No. S140894

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	(Santa Barbara County Superior Ct. No. 1200303)
v.	)	
JOSHUA MARTIN MIRACLE,	)	
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

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

HONORABLE BRIAN E. HILL, JUDGE

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APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant's guilty plea must be vacated, and his conviction and death sentence reversed, because the trial court accepted the plea in violation of Penal Code section 1018, which expressly prohibits entry of a guilty plea in a capital case by a defendant who does not "appear with counsel." (Pen. Code, § 1018.) This Court has long since upheld the constitutionality of this statute, and its clear and unambiguous language admits of no statutory construction that would validate appellant's guilty plea. The consent of appellant's advisory counsel did not satisfy the requirement that appellant appear with "counsel," as a matter of law, and in any event appellant's advisory counsel did not serve as the "functional equivalent" of counsel.

Appellant's visible, excessive restraints, which caused him pain and discomfort, exceeded what those charged with courtroom security deemed sufficient, hampered his ability to participate in his own defense, and

prejudicially fueled the prosecutor's future dangerousness argument, warrant reversal of his death sentence.

In this brief, appellant demonstrates that respondent's counter arguments are legally unavailing or unsupported by the record, or both. Appellant addresses respondent's arguments where necessary to present the issues fully and fairly to the Court. Appellant does not reply to those of respondent's arguments that are fully addressed in his opening brief. The failure to reply to any specific argument or allegation, or to reassert a point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1064-1065), but rather reflects appellant's view that the issue has adequately been presented and is fully joined.

ARGUMENT

I. APPELLANT'S GUILTY PLEA IS INVALID UNDER PENAL CODE SECTION 1018 BECAUSE APPELLANT WAS PROCEEDING IN PRO. PER. AND HAD ONLY THE CONSENT OF ADVISORY COUNSEL

A. Introduction

Penal Code section 1018 expressly prohibits the entry of a guilty plea in a capital case by a defendant who does not "appear with counsel," and provides that a capital defendant who does have counsel must have the consent of "counsel." The trial court nonetheless granted appellant's motion to represent himself and then accepted his guilty plea based on the consent of his advisory counsel, Joseph Allen. As appellant has explained, the plea is invalid under section 1018 as a matter of law. (AOB at pp. 19-48.)

Notwithstanding the plain language of the statute, respondent urges that section 1018 should be "construed" to permit a self-represented defendant to plead guilty to capital murder, "especially" if the plea is part of his penalty phase strategy, which respondent maintains was the case here. (RB at 51.) Despite this Court's considered reconciliation of section 1018 and *Faretta v. California* (1976) 422 U.S. 806 ("*Faretta*") in *People v. Chadd* (1981) 28 Cal.3d 739 ("*Chadd*"), respondent maintains that "interpreting" section 1018 otherwise would render the statute unconstitutional. Respondent argues alternatively that appellant's plea was valid because he had the consent of advisory counsel. (RB at 77-78.)

Respondent's attack on section 1018, the constitutionality of which this Court repeatedly has affirmed, is properly addressed to the Legislature. Respondent's suggestion that section 1018 may be read to accommodate appellant's plea is legally flawed and factually unsupported. Appellant did

not appear with "counsel;" advisory counsel is not the "functional equivalent" of counsel, as a matter of law; and Mr. Allen never represented appellant as counsel.

B. Section 1018 May not be Construed to Permit a Defendant who is not Represented by Counsel to Plead Guilty to Capital Murder

This Court has consistently treated the language of section 1018 as clear and unambiguous in its prohibition against the entry of a guilty plea in a capital case by a defendant who is not represented by counsel. In *Chadd* this Court noted that as a matter of statutory construction it was "difficult to conceive of a *plainer statement of law* than the rule of section 1018 that no guilty plea to a capital offense shall be received 'without the consent of the defendant's counsel.'" (*Chadd*, 28 Cal.3d at p. 746, italics added; see also *People v. Ballentine* (1952) 39 Cal.2d 193, 196 [conviction reversed where guilty plea to capital murder was accepted from a defendant who "was not represented by counsel;" *People v. Massie* (1985) 40 Cal.3d 620, 624-625 [recognizing Legislature's authority to determine that "a defendant who wants to plead guilty in a capital case must be represented by counsel who exercises his independent judgment in deciding whether to consent to the plea"]; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1299 [reaffirming the reasoning in *Chadd* and noting that in that case the Court "[e]mphasiz[ed] the plain language of section 1018"].) Respondent does not dispute that appellant was not "represented by counsel" when he pled guilty.

Respondent nonetheless maintains that to "construe" section 1018 as requiring the consent of counsel when the defendant seeks to plead guilty in furtherance of a "defense of remorse" or to demonstrate his acceptance of responsibility would violate the defendant's "fundamental right to control

and present a defense" (RB at 56), as well as the right to self-representation recognized in *Faretta*. Respondent's arguments are unavailing.

First, as a matter of statutory construction, there is in fact no basis to "construe" section 1018 at all. As this Court has recognized: "When the language of a statute is 'clear and unambiguous' and thus not reasonably susceptible of more than one meaning, 'there is no need for construction and courts should not indulge in it.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 621, citations and internal quotations omitted; see also *People v. Foreman* (2005) 126 Cal.App.4th 338, 342 ["When statutory language is clear and unambiguous, additional construction is unnecessary."]; *People v. Jae Jeong Lyu* (2012) 203 Cal.App.4th 1293.) "This principle is but a recognition that courts 'must follow the language used and give to it its plain meaning, whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature.'" (*People v. Weidert* (1985) 30 Cal.3d 836, 843.) The relevant language of section 1018 – "No plea of guilty of a felony for which the maximum punishment is death . . . *shall be received* from a defendant who does not *appear with counsel* . . . ." – is plain, clear and unambiguous. (Pen. Code, 1018, italics added.)

Second, construing section 1018 to permit a self-represented defendant to plead guilty to capital murder would render superfluous the separate statutory provision for noncapital defendants, since then all defendants would be able to plead guilty if they knowingly and intelligently waived the right to counsel.[1] As this Court observed in *Chadd*, such a

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[1] This portion of section 1018 provides:

(continued...)

construction would be "manifestly improper" because it would "obliterate the Legislature's careful distinction between capital and noncapital cases, and render largely superfluous its special provision for the former." (28 Cal.3d at p. 747, citation and footnote omitted; see also *People v. Massie*, *supra*, 40 Cal.3d at p. 624 (same).) Respondent simply ignores this fundamental rule of statutory construction.

Third, respondent effectively asks this Court to add words to section 1018 that are not there; i.e., that a self-represented capital defendant may not plead guilty "unless" the plea is "part of a strategy to obtain a life sentence at the penalty phase." (RB at 51.) Yet section 1018 categorically and unconditionally prohibits the acceptance of a guilty plea to capital murder from a defendant who "does not appear with counsel." Respondent's proposal thus contravenes the "elementary principle that the judicial function is simply to ascertain and declare what is in the terms and substance of a statute, *not to insert what has been omitted* or omit what has been inserted." (*People v. Foreman*, *supra*, 126 Cal.App.4th at p. 342, citations omitted, italics added.) In *People v. Jae Jeong Lyu*, *supra*, 203 Cal.App.4th 1293, the court reversed the defendant's conviction of sexual

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[1] (...continued)

> No plea of guilty to a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and unless the court shall find that defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel.

(Pen. Code, § 1018.)

penetration and oral copulation of an unconscious person, rejecting the state's argument that the statutory definition of unconsciousness – "not aware, knowing, perceiving, or cognizant that the act occurred" – should be construed to mean *additionally* that the victim "did not see the attack coming and was not aware or conscious of it until it had occurred." (*Id.* at p. 1301.) The court declined to "add that meaning to the clear and unambiguous language of the statutes." (*Ibid.*) Similarly here, there is no basis to add to the clear and unambiguous language of section 1018.

