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

SUPPLEMENTAL RESPONDENT'S 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).

In *People v. Miracle*, S140894 ["*Miracle*"], respondent, in response to a substantively similar question posed by this Court, opined that Penal Code section 1018 ["section 1018"] is unconstitutional in light of *McCoy v. Louisiana* (2018) 584 U.S. __ [138 S.Ct. 1500] ["*McCoy*"].

Here, respondent sets forth below an alternative way of evaluating the constitutionality of section 1018 in light of *McCoy*, an analysis that leads to the finding that this statute complies with the constitution. In any event, even if this Court finds that section 1018 is unconstitutional in light of *McCoy*, any error in precluding Frederickson from pleading guilty to his capital charge is amenable to harmless error analysis. Here, any prejudice resulting from Frederickson's inability to use a guilty plea as evidence in mitigation at the penalty phase of his trial was harmless beyond a reasonable doubt.

ARGUMENT

I. IN *MIRACLE*, RESPONDENT TOOK THE VIEW THAT IN LIGHT OF THE UNITED STATES SUPREME COURT'S OPINION IN *MCCOY*, SECTION 1018 VIOLATED THE SIXTH AMENDMENT

On September 16, 2018, this Court requested supplemental briefing in *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]?

Respondent's answer to this question was "yes." Specifically, in light of *McCoy*, respondent concluded that section 1018 was unconstitutional to the extent it prevented a self-represented capital defendant from pleading guilty. (See Respondent's Supplemental Brief in *Miracle* ["RSBM"] 6-7.)

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.

In *McCoy*, the Court found that although certain "trial management" tasks are "the lawyer's province, ... [s]ome decisions [] are reserved for the client – notably, whether to plead guilty ...." (*McCoy, supra*, 138 S.Ct. at pp. 1508-1509.) The Court further explained that under the Sixth Amendment, a criminal defendant has the "[a]utonomy to decide ... the objectives of the defense"; while counsel can make "strategic choices about how best to *achieve* a client's objectives," it is the defendant who chooses what those "objectives *are*." (*McCoy*, *supra*, at p. 1508, italics in original.)

Based on this language from *McCoy*, and noting that *Faretta v. California* (1975) 422 U.S. 806, 834 ["*Faretta*"] held that "[t]he right to defend is personal" because it is the defendant alone who "will bear the personal consequences of a conviction," respondent opined that section 1018 was unconstitutional in that it required the appearance and consent of counsel before a capital defendant could plead guilty, and thus violated a defendant's right both to decide the objective of and to control his own defense. (RSBM 10-12.) In short, respondent reasoned that the interest in a reliable death judgment, to the extent it is embodied in section 1018,

cannot justify violating a defendant's personal fundamental rights to self-representation and to control his defense. (RSBM 8-12.)

Apart from *McCoy* and *Faretta*, respondent in *Miracle* further noted an additional disadvantage under section 1018 for self-represented capital defendant – he is unable to use a plea of guilty to show a penalty phase jury that he accepts responsibility or is remorseful for his actions. (RSBM 12.) Finally, respondent observed that procedural protections still exist independent of section 1018 to ensure the reliability of a death judgment: the trial court must still ensure that any plea of guilty was competent, knowing, voluntary, and intelligent, and that there was an adequate factual basis for the plead; the penalty phase trial; an automatic motion to modify the death verdict before the trial court; and automatic appeal to this Court. (RSBM 14-16.)

II. AN ALTERNATIVE ANALYSIS OF SECTION 1018 IN LIGHT OF MCCOY LEADS TO THE FINDING THAT THIS STATUTE IS CONSTITUTIONAL

In *McCoy*, the United States Supreme Court specifically held that defense counsel may not concede his client's guilt over the objection of the defendant. Left unaddressed was the issue presented in this case — whether a state may regulate the entry of guilty pleas in capital cases by imposing safeguards that present a minor incidental encroachment on a defendant's rights in service of promoting the Eighth Amendment's requirement of heightened reliability in capital cases. Under this analysis, the holding in *McCoy* poses no threat to the constitutional validity of section 1018.

A. Factual and Procedural History

On October 30, 1996, during a hearing on one of Frederickson's *Marsden* motions in the municipal court, Frederickson first indicated a

desire to plead guilty to the capital charge. Frederickson told the court that he was "not happy" with what his appointed attorneys "want[ed] to do tactical-wise," and that he did not want his defense to be "that vigorous." (10/30/96 RT 22.) He stated that "I want them to let me — allow me to steer them away from certain witnesses that I don't want called onto the stand because of — you know, I just don't want certain information coming out." (10/30/96 RT 23.) The court clarified that Frederickson was discussing penalty phase issues, and that because they had not even gotten to the preliminary hearing, it was premature to discuss penalty phase issues which were "way down the line." (10/30/96 RT 23.) Frederickson responded, "[w]ell, that's another problem. See, I don't want it way down. I want to waive prelim. I want to go — I'm pleading guilty, sir. I mean, the only thing is, we have to go for a penalty phase." (10/30/96 RT 23-24.) He continued:

> They want time to investigate and check all avenues and all that, and I don't want them to do that, right? But I'm also afraid of losing all of my protections and rights by going pro per and allow Mr. Tanizaki, the prosecutor, to walk all over me, you know, that's tantamount to just executing me.

