In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent,

v.

DANIEL CARL FREDERICKSON,

Defendant & Appellant.

CAPITAL CASE

Case No. S067392

Orange County Superior Court Case No. 96CF1713
The Honorable WILLIAM R. FROEBERG, Judge

RESPONDENT'S REPLY TO APPELLANT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

On October 17, 2018, this Court requested supplemental briefing on the following question:

> What significance, if any, does *McCoy v. Louisiana* (2018) 584 U.S. ___ [138 S.Ct. 1500] have on the issues in this case? (See also *People v. Miracle*, S140894).

On November 15, 2018, respondent filed supplemental briefing arguing that, notwithstanding *McCoy v. Louisiana* (2018) 584 U.S. ___ [138 S.Ct. 1500] ["*McCoy*"], Penal Code section 1018 ["section 1018"] complies with the Constitution. Respondent further argued that even if this Court finds that section 1018 is unconstitutional, any error in precluding Frederickson from pleading guilty to his capital charge is amenable to harmless error analysis and was, indeed, harmless under the circumstances. On November 16, 2018, Frederickson filed his supplemental brief reiterating the position set forth in his opening brief—section 1018 is unconstitutional and that the "error" by the trial court in refusing to allow him to plead guilty to his capital charge constitutes structural error.

As set forth in respondent's brief and respondent's supplemental brief, and further reiterated here, section 1018 does not violate a defendant's Sixth Amendment's right to self-representation and to control his defense as set forth in *McCoy* or *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). Furthermore, any error the trial court arguably might have committed in its interpretation of section 1018 as it applied to Frederickson would be state law error amenable to harmless error analysis.

THIS COURT'S RECENT DECISION IN *PEOPLE V. MIRACLE* SUPPORTS RESPONDENT'S POSITION THAT SECTION 1018 IS CONSTITUTIONAL

Section 1018 states, in pertinent part:

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

On September 16, 2018, this Court requested supplemental briefing in *People v. Miracle* (S140894) ["*Miracle*"] on the following question:

> Assuming that the term "counsel" in the second sentence of Penal Code section 1018 does not encompass advisory counsel, does the statute violate the Sixth Amendment to the United States Constitution [citations] in light of the Eighth Amendment's requirement of reliability in death judgments [citations]?

After supplemental briefing was filed—wherein respondent argued that section 1018 was unconstitutional in light of *McCoy*—this Court decided not to answer the posed question; instead this Court resolved the issue before it by holding that the consent-of-counsel requirement in section 1018 is satisfied by the consent of advisory counsel. (*People v. Miracle* (Dec. 3, 2018, S140894) ___ Cal.5th ___ [p. 33; 2018 WL 6273464, *12] ["[W]e conclude that the term 'counsel' in the operative portion of section 1018 is susceptible of a construction that includes advisory counsel — and adopt that construction"].)

Although this Court in its majority opinion did not mention either *McCoy* or respondent's argument regarding the constitutionality of section 1018 in light of *McCoy*, it reiterated its previous holdings in *People v. Chadd* (1981) 28 Cal.3d 739 (*Chadd*), and *People v. Alfaro* (2007) 41 Cal.4th 1277 (*Alfaro*)) regarding the importance of requiring counsel to consent to a defendant's plea of guilty to a capital charge in order to ensure the reliability of death judgments. (*Miracle*, *supra*, ___ Cal.5th ___ [pp. 27-32; 2018 WL 6273464 at *11-14].) While this Court found that the facts present in *Miracle* were distinguishable from those in either *Chadd* or

Alfaro, it continued to hold that section 1018's consent-of-counsel requirement was necessary and that, under the circumstances presented to it, the consent of advisory counsel satisfies that requirement. (*Id.* at ___ [pp. 29-32; 2018 WL 6273464 at *12-14.)

Although this Court found it unnecessary in *Miracle* to decide the precise issue presented in this case, it continued to emphasize the strong public policy underlying section 1018 and its "counsel" requirement, which can be fulfilled by advisory counsel: ensuring reliability in capital cases. This Court concluded that

> Interpreting the operative portion of section 1018 to bar defendant from pleading guilty would raise a serious question about whether section 1018 is compatible with defendant's constitutional rights under *Faretta*. By contrast, if "counsel" is construed to include advisory counsel, then section 1018 did not forbid defendant's plea, and we need not resolve whether it could have done so constitutionally.

