

SUPREME COURT COPY

COPY

In the Supreme Court of the State of California

PEOPLE OF THE STATE OF
CALIFORNIA ,

Plaintiff and Respondent,

v.

VALDAMIR FRED MORELOS,

Defendant and Appellant.

CAPITAL CASE

Case No. S051968

SUPREME COURT
FILED

JUN 23 2014

Frank A. McGuire Clerk

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

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
MICHAEL FARRELL
Acting Chief Assistant Attorney General
RONALD S. MATTHIAS
GERALD A. ENGLER
Senior Assistant Attorneys General
GLENN R. PRUDEN
Supervising Deputy Attorney General
CATHERINE A. RIVLIN
Supervising Deputy Attorney General
State Bar No. 115210
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5977
Fax: (415) 703-1234
Email: Catherine.Rivlin@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

	Page
Statement of the Case	1
Statement of Facts.....	4
A. Appellant drifts in and out of the bay area, adding names to his list	6
B. Kurt Anderson is reported missing.....	8
C. Appellant described the murder to his sister on Monday morning	10
D. Appellant’s confessions to his roommate and the police	11
E. The forensic evidence supports appellant’s confession	22
F. Appellant’s testimony provides additional details.....	25
G. The people’s penalty phase case	40
H. Appellant’s witness and penalty phase testimony	48
Argument	57
I. The court was within its discretion to deny the motion for “assistant counsel”	57
A. Standard of review.....	58
B. Procedural background.....	59
C. Had appellant not withdrawn his application, it would not have been an abuse of discretion to deny the application for advisory counsel.....	60
II. Granting appellant the bundle of constitutional rights he asserted violated neither state law nor the federal constitution	62
III. An informed decision to self-represent followed by a choice not to put on a substantial case is not at all the same as a “complete breakdown of the adversarial process”	64

TABLE OF CONTENTS
(continued)

	Page
IV. The trial satisfied Eighth Amendment standards	71
V. The trial court properly respected appellant’s exercise of his Sixth Amendment right to represent himself at both the guilt and penalty phases.....	74
A. <i>Faretta</i> applies in capital cases	74
B. Recent <i>Faretta</i> refinements provide no basis to distinguish between capital Sixth Amendment rights and noncapital Sixth Amendment rights	76
VI. That appellant has a right to counsel at all stages of a capital trial by statute does not mean that his Sixth Amendment right to represent himself is meaningless	79
VII. The trial court’s detailed findings permit meaningful review of the penalty determination	80
A. The proceedings below	81
B. California law, as guided by the Federal Constitution, provides for independent review of death penalty determinations made by a jury and reviewable analysis of the aggravating and mitigating factors when the penalty determination is made by the court	81
C. The trial court’s penalty determination was well documented and lends itself to effective review	89
D. The legislature did not provide for independent review of a trial court’s penalty determination because there is no need for such review	92
E. Neither due process nor equal protection principles are offended by reviewing penalty judgments on the basis of the court’s statement of reasons.....	96
VIII. Appellant’s generic challenges to the death penalty statute are without merit	97
A. Section 190.2 is not impermissibly broad	98

TABLE OF CONTENTS
(continued)

	Page
B. Section 190.3, factor (a), was not applied in violation of appellant’s constitutional rights	98
C. The moral decisions made at the penalty phase are not susceptible to burden-of-proof quantification	98
D. No intercase proportionality review is required	99
E. California’s capital sentencing framework does not violate the equal protection clause	99
F. Neither international law, nor the Eighth and Fourteenth Amendments to the constitution preclude California’s capital penalty	100
IX. The reliably determined conviction, death eligibility findings, and death verdict must be upheld	100
A. Society’s interest in the fairness and accuracy of criminal proceedings and the reliability of death judgments has been served	101
B. A competent self-representing capital defendant’s choice of a bench trial for the guilt and penalty phases and decision to testify is not a guilty plea requiring the consent of a counsel validly waived by defendant	103
Conclusion	104

