standard. Second, a death sentence verdict must be more than

reasonable: because "execution is the most irremediable and unfathomable of penalties" and "death is different," the Eighth Amendment demands that in capital cases, factfinding procedures "aspire to a heightened standard of reliability." (*Ford v. Wainwright* (1986) 477 U.S. 399, 411; *People v. Mincey* (1992) 2 Cal.4th 408, 445 [both federal and California Constitutions require certain procedures to ensure reliability in fact-finding process].)

In this regard, respondent glosses over the actions of the prosecutor and actions and inactions of the trial court that led to significant irrelevant, unreliable, inadmissible and unfairly prejudicial evidence that was material to the special circumstances and the aggravating evidence in violation of appellant's rights under the Sixth, Eighth and Fourteenth Amendments and Article I, sections 7, 15, 16, and 17 of the California Constitution, as demonstrated in Arguments III and IV, *ante,* and in the opening brief, which appellant incorporates by reference herein.

Of course, reliability and due process share some features; due process requires that proper procedures ensure the reliability of the factfinding process where the state participates in the deprivation of personal liberty. (*People v. Geiger* (1984) 35 Cal.3d 510, 520, citing, inter alia, Cal. Const., art. I, § 15, overruled on another ground by *People v. Birks* (1998) 19 Cal.4th 108, 112; Cal. Const., art. I, § 17.) Together, therefore, the errors referenced in the preceding paragraph violated appellant's rights under the Eighth Amendment, even if they did not also violate appellant's right to fundamentally fair proceedings. (See *Sawyer v. Smith* (1990) 497 U.S. 227, 244 [noting that a rule required to enhance accuracy of capital sentencing under the 8th Amend. provides an "additional measure of protection against error" and therefore is not an "absolute prerequiste to fundamental fairness"].) Take, for instance, respondent's contention that appellant

"forum-shopped" for a court that would hold a bench trial. (RB 101.) In fact, the forum-shopping was initiated and done by the court, and appellant only assented to waive time for a bench trial after the prosecutor held lengthy off-the-record conversations with him. (Argument IV, C.2.b., *ante*.)

Further, by arguing that due to the evidence appellant could "reasonably be found to warrant the death penalty" (RB 100), respondent essentially urges this Court to apply the state harmless error standard for the penalty phase, i.e., whether this Court can conclude that there is a reasonable possibility that the jury would have rendered a different verdict without the errors (*People v. Brown* (1988) 46 Cal.3d 432, 448 (*Brown*)), and affirm the results below. (See also RB 65 [adversary system and reliability not endangered when a defendant who is guilty and deserves the death penalty testifies about his motives]; 102 [if appellant, despite his wishes, had an attorney, a jury, and had not testified, he would still be guilty of capital murder].)

In *Brown*, the Attorney General argued that because California's 1977 and 1978 death penalty statutes contained various channels to guide the jury's discretion, the test for reversible state law error at the penalty phase, i.e., a "miscarriage of justice," should be the *Watson*[19] "reasonable probability" standard. (*Brown, supra,* 46 Cal.3d at p. 447.) This Court rejected that point, noting that it could not ignore the United States Supreme Court mandate that a capital sentencer exercises "vast discretion" when making its normative, discretionary penalty phase determination. (*Brown,*

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[19] *People v. Watson* (1956) 46 Cal.2d 818, 836.

supra, 46 Cal.3d at p. 447, citing *Caldwell v. Mississsippi* (1985) 472 U.S. 320, 329-330 & fn. 2 (*Caldwell*).)[20]

The portion of *Caldwell* referenced by the Court in *Brown* focused on the necessity for greater scrutiny and reliability in capital sentencing because of the qualitative difference between a death sentence and other punishments. (*Caldwell v. Mississsippi, supra*, 472 U.S. at p. 329.) *Caldwell* in turn relied on the high court's capital jurisprudence, noting that it had "gone to extraordinary lengths" to ensure that the defendants are "afforded process" that assures heightened reliability in capital sentencing. (*Id.* at p. 329, fn. 2, citations omitted.) In short, this Court recognizes that the "reasonable possibility" standard requires extra vigilance when assessing the reliability of capital trial. (*People v. Brown, supra*, 46 Cal.3d at p. 447.)

Thus, even if this Court accepts respondent's sub rosa invitation to apply the reasonable possibility standard to appellant's death verdict, it should reverse because, as argued in the opening brief and *ante*, there are "specific reasons to fear substantial unreliability as well as bias" (*Caldwell v. Mississsippi, supra*, 472 U.S. at p. 330), at appellant's trial.