(*Miracle*, *supra*, ___ Cal.5th ___ [p. 32; 2018 WL 6273464 at *13].) "[S]ection 1018," the Court went on to observe,

> is obviously designed to protect defendants by assuring that such a serious step is a fully informed and competent one, taken only after consideration with and advice by counsel." (*Chadd*, *supra*, 28 Cal.3d at p. 749, 170 Cal.Rptr. 798, 621 P.2d 837.) In addition, the amendment that added the requirement that counsel consent did so to provide "a further independent safeguard against erroneous imposition of a death sentence." (*Id*. at p. 750, 170 Cal.Rptr. 798, 621 P.2d 837.) By evaluating a case and advising the defendant with respect to his or her desire to plead guilty, advisory counsel safeguards against an ill-considered entry of a guilty plea.

(*Id.* at ___ [p. 33; 2018 WL 6273464 at *13.)

In holding that the assent of advisory counsel satisfied the assent-of-counsel requirement in section 1018, this Court specifically noted that advisory Miracle's counsel was a very experienced criminal defense lawyer, who reviewed the discovery and evaluated the evidence, and

thoroughly discussed the case with this client. "This process assured that defendant's plea was fully informed by advisory counsel's evaluation of that case, and the process served as a safeguard against erroneous judgment." (*Miracle, supra,* ___ Cal.5th ___ [p. 34; 2018 WL 6273464 at *14].)

Writing in dissent, Justice Liu disagreed with the majority that the "counsel" requirement in section 1018 could be satisfied by advisory counsel (*Miracle, supra,* ___ Cal.5th ___ [Dis. Op. 1-5; 2018 WL 6273464 at *25]), but he did not dispute the constitutionality of section 1018 and its fundamental public policy purpose as an important safeguard to ensure the reliability of death judgments. Like the majority, Justice Liu reiterated this Court's holdings in emphasizing the purpose of section 1018 (*id.* at ___ [Dis. Op. pp. 8-13; 2018 WL 6273464 at *26 (citing *Chadd* and *Alfaro*)).

Even taking into consideration the view set forth in a supplemental briefing submitted by respondent in *Miracle*—that section 1018 was unconstitutional in light of *McCoy*—and recognizing the potential tension between section 1018's terms and a defendant's *Faretta* rights, Justice Liu remained convinced not only that the public policy rational underlying section 1018 is a worthy one, but that the measure itself is constitutional. (*Miracle, supra,* ___ Cal.5th ___ [Dis. Op. p. 8; 2018 WL 6273464 at *28-29] ["I see no constitutional infirmity in section 1018, at least as applied to the facts here"]; see also *id.* at ___ [Dis. Op. pp. 12-13" WL 6273464 at*29], citing *People v. Mai* (2013) 57 Cal.4th 986, 1055 [recognizing that section 1018 is an example of the "limited circumstances in which, as a matter of fundamental public policy, rights and decisions that are normally personal to a criminal defendant may be limited or overruled in the service of death penalty reliability"].)

In Justice Liu's view, *McCoy* does not call into question the constitutionality of section 1018:

> I acknowledge that aspects of *McCoy* may be read to suggest that a defendant retains the ultimate right to decide whether to plead guilty to capital charges. (See, e.g., *ibid.* ["whether to plead guilty" is a decision "reserved for the client"].) But *McCoy* did not weigh a defendant's autonomy interests against countervailing reliability interests; it did not address whether a capital defendant may enter a guilty plea against the advice of counsel in the face of a state statute requiring counsel's consent as a measure to lessen the risk of a mistaken judgment. (See *People v. Ghobrial* (2018) 5 Cal.5th 250, 285, 234 Cal.Rptr.3d 669, 420 P.3d 179 ["'a decision is not authority for propositions not considered'"].)

(*Miracle*, *supra*, ___ Cal.5th ___ [Dis. Op. p. 15; 2018 WL 6273464 at *29].)