Finally, it bears noting that the Legislature has amended section 1018 – since the 1973 amended discussed in *Chadd* (28 Cal.3d at pp. 749-750, citing Stats. 1973, ch. 719, § 11, p. 1301), that clarified that a defendant wishing to plead guilty to capital murder must not only *have* counsel, but also the consent of counsel – and has elected to retain this language. (Pen. Code, § 1018, Stats. 1991, ch. 421 (AB 2174) § 1.) "When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." (*People v. Bouzas* (1991) 53 Cal.3d 467, 475; see also *People v. Zambia* (2011) 51 Cal.4th 965, 976 ["pattern of legislative inaction signaling acquiescence" in courts' interpretation of statute].) The Legislature must be deemed to have been aware of *Chadd* and its progeny and to have acquiesced in this Court's construction of section 1018.

C. Section 1018's Prohibition Against the Entry of a Guilty Plea by a Self-Represented Capital Defendant does not Violate the Defendant's Right to Counsel or to Present a Defense

Respondent maintains that interpreting section 1018 as prohibiting a self-represented capital defendant from pleading guilty would violate the defendant's right to self-representation and to present a defense. (RB at 51.) Respondent's lengthy discussion sidesteps this Court's considered analysis of the issue in *Chadd*, is largely beside the point, and relies on cases that are legally inapposite.

Respondent acknowledges that, after *Faretta* was decided, this Court held in *Chadd* that "section 1018 provided that a guilty plea to a capital offense required the consent of counsel" and that the Court reasoned that "the state's interest in reducing the danger of erroneously imposing a death sentence by subjecting the capital defendant's right to plead guilty to the consent of counsel outweighs the infringement on the right to self-defense." (RB at 53, citing *Chadd* at pp.746, 748-749.) Respondent asserts, however, that "subsequent cases . . . have recognized that the state's interest in a reliable judgment does not justify infringement of a criminal defendant's right to self-representation, and that the right to plead guilty is a personal right that is not surrendered to an attorney." (RB at 54.) Yet, none of the cases respondent cites undermines this Court's holding or reasoning in *Chadd*; nor does any of them address the constitutionality of a statute limiting a self-represented defendant's right to plead guilty to capital murder.

In *Godinez v. Moran* (1993) 509 U.S. 389, first, the United States Supreme Court held that the standard for competency to plead guilty and waive counsel is the same as the standard for competency to stand trial, and

rejected a Nevada defendant's claim that he was not competent to represent himself.[2] The decision has no bearing on the constitutionality of section 1018. *McKaskle v. Wiggins* (1984) 465 U.S. 168, on which respondent also relies (RB at 54), is a non-capital case in which the high court rejected the defendant's claim that his stand-by counsel was permitted too active a role, at trial. The case is thus even farther from the mark. Respondent's reliance on *Lenhard v. Wolff* (1979) 443 U.S. 1306 (*Lenhard I*) (RB at pp. 54-55), is also baseless, for in *Lenhard I* Justice Rehnquist, acting as Circuit Justice, simply continued a stay of execution, pending consideration by the full court, in a *Nevada* case in which a self-represented defendant had pled guilty.

If anything, "subsequent cases" have reaffirmed this Court's holding in *Chadd*. Most recently, in *People v. Boyce* (2014) 59 Cal.4th 672, this Court rejected the defendant's claim that he should have been permitted to represent himself at the penalty phase, stating that "the right to self-representation is not absolute." (*Id.* at p. 702, quoting *Indiana v. Edwards* (2008) 554 U.S. 164, 171.) The Court noted by way of example that a *Faretta* motion may be denied as untimely, and observed that:

> Additionally, special considerations inform a request for self-representation in a capital case. By statute, "a plea of guilty to a capital felony may not be taken except in the presence of counsel, and with counsel's consent. (§ 1018.) Even if otherwise competent to exercise the constitutional right to self-representation, a defendant may not discharge his lawyer in order to enter such a plea over counsel's objection."

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[2] Respondent's observation that there is no dispute on appeal that appellant was competent to stand trial (RB at 65) is true, but irrelevant. At issue is the propriety of the trial court's acceptance of the guilty plea of a self-represented capital defendant, which is prohibited by section 1018.

(*Id.* at pp. 702-703, quoting *People v. Mai* (2013) 57 Cal.4th 986, 1055.)

Respondent next contends that "[a] self-represented capital defendant has total control over his defense even if it ultimately leads to a judgment of death." (RB at 55.) Again, respondent misses the point. Appellant does not dispute that a self-represented capital defendant would have control over his "defense," at trial; section 1018 simply prohibits that defendant from foregoing a trial by pleading guilty.

Indeed, respondent's very argument was squarely rejected in *Chadd*: "[F]rom the defendant's conceded right to 'make a defense' in 'an adversary criminal trial,' the Attorney General attempts to infer a defendant's right to make no such defense and to have no such trial, even when his life is at stake. But in capital cases . . . the state has a strong interest in reducing the risk of mistaken judgments." (*Chadd*, 28 Cal.3d at p. 751.) Subsequently in *People v. Frierson* (1985) 39 Cal.3d 803, in which this Court found the trial court had erred in allowing the defense counsel to override his client's request to present a diminished capacity defense, the Court was quick to point out that its holding was fully consistent with *Chadd*:

> Our conclusion that defense counsel may not override defendant's decision to present a defense at the guilt/special circumstance phase is not in any way inconsistent with this court's decision in *People v. Chadd* (1981) 28 Cal.3d 739 . . ., in which we held that, by virtue of a specific statutory provision (Pen. Code, § 1018), a plea of guilty to a capital offense requires the concurrence of both the defendant and his counsel. The statutory provision at issue in *Chadd* reflected a determination by the state that a particular procedural guarantee - the right to require the People to prove a defendant's guilt of a capital offense beyond a reasonable doubt at a fair and public trial - is so basic that it must be afforded unless *both* defendant *and* counsel agree that it

should be waived.

(*Id.* at p. 817, fn. 7, italics in original.)

Moreover, neither of the two cases respondent's cites (RB at 55) supports the argument that a self-represented capital defendant is constitutionally entitled to plead guilty. In *People v. Taylor* (2009) 47 Cal.4th 850, a capital defendant representing himself pled *not* guilty, went to trial, and then argued he should not have been found competent to stand trial. In *People v. Joseph* (1983) 34 Cal.3d 936, the Court reversed a capital defendant's conviction, *following a jury trial*, finding the trial court had erred in denying the defendant's *Faretta* motion. Neither case involved section 1018 or the constitutionality of its prohibition against entry of a guilty plea by a capital defendant who has been granted leave to represent himself.

Respondent also notes that a capital defendant "has a fundamental right not to present a defense and to take the witness stand to confess his guilt and request the death penalty[,]" and that "[t]he state's interest in a reliable judgment may not trump" that right. (RB at 55.) True. As this Court had noted, that is one reason why section 1018 *is* constitutional: "The statute . . . does not prevent a defendant from waiving his right to the aid of counsel and defending himself. It merely prohibits the court from receiving a plea of guilty to a felony for which the maximum punishment is death made by a defendant not represented by counsel." (*People v. Ballentine*, *supra,* 39 Cal.2d at p. 195.) Thus, section 1018 does not prohibit a capital defendant from choosing to present "no defense," at trial; it simply requires the state meet its burden affirmatively to prove its case against him. (See, *Chadd*, 28 Cal.3d at p. 750, fn. 7.)

In any event, none of the cases respondent cites here for the

proposition that a self-represented capital defendant "has total control over his defense" (RB at 55) undermines the constitutionality of section 1018. In *People v. Brown* (2014) 59 Cal.4th 86, the defendant, who had been *represented by counsel* and pled *not guilty*, argued on appeal that his counsel was ineffective at the penalty phase for *acquiescing* in his request for the death penalty. In *People v. Koontz* (2002) 27 Cal.4th 1041, *People v. Bradford* (1997) 15 Cal.4th 1229, and *People v. Clark* (1990) 50 Cal.3d 583, which respondent also cites (RB at 55), the defendants proceeded in pro. per.; but in none of these cases was a guilty plea entered: in *Koontz* the defendant challenged his competency to stand trial; in *Bradford* and in *Clark* the issue was whether the trial court had erred in granting the defendant's request to represent himself.