Appellant submits, however, that the "reasonably possibility" test is not the proper standard for state law error here. The state law "miscarriage of justice" standard also encompasses certain procedural errors that may or may not have affected the outcome. (*People v. Blackburn* (2015) 61 Cal.4th 1113 [2015 D.A.R 9457, 9465]; Cal. Const., art. VI, § 13.) That is, an "essential part of justice" is that guilt or innocence "be determined by an

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[20] The court held that it is constitutionally impermissible to rest death sentence on determination made by sentencer led to believe that responsibility for determining appropriateness of defendant's death rests elsewhere. (*Caldwell v. Mississsippi, supra*, 472 U.S. at pp. 328-329.)

orderly legal procedure," in which a defendant's substantial rights are respected. (*People v. Blackburn, supra,* 2015 D.A.R. at p. 9465, quoting *People v. O'Bryan* (1913) 165 Cal. 55, 65-66.) An "orderly legal procedure" was lacking below, as argued in the opening brief and *ante*, to the point that the proceedings violated appellant's rights under due process. (Arguments II, III, IV, VII, and VIII, *ante*, and in the opening brief, which appellant incorporates by reference herein.)

Second, respondent argues that because appellant's waivers were valid there was no error, and that the preliminary hearing, trial and now appeal process have further protected his rights, reduced the risk of mistaken judgment and assured that the trial results were fairly arrived at without unduly infringing on the rights that appellant legitimately put first. (RB 101-104.) Appellant has addressed these contentions in the preceding arguments, which are incorporated by reference here. (See Arguments I-VII of the opening brief and *ante*.)

As part of its argument that appellant's waivers take precedence, respondent argues that the right balance was struck between the "conflicting fundamental rights" of the need for fairness and appellant's right to waive counsel, to a jury and to remain silent under the Fifth and Sixth Amendments. (RB 101.) However, respondent's assumptions – that if competent defendants waive counsel within the meaning of the Fourteenth and Sixth Amendments, respectively, they can waive the substantive and procedural safeguards intended to protect and serve the state's independent interests in fair and reliable death judgments, and that a defendant's own wishes will always take precedence – are incorrect in this case. (See RB 101, 103.)

Respondent's argument fails to recognize adequately "the larger public interest at stake" when even a competent defendant pleads guilty to a capital offense and effectively stipulates to the death penalty. (*People v. Chadd*, *supra*, 28 Cal.3d at p. 747.) In this regard,

> we are not dealing with a right or privilege conferred by law upon the litigant for his sole personal benefit. We are concerned with a principle of fundamental public policy. The law cannot suffer the state's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual.

(*People v. Stanworth* (1969) 71 Cal.2d 820, 834, internal quotation marks and citations omitted.)

Hence, as argued in the opening brief, even a competent defendant cannot: plead guilty to a capital offense without the representation and consent of counsel, whose duty is not to acquiesce in his client's wishes but rather to exercise his independent professional judgement and safeguard against the risk of a mistaken death judgment; stipulate to the death penalty and waive a penalty trial; or waive the mandatory, automatic appeal from a death judgment, waive counsel on appeal, or control the issues to be raised in that appeal. (See AOB 181-183 and citations therein.)

The Legislature also enacted Penal Code section 686.1, which mandates representation by counsel at all stages of a capital proceeding. Significantly, section 686.1 is yet another reflection of California's clear legislative intent to protect the interests of the state in capital proceedings.

In rejecting challenges to these limitations, this Court has recognized that defendants enjoy fundamental rights to the assistance of counsel in their defense, to control certain fundamental aspects of their defense, and even to waive counsel in order to represent their own defense. (See, e.g., *People v.*

Bloom (1989) 48 Cal.3d 1194, 1228, fn. 9 [the failure to present mitigating evidence, in and of itself, is not sufficient to make a death judgment unreliable]; *People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1298-1302, and authorities cited therein.) However, when a capital defendant seeks to present no defense for no tactical advantage or benefit, those rights either are not implicated at all (*ibid.*), or must bow to accommodate the weightier, legitimate interests of the state. (See *People v. Chadd*, *supra*, 28 Cal.3d at pp. 746-747 [legislature has the power to regulate in the public interest procedures governing guilty pleas in capital cases]; *Indiana v. Edwards*, *supra*, 554 U.S. at p. 171 [right to self-representation is not absolute but may bow to legitimate state interests in fairness of its proceedings under certain circumstances].)