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bonin v. Vasquez</i> (1992) 807 F.Supp 589.....	90
<i>Bunnell v. Superior Court</i> (1975) 13 Cal.3d 592.....	63
<i>Dusky v. United States</i> (1960) 362 U.S. 402.....	77
<i>Faretta v. California</i> (1975) 422 U.S. 806.....	passim
<i>Godinez v. Moran</i> (1993) 509 U.S. 389.....	102
<i>Gregg v. Georgia</i> (1976) 428 U.S. 153.....	93
<i>Harris v. New York</i> (1971) 401 U.S. 222.....	66
<i>Indiana v. Edwards</i> (2008) 554 U.S. 164.....	76, 77, 101, 102
<i>Joyce v. Ford Motor Co.</i> (2011) 198 Cal.App.4th 1478.....	92
<i>Jurek v. Texas</i> (1976) 428 U.S. 262.....	93
<i>Keenan v. Superior Court</i> (1982) 30 Cal.3d 750.....	59, 60
<i>Martinez v. Court of Appeal</i> (2000) 528 U.S. 152.....	78
<i>Mason v. Vasquez</i> (9th Cir. 1993) 5 F.3d 1220.....	57

<i>McKaskle v. Wiggins</i> (1984) 465 U.S. 168	58, 78
<i>People v. Alfaro</i> (2007) 41 Cal.4th 1277	103
<i>People v. Allison</i> (1989) 48 Cal.3d 879.....	87
<i>People v. Arias</i> (1996) 13 Cal.4th 92	88
<i>People v. Barnum</i> (2003) 29 Cal.4th 1210	69
<i>People v. Bigelow</i> (1984) 37 Cal.3d 731.....	58, 59, 61
<i>People v. Blair</i> (2005) 36 Cal.4th 686	75, 98
<i>People v. Bloom</i> (1989) 48 Cal.3d 1194.....	passim
<i>People v. Bradford</i> (1997) 15 Cal.4th 1229	58, 78
<i>People v. Brown</i> (2012) 54 Cal.4th 314	96, 97
<i>People v. Chavez</i> (1980) 26 Cal.3d 334.....	58
<i>People v. Clark</i> (1990) 50 Cal.3d 583.....	passim
<i>People v. Crandell</i> (1988) 46 Cal.3d 833.....	58, 59
<i>People v. Crittenden</i> (1994) 9 Cal.4th 83	98, 99
<i>People v. Davenport</i> (1995) 11 Cal.4th 1171	90

<i>People v. Dent</i> (2003) 30 Cal.4th 213	76
<i>People v. Diaz</i> (1992) 3 Cal.4th 495	85, 88
<i>People v. Douglas</i> (1990) 50 Cal.3d 468.....	73
<i>People v. Ernst</i> (1994) 8 Cal.4th 441	102
<i>People v. Friend</i> (2009) 47 Cal.4th 1	100
<i>People v. Frierson</i> (1979) 25 Cal.3d 142.....	90
<i>People v. Frierson</i> (1991) 52 Cal.3d 730.....	87, 88
<i>People v. Goodwillie</i> (2007) 147 Cal.App.4th 695.....	59
<i>People v. Heishman</i> (1998) 45 Cal.3d 147.....	87
<i>People v. Hung Thanh Mai</i> (2013) 57 Cal.4th 986	100
<i>People v. Jennings</i> (2010) 50 Cal.4th 616	99
<i>People v. Johnson</i> (1992) 3 Cal.4th 1183	73, 79, 100
<i>People v. Johnson</i> (2008) 53 Cal.4th 519	77, 79, 80
<i>People v. Kennedy</i> (2005) 36 Cal.4th 595	98
<i>People v. Kraft</i> (2000) 23 Cal.4th 978	66

<i>People v. Lang</i> (1989) 49 Cal.3d 991.....	87
<i>People v. Lynch</i> (2010) 50 Cal.4th 693	75
<i>People v. Mayfield</i> (1993) 5 Cal.4th 220	87
<i>People v. McKinnon</i> (2011) 52 Cal.4th 610	97
<i>People v. Memro</i> (1995) 11 Cal.4th 768	88
<i>People v. Montes</i> (2014) 56 Cal.4th 809	99
<i>People v. Prieto</i> (2003) 30 Cal.4th 226	98
<i>People v. Robles</i> (1970) 2 Cal.3d 205.....	103
<i>People v. Rodriguez</i> (1986) 42 Cal.3d 730.....	95
<i>People v. Sakarias</i> (2000) 22 Cal.4th 596	98
<i>People v. Schmeck</i> (2005) 37 Cal.4th 240	97
<i>People v. Scott</i> (1997) 15 Cal.4th 1188	87, 88
<i>People v. Sullivan</i> (2007) 151 Cal.App.4th 524.....	61
<i>People v. Taylor</i> (2009) 47 Cal.4th 850	70, 75, 79
<i>People v. Watson</i> (1956) 46 Cal.2d 818.....	58, 59