People v. Ramirez (2006) 39 Cal.4th 398 and *People v. Covedi* (1966) 65 Cal.2d 199, on which respondent also relies (RB at 55), are also inapposite; neither case involves a guilty plea by a capital defendant, much less one proceeding in pro. per. In *Ramirez* the court rejected the defendant's argument that the trial court should not have granted his motion to substitute allegedly ineffective counsel, and in *Covedi*, a non-capital case, this Court reversed the conviction on the grounds the trial court had erred in appointing defense counsel's law partner to represent the defendant when defense counsel became temporarily incapacitated. None of these cases undermines *Chadd* or the constitutionality of section 1018.

Respondent also maintains that "the United States Supreme Court has *held* that a competent self-represented defendant's guilty plea and refusal to present any mitigating evidence at the penalty phase did not interfere with the state's interest in a reliable judgment." (RB at 55, italics added.) Respondent's reliance on *Lenhard v. Wolff* (*Lenhard II*) (1979) 444

U.S. 807, for this assertion is misplaced. As noted, in *Lenhard I* Justice Rehnquist merely extended a stay of execution in a Nevada capital case. In *Lenhard II* the full Court, in a single sentence, then denied the stay, over a lengthy dissent by Justices Marshall and Brennan. *Lenhard II* thus does not "hold" anything, much less that California's statutory prohibition on the entry of a guilty plea to capital murder by a self-represented defendant in unconstitutional.

Respondent argues that post-*Chadd* cases recognize that while a defendant may surrender *"most* of his fundamental personal rights" to his counsel's control, the "fundamental and personal right to plead guilty" is not one of them. (RB at 56, italics in original.) Preliminarily, it bears reiterating that appellant did not have counsel. In any event, none of the cases respondent cites (RB at pp. 56-57) supports the argument that a capital defendant has the right to plead guilty without the consent of counsel, much less that a self-represented capital defendant may do so. In *People v. Hinton* (2006) 37 Cal.4th 839, the defendant, represented by counsel at trial, was convicted of murder with special circumstances, including a prior-murder special circumstance. On appeal this Court rejected his claim that the waiver of the right to a separate proceeding on the prior murder must be given by the defendant personally, rather than by counsel. (*Id.* at pp. 873-875.) The case has no bearing on the issues at hand.

Florida v. Nixon (2004) 543 U.S. 175, which respondent also cites (RB at 56), is likewise inapposite. In that case the United States Supreme Court held that defense counsel's failure to obtain his client's consent to his strategy of conceding guilt at the guilt phase did not automatically render counsel's performance ineffective. The Court noted that the concession

was not the "functional equivalent" of a guilty plea and that the state was still compelled to present "competent, admissible evidence of the essential element of the crimes . . . charged." (*Id.* at pp. 187-188.) The Court had no occasion to decide the constitutionality of a state statutory limitation on a capital defendant's right to plead guilty. If anything, *Florida v. Nixon* is fully consistent with this Court's analysis of section 1018 in *People v. Bloom* (1989) 48 Cal.3d 1194 (*Bloom*), where the Court cited *Chadd* for the proposition that a capital defendant representing himself has no duty to present a defense, but may simply "put the state to its proof" and take the stand and confess guilt. (*Id.* at p. 1222, citing *Chadd*, 28 Cal.3d at p. 750, fn. 7.)

Respondent's reliance on *Jones v. Barnes* (1983) 463 U.S. 745, a non-capital case (RB at 56), is equally unavailing. In that case the high court held that appellate counsel did not have a constitutional duty to raise every non-frivolous issue the defendant requested be raised. The cases respondent cites regarding the "conflict between counsel and defendant about whether to present a defense" at the guilt phase of a capital trial (RB at 57) are also inapposite, as here it is undisputed that appellant did not have counsel, much less a conflict with counsel regarding guilty phase strategy. In *In re Horton* (1990) 54 Cal.3d 82, 95, this Court found that defense counsel had impliedly stipulated that the case could proceed before a commissioner acting as a temporary judge, noted that through an "oversight" the defendant's personal stipulation was not obtained, and held that the right to a trial by an elected superior court judge was not one that required the defendant's personal waiver. (*Id.* at p. 100.) The case has no bearing on whether a self-represented defendant may plead guilty to capital murder. If anything, both *Barnes*, *supra*, 54 Cal.3d 82, and *Horton*

undermine the notion that a criminal defendant has "total control" over his defense. (RB at 55.)

In *People v. Freedman* (2004) 8 Cal.4th 450, which respondent also cites (RB at 57), this Court rejected the claim by a capital defendant that his counsel's strategy of focusing on intent rather than identity amounted to a "concession of guilt" requiring the defendant's knowing and voluntary waiver of his constitutional rights. Here, the issue is whether a capital defendant wishing to plead guilty must have the consent of counsel, as section 1018 provides.

In *Cooke v. State* (Del. 2011) 977 A.2d 803, finally, the Delaware Supreme Court held that by electing to proceed on the theory that the defendant was guilty of murder but mentally ill, over his client's objection and contrary to his assertion of factual innocence, defense counsel had violated the defendant's right to plead *not* guilty and to testify on his own behalf. The case has no bearing on the constitutionality of a California state statutory prohibition on entry of a guilty plea by a self-represented capital defendant.

Respondent's observation, next, that "the defendant's right to control his defense does not render his death judgment unreliable" because he "has a right to forego mitigating evidence" (RB at pp. 57-58; see also p. 60) is beside the point; appellant does not dispute that a capital defendant, whether represented by counsel or not, may elect not to present mitigating evidence at the penalty phase. The cases respondent cites here – *People v. Clark* (1992) 3 Cal.4th 41; *Bloom*, *supra*, 48 Cal.3d 1194; and *People v. Taylor*, *supra*, 47 Cal.4th 850 (RB at pp. 57-58) – are all cited for the proposition that the defendant has the right to determine how his case should be presented at the penalty phase. Similarly, in support of the

assertion that "[n]othing in the Sixth or Eighth Amendments or . . . *Faretta* permits the state to infringe on the defendant's right to enter a guilty plea [or] allows defense counsel to act against his client's wishes by vetoing his client's guilty plea" (RB at 60), respondent cites *People v. Lang* (1989) 49 Cal.3d 991, 1030-1032, and *Bloom*, *supra*, 48 Cal.3d at p. 1228, again, with parentheticals related to the presentation of mitigation at the penalty phase. At issue here is the validity of a guilty plea entered by a capital defendant proceeding in pro. per.

Drawing on the principle that a capital defendant has the right to determine what evidence is or is not presented at the penalty phase, respondent urges that "[t]he same reasoning applies to the present case." (RB at 59.) Respondent cites *People v. Bradford*, *supra*, 15 Cal.4th at p. 1635, for the proposition that "a capital defendant has an unconditional right to self-representation[,]" and *Bloom*, *supra*, 48 Cal.3d at pp. 1221-1222, in support of the notion that "a criminal defendant's personal choices must be respected," and concludes that, "[a] fortiori," a capital defendant "has an unconditional right to represent himself and decide *whether to enter a guilty plea* as part of a strategy to argue for a lesser punishment than death at the penalty phase . . . ." (RB at 59, italics added.) Yet, nothing in *Bradford* or *Bloom,* which in relevant part address the right to self-representation at the penalty phase (*Bradford*, *supra*, 15 Cal.4th at pp. 1363-1367; *Bloom*, *supra*, 48 Cal.3d at pp. 1220-1222), so much as intimates that section 1018's prohibition against entry of a guilty plea by a self-represented capital defendant runs afoul of *Faretta* or is otherwise unconstitutional.

D. The Record Does Not Support Revisiting *Chadd* or Limiting the Application of Section 1018 in this Case

Respondent's argument that *Chadd* should be revisited or limited in this case because appellant sought to plead guilty as part of a "remorse" strategy (RB at pp. 64, 65) is both legally unavailing and refuted by the record. As explained in Section I.B., above, there is no basis to construe section 1018 as inapplicable where a self-represented capital defendant indicates he wishes to plead guilty in furtherance of a particular penalty phase strategy. The statue on its face categorically prohibits entry of a guilty plea in a capital case from a defendant who does not "appear with counsel." Moreover, the record here establishes that appellant had no such strategic reason for seeking to plead guilty.