(10/30/96 RT 23-24.)

The court denied Frederickson's *Marsden* motion without prejudice, noting he believed Frederickson and counsel had a personality conflict that the court was hopeful could be worked out. (10/30/96 RT 25-26.)

On January 23, 1997, Frederickson, this time appearing in pro per with Edgar Freeman was serving as advisory counsel, asked:

> I would like to ask the court to go public and allow me to enter a change of plea. After I enter a change of plea and make my plea, I would like to request a waiver of – well, by pleading guilty, I will be waiving by preliminary examination. I'd like the court to take my waiver of rights and schedule me on calendar for Department 5 Superior Court arraignment for

> schedule for trial for the penalty phase for February 5 and appoint the Public Defender's Office. I've already talked to Bob Goss. Bob Goss, Debra Barnum is willing to take the case on as soon as I plead guilty to the criminal aspect and set for Superior Court arraignment to set for trial for the penalty phase.

(1/23/97 RT 21-22.)

Frederickson explained that he made this decision "based on the fact that there is absolutely zero potential for me receiving any type of justice whatsoever. The games — the games — you know, the computer is a joke. I'm still laughing about it. If Mr. Matherly can have someone come pick that up from the jail — because it's taking up space, it's a joke." (1/23/97 RT 22-23.)

Frederickson further explained that the court's authorization of unmonitored collect phone calls of "no more than two hours a day," left him "no room" to actually make any phone calls, and that he

> would like to enter a plea.... I do not care — I do not care to allow the State of California, the government, to run over me. I want to just go ahead, plead guilty, go and put my life in front of a jury and let the jury decide whether or not I should get this death penalty or whether I should get life imprisonment. But as to the matter of death, I don't even want to play these games anymore. I want to just go ahead, I want to enter a plea or guilty. I have a right to do so, and I wish to do so at this time.

Frederickson continued:

> I've spoken with counsel. And like I said, I would drop my pro per status and accept the public defender's office to represent me as far as the penalty phase is concerned. And if the court would take my waiver, I'm making a knowing and knowledgement [*sic*] — intelligent waiver.

(1/23/97 RT 23-24.)

The court explained that the issue of a guilty plea was not before it at that time. At this point, a portion of the transcript is sealed and has not been made available to respondent. (1/23/97 RT 23-24.) The transcript

picks up with Frederickson stating that he would like to "make the matter moot" by "revoking my own pro per privileges and accepting the appointment of the public defender's officer." (1/23/97 RT 30.) The court indicated that pursuant to Frederickson's request, it would ensure a hearing was calendared in order for Frederickson "to consider a change of plea or waiver of preliminary hearing and/or appointment of other counsel." (1/23/97 RT 30.) There is another portion of the sealed transcript that is unavailable to respondent, that picks up with Frederickson clarifying that is not asking for another defense investigator because "the criminal case is over with, your honor. I'm pleading guilty and that's that." (1/23/97 RT 34.) The court replied that "you haven't done that yet," to which Frederickson stated "[w]ell, I'm attempting to very, very, very hard." (1/23/97 RT 34.) Frederickson explained that he had discussed these matters with his former appointed counsel, Bob Goss, who indicated a willingness to represent Frederickson at the penalty phase following the entry of a guilty plea. (1/23/97 RT 35.)

On January 27, 1997, appearing in pro per, Frederickson told the court:

> [T]he guilt of my crime has been weighing heavily on me with a remorseful heart. I would like to offer a change of plea and enter a plea of guilty to murder in the first degree and admit the special circumstances and waive all appellate rights at this time.

(MRT 159.)

The prosecutor requested to speak with Frederickson off the record. Following that conversation, the prosecutor represented to the court that Frederickson:

> [W]ants to plead guilty to the charges. I told him by law he cannot plead guilty to a special circumstances allegation case. He understands that, but I told him no judge can accept [his] plea.

> Furthermore, I told him that it was my opinion Mr. Freeman would offer him the best possible representation and suggested that he follow Mr. Freeman's advice on the matter.

(MRT 160.) This appears to be the last time Frederickson mentioned a desire to plead guilty until the penalty phase when he told the jurors that he thought they should "recommend death" as his punishment. (16 RT 3065.) When asked if had any last words for the jury, Frederickson stated:

> "I'd like to apologize. From the day that this has happened, I have never tried to deny to anybody, and I thought that it was a joke for anybody – the Public Defender's Office or anybody to stand up on my behalf and answer not guilty to the charges that I'm accused of.
>
> I've attempted to plead guilty. I've attempted to acknowledge full responsibility to all of the charges, including the special circumstances, even though I don't believe in my mind that they're true."