<i>People v. Weaver</i> (2012) 53 Cal.4th 1056	passim
<i>People v. Welch</i> (1999) 20 Cal.4th 701	74, 75, 77, 102
<i>People v. Williams</i> (2013) 58 Cal.4th 197	99
<i>Proffitt v. Florida</i> (1976) 428 U.S. 242	93
<i>Pulley v. Harris</i> (1984) 465 U.S. 37	94, 99
<i>Roberts v. Louisiana</i> (1976) 428 U.S. 325	93
<i>Rockwell v. Superior Court</i> (1976) 18 Cal.3d 420.....	93, 94
<i>Roper v. Simmons</i> (2005) 543 U.S. 551	100
<i>Strickland v. Washington</i> (1984) 466 U.S. 668	65
<i>U.S. v. Cronic</i> (1984) 466 U.S. 648	65
<i>Vasquez v. Hillery</i> (1986) 474 U.S. 254	97
<i>Walton v. Arizona</i> (1990) 497 U.S. 639	92
<i>Williams v. Superior Court</i> (1939) 14 Cal.2d 656.....	88
<i>Woodson v. North Carolina</i> (1976) 428 U.S. 280	93
STATUTES	
Evidence Code § 773, subd. (b).....	69

Penal Code

§ 187 1
 § 190.1 93
 § 190.2 1, 8, 9
 § 190.2, subds. (a)-(k) 90
 § 190.2, subd. (a)(7)(D) 1
 § 190.2, subd. (a)(17)(A) 1
 § 190.2, subd. (a)(18) 1
 § 19003 93, 98
 § 190.4, subd. (e) passim
 § 211 2
 § 212.5, subd. (a) 2
 § 245, subd. (a) 2
 § 459 2
 § 460.1 2
 § 667, subd. (a) 2
 § 667.5, subd. (a) 2
 § 667.5, subd. (b) 2
 § 667.5, subd. (c) 2
 § 686.1 79, 80
 § 1118 2
 § 1192.7 2
 § 1203.06 1
 § 1239, subd. (b) 83
 § 12022.5, subd. (a) 1
 § 12022.7 2

CONSTITUTIONAL PROVISIONS

United States Constitution

Fifth Amendment 101
 Sixth Amendment passim
 Eighth Amendment 63, 71, 98, 100
 Fourteenth Amendment 63, 100

California Constitution, Article I

§ 16 102

California Constitution, Article VI

§ 11 89, 90

OTHER AUTHORITIES

Equal Protection Clause 99

Assembly Bill 256 95
Senate Bill 155 95

STATEMENT OF THE CASE

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

On December 27, 1993, an information was filed in Santa Clara County Superior Court charging appellant with the murder of Kurt Anderson. (Pen. Code, § 187.¹) It was further alleged that appellant used a handgun (§§12022.5(a), 1203.06), and that three special circumstances applied: (1) murder in the commission or attempted commission of robbery (§190.2. subd. (a)(17)(A)); (2) murder in the commission or attempted commission of specified sexual acts (sodomy and oral copulation) (§ 190.2(a)(7)(D),(F)); and, (3) intentional murder that involved the infliction of torture (§ 190.2, subd. (a)(18)). (2 CT 351-353.) Prior convictions for robbery and burglary were also alleged for enhancement purposes. (2 CT 353-354.)

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

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

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

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

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

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

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

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

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

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

This is an unusual case because the defendant has wished to plead guilty since the proceedings began and has wanted to admit the special circumstances. Defendant stated he believes the appropriate penalty is death.

We have gone through a court trial which the court would characterize as a slow plea.

Court was kind of troubled by the procedure, but the court will note at this time the court sought guidance from the California Supreme Court in *People versus Bloom* that can be found at 48 Cal.3d 1994.

Mr. Morelos has offered no defense to the charges. He has offered no mitigation in the penalty phase of trial. In fact, the

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

(2 RT 532-533; italics added.)

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

This appeal is automatic.

STATEMENT OF FACTS

INTRODUCTION

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

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

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

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

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

EVIDENCE PRESENTED AT THE GUILT PHASE

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

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

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

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

recalled that Cota once briefly stopped by to visit appellant. It was around that time that appellant told Picklesimer he wanted to kill Cota because appellant had been arrested during the clock dispute. (1 RT 36-37.)

Although Picklesimer bailed out appellant, he never knew if any charges were filed against appellant and never got the bail money back. (1 RT 37.) Cota was now on the list. (2 RT 273-274.)

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

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

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

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

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

B. Kurt Anderson is Reported Missing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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