Further, this Court has recognized that various of these factors combined together (*People v. Burgener* (1986) 41 Cal.3d 505, 541-543, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 746 [penalty phase reversed due to defense stipulation to aggravation, failure to present mitigation and jury instruction that effectively told jury it must impose death], or with other factors may violate the state's independent interests in fair and reliable capital proceedings. Thus, this Court has "left open the possibility that the state's interest in a reliable penalty verdict may be compromised when, in addition to the defendant's failure to present mitigating evidence, the jury was also given misleading instructions and heard misleading argument" (*People v. Sanders*, *supra*, 51 Cal.3d at p. 526, fn. 23); the factfinder hears the defendant's testimony requesting a death verdict (*People v. Williams*, *supra*, 48 Cal.3d at p. 1152); defense counsel presents no opening statement, no challenge to the state's aggravating evidence, no mitigating evidence, or closing argument (*People v. Snow*,

supra, 30 Cal.4th at pp. 122-123); or the defendant enters an unconditional plea to a capital offense for reasons other than to achieve some benefit for his defense (*People v. Chadd*, *supra*, 28 Cal.3d at p. 753; *People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1300-1302).

These factors appear here. Appellant, though denied his request to enter a guilty plea and receive a death verdict, took part in a trial that the court characterized as a slow plea. (Argument II.) Appellant presented no opening statements, no meaningful challenge to the state's guilt phase or aggravating evidence, no mitigating evidence, no closing arguments, and testified in favor of a death sentence. (Arguments II - IV.) The court's misunderstanding of the law regarding aggravation and three of the mitigating factors was reflected in the court's incorrect application of the law to the evidence in determining appellant's sentence. (Argument IV.)

Further, the failure of the court and prosecutor to ensure a procedurally reliable and fair trial did not meet the "rigorous standards" of *People v. Bloom*, *supra* (1989) 48 Cal.3d at p. 1228, led to a breakdown in the adversary process and to an unreliable trial. (Arguments III, IV.) Advisory counsel may have served to eliminate or mitigate some of these problems, and advance the state's independent interest in the fairness and accuracy of capital proceedings (*People v. Bigelow* (1984) 37 Cal.3d 731, 746, citing *People v. Chadd*, *supra*, 28 Cal.3d at pp. 752-753), but none was appointed because the court never recognized its discretion to appoint one. (AOB Argument I, incorporated by reference herein and *ante*.)

Section 686.1 mandates representation by counsel, and the failure to enforce the statute at appellant's trial was error. (AOB Argument VI, incorporated by reference herein.) Moreover, because this was a capital case, and especially under its unique circumstances, the court should have

not granted appellant pro. per. status, and minimally should have revoked it at the penalty phase. (AOB Argument V, incorporated by reference herein and *ante*.)

For all of these reasons, appellant's capital murder trial subverted society's independent interests in the fairness and reliability of its capital proceedings and failed to produce a death verdict reflecting a highly reliable determination that appellant was not only eligible for the death penalty but also bereft of any value as a human being deserving of mercy. As such, the trial and death eligibility and death verdicts it produced violated state law, sections 15, 16 & 17 of the California Constitution and the Sixth, Eighth and the Fourteenth Amendments, even if appellant's waivers of his right to counsel, a jury, to present a defense, and other trial rights were valid. As appellant had no right to waive the state's independent interests in the fairness and reliability of its capital proceedings or to "compel the people of the State of California to use their resources to take his life" (*People v. Deere*, *supra*, 41 Cal.3d at p. 362), the conviction, death eligibility findings and death judgment must be reversed.

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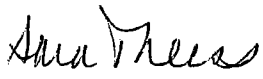
CONCLUSION

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

DATED: September 14, 2015

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATE OF COUNSEL
(CAL RULES OF COURT, RULE 8.360)

I am the Deputy State Public Defender assigned to represent appellant, VALDAMIR FRED MORELOS, 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, excluding tables and certificates, is 24,418 words in length.

DATED: September 14, 2015

Sara Theiss

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People v. Valdamir Fred Morelos

Supreme Court No. S051968
Superior Court No. CSC169362

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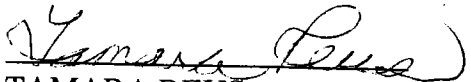
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on September 14, 2015, at Oakland, California.



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