

SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

DANIEL CARL FREDERICKSON,

Defendant and Appellant.

Case No. S067392

CAPITAL CASE

Appellate District, Case No. 96CF1713
Orange County Superior Court, Case No. 96CF1713
The Honorable William R. Froeberg, Judge

**SUPREME COURT
FILED**

NOV 15 2016

SUPPLEMENTAL RESPONDENT'S BRIEF

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DEATH PENALTY

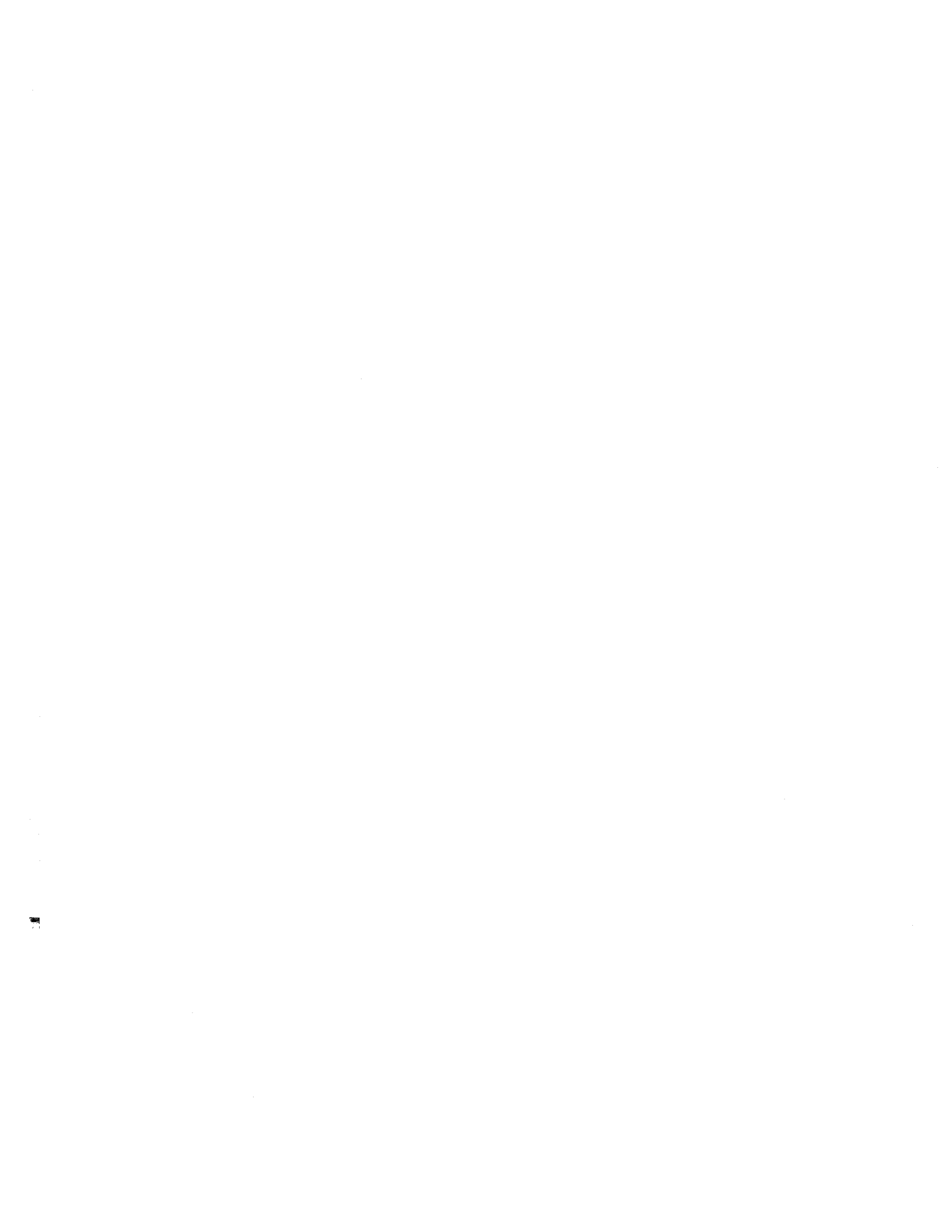


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INTRODUCTION

Appellant, Daniel Carl Frederickson, was convicted of special circumstance first degree murder and sentenced to death in 1998. Initial briefing in this matter was completed in 2011. In a Supplemental Opening brief, filed in September 14, 2016, Frederickson claims the trial court improperly imposed a restitution fine in his absence, without an opportunity to be heard, in violation of his rights to due process and a jury trial. Respondent agrees that the restitution fine was improperly imposed and should be stricken, albeit for a different reason.

ARGUMENT

I. THE TRIAL COURT HAD NO AUTHORITY TO AMEND THE JUDGMENT BY NUNC PRO TUNC ORDER TO IMPOSE A RESTITUTION FINE NOT INCLUDED IN THE ORAL PRONOUNCEMENT OF JUDGMENT

Frederickson contends that the court improperly imposed a \$10,000 restitution fine in his absence, without notice, without considering his inability to pay the fine, and because the amount of the fine should have been determined by the jury. (Supp. AOB 1-22.) Fredrickson's arguments are moot since no restitution fine was imposed at the oral pronouncement of judgment and the trial court had no authority to impose one nunc pro tunc.