As respondent notes (RB at 64), in *Alfaro* the Court declined to decide whether *Chadd* would apply if a defendant sought to plead guilty over counsel's objection in furtherance of a strategy to obtain a sentence less than death, because the defendant was in fact not motivated by such a strategy; rather she wanted to avoid testifying against a co-perpetrator whom her counsel sought to implicate as an accomplice. (*Id.* at pp. 1299-1300.) Similarly here, the record belies any suggestion that appellant sought to plead guilty in furtherance of a "remorse" or other strategy. Rather, he made clear that he wanted to plead guilty in order to absolve Ibarra, his co-defendant, of blame for the homicide and take responsibility himself.[3] He also repeatedly stated that he did not want to use the fact of

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[3] As noted in appellant's opening brief (AOB at pp. 2-3), the indictment alleged that Ibarra had intentionally committed the murder while lying in wait (Pen. Code, § 190.2, subd. (a)(15)); that in the commission of

(continued...)

his guilty plea in mitigation.

Thus, at the June 14, 2005 in camera hearing appellant told the court he did not want a jury trial at the penalty phase and explained that the *only* reason he wished to plead guilty was to exonerate co-defendant Ibarra:

> I just want to make it clear that *the only reason* that I would like to enter a guilty plea and accept responsibility is because I feel that I'm the sole individual that is responsible, and that's the only motive that I have is that I want to do the right thing and take responsibility and offer exonerating testimony on behalf of Mr. Ibarra.

(2 RT 246, italics added.)[4] Appellant expressly stated that he did not want to use his guilty plea as evidence in mitigation:

> As far as offering that as mitigating evidence at the penalty trial, that's a benefit that Mr. Carty pointed out to me after I had already let him know what my desire was in pleading guilty. So, I just want to make that clear that – that using that as mitigating evidence at the penalty phase *is not my motive for pleading guilty.*

(2 RT 246, italics added.) When the court nonetheless suggested that using the plea in mitigation might not be his "main motive" and indicated the plea "would be used" at the penalty phase, appellant responded, "Tell you the truth, I'm not concerned about it al all." (2 RT 246.) Mr. Allen then acknowledged that using the guilty plea in mitigation was "not one of

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[3] (...continued)
the murder he had personally used a deadly and dangerous weapon (a knife) (Pen. Code, § 12022, subd. (b)(1)); and that he had committed the offense for the benefit of, at the direction of, or in association with, a criminal street gang (Pen. Code, § 186.22, subd. (a)(22)). (1 CT 1-6.)

[4] By Order filed June 25, 2014, this Court granted appellant's motion to unseal the transcript of the June 14, 2005, in camera proceedings, spanning pages 238 to 254 of Volume 1 of the Reporter's Transcript.

[appellant's] motives, but it is one of mine." (2 RT 247.)[5]

Appellant then indicated he would like to waive his right to a jury at the penalty phase, adding, "I would prefer . . . not to offer any kind of defense at the penalty phase, or offer[ ] any kind of mitigating evidence on my behalf, because it just goes against my grain. I just don't believe in doing that, I believe the right thing for me to do is take responsibility." (2 RT 247-248, italics added.) When the court admonished appellant that "we're going to have a penalty phase whether or not you're represented by counsel," appellant responded, "What I see happening here is I see the Court interfering with . . . my right to take responsibility and not offer any excuses for what I did." (2 RT 250.) Respondent's assertion that "appellant's desire was to plead guilty in order to accept responsibility *as a strategy for arguing that the jury should impose a sentence of life without the possibility of parole*" (RB at 64, italics added) is thus contradicted by the record.

Respondent further misrepresents the record by stating (1) that appellant believed that "[h]is only chance for a life sentence was to accept responsibility *and offer a remorse defense at the penalty trial*;" (2) that at trial "appellant expressed that he wanted to avoid the death sentence and believed a guilty plea was *the best strategy* to have the jurors view him favorably;" and (3) that on appeal appellant "fails to mention that he chose

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[5] When Mr. Allen later suggested modifying the jury instruction that stated that appellant had been "convicted" of murder and that the special circumstances "are true" (4 CT 1074) to read that appellant had *pled* guilty and *admitted* the special circumstances, appellant objected, and asked that the instructions not refer to his plea or to the admission of the special circumstances at all. (8 RT 1933-1035.) The instruction remained unchanged. (4 CT 1074, 1109.)

to represent himself in order to plead guilty *as part of a strategy to obtain a life sentence at the penalty phase*." (RB at pp. 65, 66, italics added.) As noted, at trial appellant expressly stated that he did *not* want to argue that the fact of his guilty plea should be considered a circumstance in mitigation and that he did not even want a jury.[6] Mr. Allen may have thought it would be a good idea to argue to a penalty phase jury that appellant's guilty plea should count in mitigation, but it was not what appellant wanted or what was motivating his desire to plead guilty.

Consistent with appellant's desire that no mitigating evidence be presented and that his plea not be urged as a mitigating factor, he ultimately presented no opening statement, no case in mitigation, no closing argument, and no allocution. Lest the jury might nonetheless consider his guilty plea was mitigating, the prosecutor argued, without rebuttal, that the plea was in fact aggravating: "To the extent that you're going to give Mr. Miracle credit for pleading guilty for some reason, please also consider that that is the biggest notch he currently has on his criminal resume, not just the murder of Silva, but the pleading guilty to it, the standing up, the pounding of the Eastside [gang] chest and saying, 'I did it, oh, yeah I did it, I did all of it.'" (8 RT 1996.)

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[6] None of respondent's record citations on this issue support the assertion that appellant sought to plead guilty in furtherance of a remorse strategy. First, respondent cites portions of the June 14, 2005 in camera hearing where appellant says absolutely nothing. (RB at 64, citing 1 RT 239-242.) Second, respondent's citation to pages 244 to 248 of volume 1 (RB at 64) is misplaced, if not misleading. It is at pages 246 to 247 that appellant expressly states that exonerating Ibarra is his "only reason" for seeking to plead guilty; that he does not want a jury at his penalty phase; and that using the plea as a factor in mitigation is not his motive for pleading guilty. (1 RT 246-247.)

E. The Acceptance of Appellant's Guilty Plea Invalidates His Conviction

Respondent's argument that appellant's guilty plea "does not render his death judgment unreliable" (RB at pp. 67-72) is confusing at best and ultimately misapprehends appellant's claim. First, the point is that appellant's invalid guilty plea was tantamount to an unlawful conviction, in violation of his Fifth Amendment privilege against self-incrimination, his Sixth Amendment right to trial by jury and to confrontation, his Eighth Amendment right to a reliable, non-arbitrary sentencing determination, his Fourteenth Amendment right to due process and his analogous rights under the California Constitution. (See *Chadd*, 28 Cal.3d at p. 748 [a guilty plea "strips the defendant of such fundamental protections as the privilege against self-incrimination, the right to a jury, and the right of confrontation" and "serves as a stipulation that the People need introduce no proof whatever to support the accusation: the plea ipso facto supplies both evidence and verdict"].) The reliability of the jury's penalty phase determination is not at issue here. Simply put, this is a guilt phase claim.

Second, respondent's observation that appellant does not contend he was not competent to represent himself (RB at 68) is beside the point; section 1018 prohibits the acceptance of a guilty plea to capital murder by a defendant proceeding in pro. per., which can only occur if the defendant is competent.

Third, respondent's argument that a self-represented capital defendant's constitutional rights are "adequately protected" when he is "assisted" by advisory counsel, again ignores that the issue is the validity of appellant's plea under section 1018, not the adequacy of advisory counsel's services at the penalty phase trial. Respondent's reliance on *People v.*

Jenkins (2000) 22 Cal.4th 900 (RB at 68) is thus misplaced. In *Jenkins* a capital defendant pled not guilty and was represented by counsel at the guilt phase of his trial. He was allowed to represent himself at the penalty phase, with his former counsel serving as advisory counsel. (*Id.* at pp. 1033-1034.) On appeal the Court rejected his claim that he lacked adequate resources to present a defense, noting that he had the assistance of advisory counsel. (*Id.* at 1040-1041, 1042.) Appellant does not here contend he lacked adequate resources at the penalty phase of his trial.