EVEN IF THIS COURT FINDS THAT THE TRIAL COURT ERRED IN PRECLUDING FREDERICKSON FROM PLEADING GUILTY TO A CAPITAL CRIME, ANY SUCH ERROR IS AMENABLE TO HARMLESS ERROR ANALYSIS

In appellant's supplemental brief [ASB], Frederickson argues that any error resulting from the trial court precluding him from pleading guilty to a capital crime is "structural error." (ASB at 31-36.) For the reasons set forth in respondent's brief, respondent's supplemental brief, and as set forth below, Frederickson is incorrect.

Even assuming that the trial court erred in interpreting section 1018 to preclude Frederickson from pleading guilty to a capital crime, any such error is amenable to harmless error review and, in the present case, is harmless. As this Court held in *Miracle,* the consent of advisory counsel satisfies the consent-of-counsel requirement in section 1018. The trial court in the instant case did not allow Frederickson to explore the possibility of obtaining advisory counsel to serve the role of "counsel" under section 1018 and consent to his purported desire to plead guilty. As Frederickson was allowed to represent himself, any error in the trial court's

interpretation of section 1018 (understandable, as it did not have the benefit of the *Miracle* opinion) was an error solely in the interpretation of a state statute, and did not infringe Frederickson's rights under the federal Constitution.

And this claimed state-law error is amenable to harmless error analyses. Frederickson sets forth several "categories" of error he claims constitute "structural error;" meaning they are not amenable to harmless error analysis. (ASB at 32-38.) He is mistaken. Although Frederickson argues that errors are structural when the right at issue "is not designed to protect the defendant from erroneous conviction but instead protects some other interest" (ASB at 32), any "error" in this case impacts only a defendant's protection from "erroneous conviction." In fact, the only purpose of section 1018 *is* to protect against erroneous conviction or, put another way, to ensure the reliability of a death judgment in a capital case. (*Miracle*, *supra*, ___ Cal.5th ___ [pp. 27-32; 2018 WL 6273464 at *11-14]; *Alfaro*, *supra*, 41 Cal.4th at p. ____; *Chadd*, *supra*, 28 Cal.3d at p. 750.)

Frederickson next asserts that whenever "the effects of the error cannot be ascertained or are too hard to measure," The error must be deemed "structural." (ASB at 33.) But the only prejudice that conceivably resulted from the error alleged here—disallowing Frederickson's guilty plea—was an inability to point to entry of that plea and urge the jury to regard as a form of mitigating evidence at sentencing. This Court, of course, is frequently called upon to assess how excluded evidence likely affected the outcome of trial proceedings. In many instances, that inquiry is most helpfully informed by taking stock of what other evidence *was* made available for the jury's consideration. Here, Frederickson's jury knew of his *desire* to plead guilty (even while he contended that the charges were not "true"), a fact that, whatever mitigating value his jury might have assigned to it on account of what it revealed about *Frederickson*, would not

have been materially enhanced by additional information reflecting only how *the trial court responded* to Frederickson's resolve to plead guilty. (See 16 RT 3065, 3069.) That conclusion is especially compelling here, given Frederickson never linked his desire to plead guilty to any appeal to the jury's sense of "mercy." Although he spoke at times of accepting responsibility for his actions which, he claimed, weighed of his conscience, when given the opportunity to speak at his penalty phase, he not only refused to accept responsibility for committing his crimes, he specifically requested the death penalty—hardly a plea for mercy.

CONCLUSION

The People respectfully submit that the judgment should be affirmed.

Dated: December 17, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Reply to Appellant's Supplemental Brief** uses a 13-point Times New Roman font and contains 1,953 words.

Dated: December 17, 2018

XAVIER BECERRA
Attorney General of California

/s/ *Tami Falkenstein Hennick*

TAMI FALKENSTEIN HENNICK
Deputy Attorney General
Attorneys for Respondent

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No.: **S067392**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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HON WILLIAM R FROEBERG
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 17, 2018, at San Diego, California.

STEPHEN MCGEE	/s/ *Stephen McGee*
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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/s/Tami Hennick

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