Frederickson, acting as his own attorney, was convicted of one count of murder with the special circumstance of committing the murder while engaged in the commission of a robbery. (3 CT 808-810.) On December 3, 1997, a jury recommended Frederickson be punished by death. (3 CT 1084.)

On January 9, 1998, the probation department filed its presentence report. The report recommended Frederickson be ordered to pay a \$5,000

restitution fine pursuant to Penal Code¹ section 1202.4, subdivision (b). (4 CT 1178.) That same day the court sentenced Frederickson to death. (16 RT 3250-3252.) The reporter's transcript of the sentencing hearing contains no reference to imposition of a restitution fine [or objection to its omission?]. (16 RT 3230-3252.) However, the abstract of judgment indicates the court imposed a \$10,000 restitution fine. (4 CT 1179.) The clerk's minute order also states "Defendant to pay \$10,000 restitution fine." (4 CT 1196.)

Following the sentencing hearing, Frederickson wrote a letter to the court complaining that the \$10,000 fine was imposed in his absence. (Supp. CT 44.) On March 13, 1998, the court held a record certification hearing.² There the court explained that it "received a letter from Mr. Frederickson complaining bitterly about the insertion of that \$10,000 restitution fine." (March 13, 1998 RT 3255.) The court noted that "at the sentencing hearing, I had fully intended to but did not, on the record, impose a \$10,000 restitution fine. Once I discovered that I had not done it on the record, I instructed the clerk to put that in the abstract of judgment." (March 13, 1998 RT 3254.) The court noted that "Since it is the maximum amount, I suppose there's some room for argument, but at this point, I didn't really see that there was any need to bring Mr. Frederickson down just to resentence him for the purpose of putting in the restitution fine. If counsel feel it's necessary, I will get him shipped back down." (March 13, 1998 RT 3255.) Advisory counsel replied "Could we leave it this way, judge? I'll advise him of this discussion we've had regarding it...and if he

¹ Further statutory references are to the Penal Code unless otherwise indicated.

² Frederickson waived his right to be at the record certification hearing. (16 RT 3251-3252.)

still has objections to it, I will advise you and [the prosecutor].” (March 13, 1998 RT 3255.) The court and prosecution agreed to this resolution. (March 13, 1998 RT 3255.) The minute order from the hearing states that the “court clarifies record and orders restitution find of \$10,000 which was ordered at time of sentencing.” (Supp CT 52.)

Section 1202.4 requires trial courts to impose a restitution fine as part of the judgment of conviction entered against a criminal defendant. The restitution fine under section 1202.4 is mandatory unless the sentencing court “finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.” (*People v. Tillman* (2000) 22 Cal.4th 300, 301-302; § 1202.4, subd. (b).) The imposition of a restitution fine is “a discretionary choice....” (*Id.* at p. 303.) Thus, the waiver rule applies to the omission of a restitution fine at the sentencing hearing. (*Ibid.*)

Here, the trial court failed to impose a restitution fine at the sentencing hearing and sought to correct that oversight at the record certification hearing by means of a nunc pro tunc order. However, “a nunc pro tunc order cannot declare that something was done which was not done.” (*Johnson & Johnson v. Superior Court* (1985) 38 Cal.3d 243, 256, quoting 4 Witkin, Cal. Procedure (2d ed. 1970) Judgment, § 61, p. 3223.)

As this Court explained in *In re Candelario* (1970) 3 Cal.3d 02, “[i]t is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts.” (*Id.* at p. 705.) “Clerical error, however, is to be distinguished from judicial error which cannot be corrected by amendment. The distinction between clerical error and judicial error is ‘whether the error was made in rendering the judgment, or in recording the judgment rendered.’ [Citation.]” (*Ibid.*, quoting 46 Am. Jur. 2d, Judgments, § 202.)

Moreover, the oral pronouncement of judgment controls over and must be accurately reflected in the minute orders and abstract of judgment.

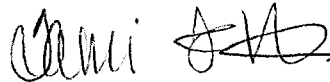
(*People v. Mesa* (1975) 14 Cal.3d 466, 471.) Accordingly, the March 13, 1988, nunc pro tunc order was not valid, the restitution fine was improperly imposed, and the judgment, minute orders and abstract of judgment should be amended accordingly.

CONCLUSION

Respondent submits that the court restitution fine should be stricken from the judgment and the minutes and abstract of judgment be modified accordingly. As set forth in Respondent's Brief previously filed in this Court, Respondent respectfully requests that the judgment and sentence of death be affirmed in all other respects.

Dated: November 8, 2016 Respectfully submitted,

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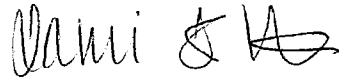
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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 965 words.

Dated: November 8, 2016

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read "Tami & A".

TAMI FALKENSTEIN HENNICK
Deputy Attorney General
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Frederickson**

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; my business address is 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266.

On November 14, 2016, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

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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 November 14, 2016, at San Diego, California.

Carole McGraw

Declarant



Signature