Fourth, respondent's suggestion that appellant's guilty plea "was anything but 'ill-advised,' inaccurate or unfair," because it would "enhance his penalty phase defense" (RB at pp. 68-69) again overlooks the fact that appellant never intended to use his plea as a mitigating factor, and ultimately misses the point; the acceptance of appellant's guilty plea in violation of section 1018 invalidates his conviction of capital murder as a matter of law. Moreover, as explained in Subsection F., below, given the state's election to prosecute Ibarra for the same capital murder, on the theory that he and appellant together stabbed Silva to death, appellant's guilt was anything but a foregone conclusion and an unconditional guilty plea to capital murder was ill-advised on its face. (See 1 CT 43, 495-496 [grand jury proceedings]; see also AOB at 29, fn. 12.)

Finally, respondent's assertion that "appellant's guilty plea did not automatically ensure a death sentence," because he had a penalty phase trial assisted by advisory counsel, and because the court reviewed the sentence pursuant to Penal Code section 190.4, subdivision (e), again simply ignores that appellant is challenging the legality of his conviction. (RB at 69, 71; see also p. 70 ["The reliability of a death judgment is not dependent on the manner in which appellant is found guilty"].) Moreover, respondent

overlooks the possibility that appellant might not have been convicted of first degree murder with special circumstances had he gone to trial; or that he might have been convicted of a lesser offense; or that he might have negotiated a conditional plea, eliminating the prospect of a death sentence. (See, *e.g.*, *People v. Alfaro*, *supra*, 41 Cal.4th at p. 1297 [parties disputed whether guilty plea was offered "in exchange for a an agreement to avoid the death penalty"].

F. The Consent of Appellant's Advisory Counsel does not Satisfy the Requirements of Section 1018

Respondent maintains that even if this Court declines to "interpret section 1018 as respondent suggests," appellant's conviction should be affirmed because the consent of advisory counsel "acting in an 'enhanced role' as de facto counsel for purposes of appellant's guilty plea, satisfied the intent and purpose of section 1018." (RB at 72.) Respondent is mistaken.

First, as explained in appellant's opening brief (AOB at pp. 45-46), "counsel" and "advisory counsel" are legally distinct. A criminal defendant is entitled to be represented by counsel or, with leave of court, may represent himself. A self-represented defendant may have the assistance of advisory counsel, at the court's discretion. Respondent cites no applicable legal authority for the proposition that an attorney serving as advisory counsel may be deemed "de facto counsel" (RB at 72) or, as the trial put it, the "functional equivalent" of counsel (2 RT 283), for purposes of Section 1018.

Second, the inquiry here is whether the court erred in accepting appellant's guilty plea based on Mr. Allen's consent as advisory counsel; the extent to which Mr. Allen may subsequently have played "a more active role" at penalty phase trial, where he "cross-examined witnesses [and]

lodged appropriate legal objections" (RB at 69) is irrelevant. Thus, respondent's reliance on *People v. Moore* (2011) 51 Cal.4th 1104, *McKaskle v. Wiggins*, *supra*, 465 U.S. 168 and *People v. Jenkins*, *supra*, 22 Cal.4th 900 (RB at 73-74) is misplaced. In *Moore* the Court rejected the claim that at trial the defendant was entitled to the assistance of cocounsel, as well as advisory counsel (51 Cal.4th at 1120); in *McKaskle*, as explained above, the defendant had argued that his stand-by counsel was permitted too active a role at trial (465 U.S. at 180-187); and in *Jenkins*, as noted, the court rejected the defendant's claim that he lacked the resources to represent himself, noting he had advisory counsel at trial (22 Cal.4th at 1040-1041). The adequacy or extent of Mr. Allen's performance at the penalty phase is not at issue here.[7]

Finally, respondent's suggestion that Mr. Allen independently assessed the case against appellant and on that basis concluded that appellant should plead guilty unconditionally to capital murder (RB at pp. 74-75) ignores that Mr. Allen admitted he had not "attempted to assess Mr. Ibarra's relative guilt . . . ." – even though appellant had made clear that exonerating Ibarra was his sole reason for seeking to plead guilty (1 RT

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[7] In any event, Mr. Allen's participation was insubstantial. The only "issue" he "researched" (RB at 77) was the relationship between section 1018 and *Faretta*, in support the entry of appellant's guilty plea itself. (2 CT 581-591 ["Memorandum Brief In Support Of Constitutional Right of Self-Represented Defendant To Enter Plea Of Guilty To Capital Charge"].) Once the plea was accepted, Allen filed no motions in limine or other pretrial motions; he submitted no proposed jury instructions (not even a pin-point instruction to inform the jurors they could consider appellant's unconditional guilty plea as a factor in mitigation); he asked no questions of prospective jurors on voir dire; he called no witnesses; he introduced no evidence; and he gave no opening statement or closing argument.

243, 244, 246-247) – and notwithstanding the strength of the case against Ibarra. As noted above, and in appellant's opening brief (AOB at 29), the transcript of the grand jury proceedings reveals that the prosecution's theory was that Ibarra was at least equally culpable – that he and appellant had each stabbed Silva; that earlier in the day Ibarra had warned Nicole Palacios to leave because something bad was going to happen; that Ibarra was agitated and upset that Silva refused to bring him drugs on request; that Ibarra is shown on a Home Depot security video buying items of the sort that might be used by someone planning to stab someone to death; and that Ibarra's fingerprint was on the knife recovered at the scene. (1 CT 43, 81-82; 2 CT 379-382, 484-486; Grand Jury Exs. No. 6, 9, 36 and 37.) The prosecutor told the grand jury that Ibarra "assisted in the promotion of the Eastside gang, and he did that *by killing somebody in cold blood* in this incredibly violent way that sends a message to other gang members and to the community." (2 CT 495, italics added.)[8] The prosecutor then argued in open court, before Mr. Allen consented to appellant's guilty plea, that the grand jury testimony disclosed that Ibarra had "multiple" reasons for wanting to kill Silva. (1 RT 207-208.)

Had Mr. Allen taken Ibarra's culpability into account and fully assessed the state's case against him, which he acknowledged he did not (1 RT 243, 244), he would have recognized that the one reason appellant repeatedly gave for wanting to plead guilty – to exonerate Ibarra – was utterly pointless and misguided; pleading guilty would not exonerate Ibarra. Instead, barely six weeks after his appointment as advisory counsel, Mr.

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[8] The record establishes that Mr. Allen was provided with a copy of the transcript of the grand jury proceedings. (1 RT 154-155.)

Allen readily urged the court to accept appellant's unconditional guilty plea to capital murder so that appellant could use the plea in mitigation – even though he knew appellant had no intention of doing so (and ultimately did not do so).[9] That appellant's guilty plea would serve no purpose was thus a foregone conclusion.[10] Ultimately Allen's "greatly expanded role" was merely to facilitate entry of appellant's unconditional plea of guilty to capital murder, in violation of section 1018.

G. Harmless Error Analysis is Inapplicable

As explained in appellant's opening brief (AOB at pp. 20, 46-48) this Court has recognized that the erroneous acceptance of a capital defendant's guilty implicates his Eighth Amendment right to a reliable, non-arbitrary sentencing determination and his Fourteenth Amendment due process liberty interest in the enforcement of state statutory rights, as well as "such fundamental protections as the privilege against self-incrimination, the right to a jury, and the right of confrontation." (*Chadd*, 28 Cal.3d at p. 748, citing *Boykin v. Alabama* (1969) 395 U.S. 238, 243, and *In re Tahl* (1969) 1 Cal.3d 122, 130-133.) As this Court held in *Chadd*, the remedy

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[9] For his part, after six weeks representing appellant as appointed counsel (see 1 CT 8; 2 CT 534, 537), Michael Carty had concluded, based on his review of the grand jury transcript and "thousands" of additional documents, that he could not consent to entry of a guilty plea; not only because appellant had made clear that he did not want to put on evidence in mitigation, but also based on his assessment of the appellant's culpability: "He knows that with his requirement that he be allowed to admit the lying-in-wait allegation that I will not consent to [the plea] . . . . " (1 RT 87.)

[10] On appeal, appellant does not contend his advisory counsel's consent to entry of the guilty plea constitutes ineffective assistance of advisory counsel. Rather, his claim is that the trial court erred in accepting appellant's plea based on the consent of advisory counsel.

for the violation of section 1018 is to reverse the judgment of death and strike appellant's plea of guilty and admission of the special circumstances. (*Chadd,* 28 Cal.3d at 754.)

Respondent's argument that even if this Court finds appellant's guilty plea was entered in violation of section 1018, the error is merely statutory and is harmless under *People v. Watson* (1956) 46 Cal.2d 818, ignores *Chadd* and defies law and logic. (RB at pp. 78-80.) Respondent's reliance on *People v. Crayton* (2002) 28 Cal.4th 346, is entirely misplaced. In *Crayton*, the defendant waived his right to counsel when he appeared for arraignment in municipal court. When he appeared for arraignment in superior court, before the same judge, the court neglected to readvise him of his right to counsel, in violation of Penal Code section 987, which requires that a defendant in a noncapital case who appears at arraignment without counsel be advised of the right to counsel. This Court found the error did not implicate federal constitutional rights and applied the harmless error test set out in *Watson*, governing statutory error. The Court found the error harmless, because there was no reasonable probability the defendant would have elected to proceed with counsel if he had been advised a second time of his right to do so.

Respondent argues that, by analogy to *Crayton,* "there is no reasonably probability that appellant would not have pled guilty and insisted on going to trial absent any alleged violation of section 1018." (RB at 80.) The point, however, is that appellant would not have been permitted to plead guilty had the trial court complied with section 1018. It is the acceptance of the guilty plea that is the error. Put differently, if the trial court in *Crayton* had complied with section 987, it would have readvised the defendant of his right to counsel, and this Court reasonably could

conclude he would have waived that right again. Here, if the trial court had complied with section 1018, it would not have accepted appellant's guilty plea. Period.

Respondent's reprise of the argument that appellant wanted to plead guilty and that he had the consent of advisory counsel (RB at 80), addressed above, concerns error, not harmlessness. The suggestion that if Mr. Allen had been appointed as counsel appellant would have pled guilty with his consent is tantamount to saying there would have been no error but for the error. The assertion that there is no reasonable probability that, "had [appellant] been forced . . . to undergo a guilt trial . . . he would have presented a defense or would have been acquitted" is simply misplaced speculation.

H. Conclusion

Appellant's guilty plea must be vacated because it was accepted in violation of section 1018. He did not "appear with counsel," much less have the consent of "counsel." Respondent's statutory construction arguments are legally baseless, and the constitutionality of section 1018 is well established. The notion that consent of appellant's advisory counsel satisfied the requirements of section 1018 is without legal precedent and is undermined by the record. Accordingly, appellant's conviction must be reversed.

II. APPELLANT WAS EXCESSIVELY AND VISIBLY SHACKLED IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO PARTICIPATE IN HIS OWN DEFENSE AND TO A FAIR AND RELIABLE PENALTY DETERMINATION

A. Introduction

As explained in appellant's opening brief (AOB at 49-69), the trial court insisted appellant be visibly shackled in the courtroom to an extent that caused him pain and discomfort, that hampered his ability to participate in his own defense, that portrayed him as a dangerous man and bolstered the prosecutor's argument that he was, and that exceeded what those charged with courtroom security deemed necessary. Appellant has also demonstrated that his excessive, visible restraints were prejudicial (AOB at 69-75), particularly given the evidence and argument implicating co-defendant Robert Ibarra and diminishing appellant's culpability, the prosecutor's future dangerousness theme at closing argument and the deliberating jury's questions. Respondent's arguments to the contrary are unavailing.

B. Appellant's Restraints Were Excessive

As respondent notes (RB at 81), appellant conceded at trial (2 RT 402,[11] 507-509[12]) and acknowledges on appeal (AOB at 49) that the record of his misconduct in custody outside the courtroom supported the trial court's decision that he be restrained in the courtroom. However, contrary

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[11] Advisory counsel indicated that leg shackles not visible to the jury would be acceptable.

[12] Appellant proposed the use of a stun belt, which, as this Court has recognized, is not visible to the jury. (*People v. Lomax* (2010) 49 Cal.4th 530, 562.)

to respondent's assertion that "appellant does not dispute that there was a manifest need to restrain him *and that the least restrictive restraints were used*" (RB at 131, italics added), appellant maintains he was excessively restrained, before and during his penalty phase trial. It is undisputed that at all times his ankles were shackled and his wrists were confined, first in a lock box and then in triple handcuffs, with his writs tethered to a waist chain either way.

1. Appellant's Restraints were all Visible to the Jurors

The various restraints appellant was made to wear were clearly visible to the jurors. Although the lock box appellant initially wore was eventually replaced by the triple handcuffs, appellant was wearing the lock box during jury selection. (See AOB at 60 [comprehensive record citations].) Respondent's assertion that, "[i]mportantly, appellant appeared in the least restrictive restraints – the three-handcuff system – *before the empaneled jurors* . . . ." (RB at 104, italics added) is thus misleading. As appellant has noted (AOB at 60, 67 fn. 18, 70), 11 of the 12 empaneled jurors, and one of the alternates who later sat on the jury, had seen appellant in the lock box during voir dire. Moreover, respondent's repeated characterization of the triple handcuff restraints as "the least restrictive" (RB at 81,104, 131) begs the question at hand. While the handcuffs may have caused appellant less pain than the lock box, from the jurors' perspective he still appeared heavily restrained.[13]

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[13] Respondent's argument regarding the court's instruction not to consider the restraints (RB at 105) is more properly addressed to the issue of prejudice, discussed in Subsection C., below.

2. Appellant's Restraints Interfered with his Ability to Participate in his own Defense

Appellant explained in his opening brief (AOB at 64-67) how the restraints he was made to wear – the triple handcuffs, as much as the lock box – interfered with his ability to participate in his own defense and exceeded the level of restraint those charged with courtroom security thought sufficient. Even though the sheriff had concluded that appellant could safely have his writing hand free and use a 2 ½ inch golf pencil to write on a notepad taped to counsel table, the court insisted on greater restraints. (2 RT 469-470, 3 RT 750.) With the triple handcuffs, as with the lock box, appellant's hands were joined at the wrist and tethered to a waist chain; and he was denied the use the golf pencil.

Respondent nonetheless asserts that "there is no evidence that the restraints impaired or prejudiced appellant's right to testify *or participate* in his defense," because he had pled guilty and had already indicated he did not intend to testify at the penalty phase or address the jury. (RB at 100, italics added.) Yet, appellant's guilty plea is beside the point at the penalty phase. And whether or not he might have changed his mind about testifying had he not been shackled to the extent he was, the restraints he was forced to wear constrained his ability to participate in any meaningful way, at any stage of the proceedings, irrespective of the decision every defendant makes whether to take the stand or address the jury. He could not take notes for his own use or communicate in writing with advisory counsel. The restraints linking his wrists together even prevented him from reviewing documents. (AOB at 51; 2 RT 467.)

Respondent's argument that the restraints did not hamper appellant's participation because he had "authorized his advisory counsel to present a

defense" and examine witnesses is unavailing. (RB at 101.) Whatever the extent of appellant's delegation to advisory counsel of tasks undertaken at trial, he was still proceeding in pro. per., and in any event was entitled to participate meaningfully in his own defense. As noted, here appellant was unable to communicate in writing with Mr. Allen, or take notes for his own reference, or review documents, which any defendant – particularly one proceeding in pro. per. – reasonably would want to do.

Respondent's suggestion that "ironically" appellant faults the court for deferring to the law enforcement personnel who kept appellant restrained in the courthouse holding cell, yet insisting on courtroom restraints greater than those the sheriff deemed sufficient (RB at 106) misses the point. Any inconsistency lies with the court's actions, not appellant's. As appellant has noted (AOB at 67), the court rejected the sheriff's well-founded recommendation that more relaxed restraints be used in the courtroom, such as allowing appellant to have his writing hand free and use the golf pencil, yet deferred to the sheriff's merely convenience-based election to keep appellant fully restrained when locked inside a courthouse holding cell.

Respondent's reliance on *People v. Duran* (1976) 16 Cal.3d 282, 289, for the proposition that it is "permissible to transport a prisoner in handcuffs to court and to retain those restraints until he enters the courtroom" (RB at 106) is misplaced. The issue here is whether the court erred in requiring appellant to remain in his restraints inside the courthouse holding cell when the court was in recess. Appellant does not contend he had the right to be free of restraints from the time he left the holding cell until he entered the courtroom, or while being transported from the courtroom to the holding cell. *People v. Slaughter* (2002) 27 Cal.4th 1187,

on which respondent also relies (RB at 108) is also distinguishable, as in that case the defendant was only required to wear an "unobtrusive" leg brace under his pants, generally not "noticeable" to the jurors (apart from a portion of the device covering the shoe that might have led jurors to conclude it was a medical device). (*Id.* at pp. 1213-1214.) *People v. Roberts* (1992) 2 Cal.4th 271, which respondent also cites (RB at 106), is still less relevant. In that "unusual case" this Court found the trial court had correctly declined to order prison officials to alter their rules to allow the defendant to be free of restraints during a jury view of the crime scene, conducted *in the prison* where the crime had occurred. (*Id.* at p. 307.)

3. Appellant's Restraints Caused Pain and Discomfort

As appellant has noted (AOB at 67-68), he and his advisory counsel made clear to the trial court that his restraints caused him pain and discomfort. (3 RT 752-754; 5 RT 1191-1192.) Respondent thus errs in asserting that "appellant addressed the court throughout the *penalty trial* but never personally expressed any pain or discomfort or requested a recess . . . ." (RB at 103, italics added.)

As set out in appellant's opening brief (AOB at 55-56), not only did Mr. Allen advise the court during pretrial proceedings that the lock box was causing appellant to suffer "muscle cramps," but appellant himself said so as well: "Because after one or two hours in the courtroom I start cramping up, and by the time I go back to the jail my whole body is really stiff. Especially my neck." (3 RT 754.) Appellant explained that his neck got stiff because the lock box forced him to lean forward. (*Id.*) Appellant has also cited a December 1, 2005 colloquy between appellant and the court (AOB at 58), in which appellant personally made clear that the lock box

caused him discomfort, to the point of seeking not a "recess" as such (RB at 103), but a waiver of his presence:

> THE COURT: Okay. It's your desire not to be present for the voir dire that's going to take place Monday?
>
> THE DEFENDANT: Yes. I would like to be excluded from his courtroom and from these restraints as much as possible. Any day that I don't have to be here, that my presence is not absolutely necessary, I would prefer to be in my cell doing my own thing, comfortable, free to move about.
>
> THE COURT: Okay. and the reason you don't want to be here is the restraints on your arms?
>
> THE DEFENDANT: Yes.
>
> THE COURT: *Because there's some discomfort associated with those restraints?*
>
> THE DEFENDANT: *Yes.*

(5 RT 1192-1193, italics added.) That appellant voiced this complaint during pretrial proceedings, rather than "throughout" the penalty phase trial (RB at 103), does not diminish the discomfort he experienced, particularly with the lock box. Even with the triple handcuffs, appellant's hands and wrists remained restrained and tethered to the waist chain.

Moreover, it was apparent that any further complaints would have been futile. Not until appellant and his advisory counsel had repeatedly complained about the lock box – which the court found did not inflict "the type of discomfort or pain that rises to the level of a violation of due process or a violation of [appellant's] legal rights" (3 RT 754), and which it initially insisted on even in the face of the sheriff's assurance that appellant could safely have his writing hand free (2 RT 469-470) – did the court agree

to allow appellant to be restrained with the triple handcuffs and waist chain. Clearly the court would not have been moved by complaints that even with these restraints, which the court had only grudgingly agreed to as a concession, appellant continued to suffer pain or discomfort.

Respondent's suggestion that during the colloquy cited above appellant was complaining not about the lock box, but about his waist chain, is at best beside the point. (RB at 109) Whether, as the court observed during the December 1st colloquy, the pain was caused by the restraints "on [appellant's] arms" (5 RT 1193) or, as Deputy Ybarra testified, based on an incident that had occurred the day before, it was the waist chain that was causing him pain (7 RT 1771) hardly matters. If anything, that the waist chain could be causing pain or discomfort is more damning, because appellant was always thus restrained, whether with the lock box or the triple handcuffs.

Respondent's insistence that the trial court "did its best to accommodate appellant and ensure that he was comfortable and could fully participate in his defense" is belied by the record. Indeed, the only accommodation respondent identifies is the court's order that appellant be brought into court 10 minutes before the jurors entered and by adjourning the proceedings 10 minutes early so that appellant could consult with advisory counsel. (RB at 101.) Even as to that, the record does not demonstrate that appellant in fact was brought into court early or allowed to remain after the jury had been excused, and respondent offers no record citations so indicating. (*Ibid.*) Moreover, no matter how many breaks the court may have taken, it is clear appellant remained fully shackled in the courtroom at all times. Thus, when the court agreed to take two 10-minute breaks each morning and afternoon instead of one 15-minute break, so that

appellant could stand up to help alleviate his discomfort, it noted that this would not be "like being free of restraints . . . ." (3 RT 754.) And it appears that even when appellant was in the courthouse holding cell, during longer recesses, he remained fully restrained. (See AOB at 68, citing 2 RT 467; 4 RT 903.)

While respondent notes that the court was not always in session all day "throughout voir dire and the penalty trial" (RB at 101), appellant endured the lock box for multiple court appearances, starting before November 14th, when voir dire began, until December 5th, when the lock box was replaced by the triple handcuffs. Thus, on October 18th Mr. Allen observed that appellant "*has been* coming to court under rather tight security conditions" that precluded him from using his hands (2 RT 401, italics added); on October 28th the sheriff filed its motion in support of the use of the lock box (3 CT 850-863); and on November 3rd Mr. Ghizzoni confirmed that appellant was being restrained in a lock box (2 RT 468). In any event, whether or not the court was in session all day, appellant would have been restrained from the moment he left his jail cell in the morning until he was brought back to jail after court, given he would have been restrained while being transported from the jail to the courthouse and back and from the courthouse holding cell to and from the courtroom, and was not freed of restraints during courtroom breaks (3 RT 754), or in the courthouse holding cell (4 RT 903-904; see also 3 RT 754 [appellant states that "by the time I go back to the jail my whole body is really stiff. Especially my neck."].)

C. The Court's Excessive Shackling of Appellant was Prejudicial

1. Because Appellant was Visibly Restrained to the Extent he was Without Adequate Justification, the *Chapman* Harmless Error Standard Applies

As noted in appellant's opening brief (AOB at 69-70), visible shackling is "'inherently prejudicial.'" (*Deck v. Missouri* (2005) 544 U.S. 622, 635, citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 568; see also *People v. Hernandez* (2011) 51 Cal.4th 733, 745-746 ["the high court has held that shackling is an inherently prejudicial practice"].) Thus, if a defendant is visibly shackled without "adequate justification," the state bears the burden to establish the error was harmless beyond a reasonable doubt, under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Deck v. Missouri*, *supra*, 544 U.S. at p. 635; *People v. Hernandez*, *supra*, 51 Cal.4th at pp. 745-746; *People v. Jackson* (2014) 58 Cal.4th 724, 748 [stun belt; applying *Chapman*]; *People v. Howard* (2010) 51 Cal.4th 15, 30 [stun belt; applying *Chapman*]; *People v. McDaniel* (2008) 159 Cal.App.4th 736, 742 [applying *Chapman* where shackles presumed to be visible to the jury].) Because appellant was visibly restrained to the extent he was without adequate justification, particularly given his pro. per. status and the sheriff's assessment that less restrictive measures would be sufficient to ensure courtroom security, the state has the burden to show the error was harmless under *Chapman*.

Respondent initially misapprehends the prejudice analysis, urging that *Chapman* does not apply because "there *was* adequate justification to support the use of restrains on appellant." (RB at 111, italics in original; see also 112 [arguing that two cases appellant cites are distinguishable

because "both were cases in which the defendants were ordered shackled '*without a proper determination of the need for them.*' (Sic)" (Italics in original)].) This simply reprises respondent's merits argument – i.e., that the court did not err in ordering that appellant be shackled in the manner he was. Yet, the prejudice inquiry necessarily starts from the premise that the court did err – i.e., that in this case appellant was shackled in the manner he was *without* adequate justification. Moreover, respondent again implicitly suggests that appellant is challenging "the use of restraints" as such. (RB at 111.) Appellant has made clear that the prejudicial error lies in the imposition of *excessive*, visible restraints.

2. That the Jury was Instructed to Ignore Appellant's Restraints does not Render the Excessive Shackling Harmless

On the issues that are relevant to the prejudice inquiry, respondent notes, first, that the jury was instructed "that shackles or restraints were to have no bearing on their determination of the sentence," and that they are presumed to have followed this instruction. (RB at113.)[14] Yet, respondent ignores the significance of the fact that the instruction was not given until *after* the close of evidence (8 RT 1958), as part of the litany of penalty phase instructions (8 RT 1954-1966). At this point the jurors had seen appellant heavily restrained throughout the trial, without instruction, and so would already have formed the view that he was dangerous. Moreover, courts have recognized that a "curative instruction" on shackling can backfire: "To tell jurors to ignore shackles may rivet the jurors' attention

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[14] As noted, respondent made a similar argument in addressing the merits of appellant's claim that the court erred in visibly shackling him. (RB at 105.)

on them . . . ." (*Maus v. Baker* (7th Cir. 2014) 747 F.3d 926, 928, citation omitted.)

Respondent also baselessly suggests that the "purpose" of the instruction – "to prevent the jurors from inferring . . . that appellant was a violent person and thereby (sic) committed the charged offense" – was "absent" here because appellant had already pled guilty. (RB at 105) As explained in appellant's opening brief (AOB at 63), it is well established that at the penalty phase of a capital trial "the jury knows the defendant is a convicted felon. But the extent to which he continues to be dangerous is a central issue the jury must decide in determining his sentence." (*Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 748.) Here, as explained further below, the prosecutor urged the jury to take appellant's likely "future dangerousness" into account as a factor favoring the imposition of a sentence of death. (See AOB at 73-74; 8 RT 1990, 1997-1998, 2000-2001.) Finally, respondent's conclusion that "appellant has failed to demonstrate" that the jury's verdict was influenced by his visible restraints (RB at 113) mistakenly shifts the burden to appellant to show prejudice when in fact the state bears the burden to show the excessive shackling was harmless beyond a reasonable doubt, under *Chapman*.

3. Appellant's Restraints Prejudicially Fueled the Prosecutor's "Future Dangerousness" Argument

As appellant has pointed out, the prosecutor urged the jury to consider appellant's likely "future dangerousness" in determining whether he should be sentenced to death. (See AOB at 73-74; 8 RT 1990, 1997-1998, 2000-2001.) Appellant's visible restraints graphically reinforced the prosecutor's message.

Respondent's argument that appellant has "forfeited the claim" that

the prosecutor "improperly argued future dangerousness," because he failed to object at trial (RB at 114), misses the point. Appellant is not asserting a claim of prosecutorial misconduct based on the future dangerousness argument. Rather, as explained in appellant's opening brief at the very pages respondent cites (RB at 114; AOB at 73-75), appellant argues that his excessive and visible restraints "graphically brought home the prosecutor's message that appellant would pose a continuing threat of violence, in the prison 'community.'" (AOB at 74.) In other words, one of the factors rendering appellant's excessive shackling prejudicial is that his visible restraints bolstered the prosecutor's argument that the jury should vote to sentence him to death because he would pose a danger to others if allowed to live.

4. The Prosecution's case for Death left room for Doubt as to Appellant's Individual and Relative Culpability Vis-a-Vis Co-defendant Robert Ibarra

As explained in appellant's opening brief (AOB at 70-72) and in Argument I, above, the prosecutor consistently portrayed Robert Ibarra as equally culpable in Silva's death – i.e., that appellant "*and a man named Robert Ibarra* . . . [had] murdered Eli Silva." (6 RT 1582, italics added.) Robert Galindo's testimony confirms that it was Ibarra, "agitated and jumpy," who took the lead in the campaign to get Silva to bring more drugs to the apartment. (See 7 RT 1653, 1650-1652, 1654, 1656, 1657.)[15]

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[15] As appellant has noted (AOB at 2), Ibarra was tried separately and found guilty of murder. The jury found true the lying in wait special circumstance, and found that Ibarra personally used a knife and committed the murder for the benefit of a criminal street gang. (See *People v. Robert Quinonez Ibarra* (Mar. 11, 2014, B243065) [nonpub. opn.].) Had appellant (continued...)

Respondent simply ignores the fact that Ibarra's prominent role diminishes appellant's relative culpability, leaving open a reasonable possibility that at least one juror might have found that death was not the appropriate sentence for appellant, had appellant not appeared in the multiple restraints that made him seem so dangerous and invited the prosecutor to urge that he was.

Appellant has also pointed to the note the jury sent out during penalty phase deliberations, which reveals, among other things, that at least one juror questioned whether appellant had personally used a knife on Silva, and whether someone under the influence of crystal meth would "know what they're doing." (AOB at 71-72; 4 CT 1114.) Evidence was presented that two knives were used in the assault on Silva, and that appellant and Ibarra had been using crystal meth together for some time before the homicide. (7 RT 1649, 1713-1714; see also 6 RT 1583 [the prosecutor informs the jury that Ibarra and appellant consumed drugs on and off during the three or four days preceding the homicide].) Respondent dismisses the significance of the note on the grounds that the jury ultimately returned its death verdict without waiting for the court to respond. (RB at 113.) The point, though, is that the note illuminates the jurors' deliberations and shows that one or more jurors were struggling with the sentencing determination. The very fact of the questions shows that death was not a given and that the visible restraints could well have contributed to the death verdict.

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[15] (...continued)
and Ibarra been tried jointly, the outcome for appellant might well have been different. (See *Kansas v. Carr* (2016) 136 S.Ct. 633, 646 ["Joint trial may enable a jury 'to arrive more reliably at its conclusions regarding the guilt or innocence of a particular defendant and to assign fairly the respective responsibilities of each defendant in the sentencing.'" [Citation omitted].)

D. Conclusion

Appellant's death sentence must be reversed because his visible and excessive shackled caused him pain and discomfort, interfered with his ability to participate in his own defense, exceeded the level of restraint those charged with courtroom security had deemed sufficient and prejudicially fueled the prosecutor's argument that appellant would be a danger to others if allowed to live. The state's position at appellant's trial that Ibarra was equally responsible for Silva's death diminishes appellant's culpability and further underscores the prejudicial impact of the excessive shackling.

CONCLUSION

For all of the reasons stated above, and for the reasons set forth in appellant's opening brief, the entire judgment – the conviction, the special circumstance findings, the sentence of death and the restitution orders and fines – must be reversed.

Dated: February 25, 2016

Respectfully Submitted,

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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, Rule 8.630(b)(2))

I, Andrea G. Asaro, am the Senior Deputy State Public Defender assigned to represent appellant Joshua Martin Miracle in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 12,033 words in length.

Dated: February 25, 2016

ANDREA G. ASARO
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Joshua Martin Miracle* Cal. Supreme Ct. No. S140894
(Santa Barbara Co. Sup. Ct. No. 1200303)

I, MARCUS THOMAS, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, California 94607. On this day, I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;

/ X / **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **March 1, 2016**, as follows:

Peggy Huang, Esq.
Deputy Attorney General
Department of Justice
300 South Spring Street
Los Angeles, CA 90013

Honorable Brian E. Hill
Santa Barbara Co. Superior Ct.
1100 Anacapa Street
Santa Barbara, CA 93101

Pursuant to Policy 4 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, the above-described documents will be hand delivered to appellant, Joshua Martin Miracle, at San Quentin State Prison within 30 days.

I declare under penalty of perjury that the foregoing is true and correct. Signed on **March 1, 2016**, at Oakland, California.

DECLARANT