(16 RT 3069.)

B. This Court Has Consistently Upheld the Constitutionality of Section 1018

As set forth above, Frederickson could not have pleaded guilty because he was representing himself, and section 1018 requires a defendant charged with a capital offense to have counsel and the consent of such counsel before such a plea can be entered. This Court has recognized a tension between section 1018 and *Faretta* but has consistently held that section 1018 is a justifiable limitation on a defendant's rights.

In 1975, the United States Supreme Court concluded in *Faretta* that a defendant has a constitutional right to represent himself in a state criminal trial when he voluntarily and intelligently elects to do so and that the state may not force a lawyer upon him when he insists on conducting his own defense. (*Faretta*, *supra*, 422 U.S. at pp. 819-821, 831-836.) This Court has recognized that, under *Faretta*, "a defendant 'must be free personally to

decide whether in his particular case counsel is to his advantage,' even though 'he may conduct his own defense ultimately to his own detriment.'" (*People v. Trujeque* (2015) 61 Cal.4th 227, 262.) This Court has also recognized this right to self-representation extends to capital prosecutions. (*Ibid*.)

Yet, this Court has also consistently recognized 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." (*People v. Mai* (2013) 57 Cal.4th 986, 1055.)

For example, a capital defendant is not permitted to waive his or her automatic appeal of a death judgment. (Cal. Const., art. VI, § 11, subd. (a); Pen. Code, § 1239, subd. (b); *People v. Stanworth* (1969) 71 Cal.2d 820, 834.) And, as is relevant here, under section 1018, a plea of guilty to a capital charge may not be taken except in the presence of counsel, and with counsel's consent. (*People v. Massie* (1985) 40 Cal.3d 620, 624 [*Faretta* did not affect the state's power to limit a capital defendant's right to plead guilty to situations in which his counsel advises such a move.].)

Even if otherwise competent to exercise the constitutional right to self-representation, this Court has repeatedly held that a defendant may not discharge his lawyer in order to enter a guilty plea over counsel's objection. (E.g., *People v. Chadd* (1981) 28 Cal.3d 739, 747-757 (*Chadd*); see *People v. Alfaro* (2007) 41 Cal.4th 1277, 1299-1302 (*Alfaro*).)

In *Chadd*, this Court considered the interplay between section 1018 and *Faretta*. After entering a plea of not guilty to a first degree murder for which the state was seeking the death penalty, the defendant attempted suicide and waived his preliminary examination. The defendant's attorney informed the trial court that the defendant wished to plead guilty against his advice and that he would not consent to such a plea. The attorney

explained that the defendant wanted to commit suicide and sought the state's cooperation in that endeavor. (*Chadd*, *supra*, 28 Cal.3d at p. 744-745.) The trial court ruled that it could find the defendant sufficiently competent to act as his own attorney under *Faretta* and that it would accept the defendant's guilty plea despite the attorney's refusal to consent thereto. The trial court reasoned that such a finding would be tantamount to relieving the defendant's attorney as counsel and permitting the defendant to represent himself. (*Id*. at p. 745.) This Court ruled the trial court committed prejudicial error in accepting the defendant's guilty plea without the consent of the defendant's counsel as required by section 1018. (*Id*. at pp. 743, 746, 754.)

On appeal in *Chadd*, this Court rejected the People's contention that section 1018 is unconstitutional because it allows an attorney to "veto" a capital defendant's decision to plead guilty. While recognizing the decision as to how to plead to a criminal charge is personal to a defendant, the Court stated the Legislature has the power to regulate, in the public interest, the manner in which that choice is exercised. (*Chadd*, *supra*, 28 Cal.3d at pp. 747-748.) The Court added that "[n]othing in *Faretta*, either expressly or impliedly, deprives the state of the right to conclude that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plead guilty in capital cases is subject to the requirement of his counsel's consent." (*Id*. at p. 751.)

In 2007, this Court again addressed the interplay between section 1018 and *Faretta* in another capital case in which the defendant had wanted to plead guilty, over counsel's objection, to avoid testifying against another person whom her counsel sought to implicate as an accomplice in the murder. (*Alfaro*, *supra*, 41 Cal.4th at p. 1277.) Summarizing its decision in *Chadd*, this Court in *Alfaro* reiterated that section 1018 is one of several

exceptions to the general rule recognizing "'the need to respect the defendant's personal choice on the most "fundamental" decisions in a criminal case'" and that "'it is 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."'" (*Alfaro*, *supra*, 41 Cal.4th at p. 1298.)

This Court further noted that it had previously recognized, in *Chadd*, that the 1973 statutory revision adding to section 1018 the requirement of counsel's consent was part of a more extensive revision of the state's death penalty legislation and was intended to serve as another independent safeguard against the erroneous imposition of a death sentence. The Court explained that the consent requirement of section 1018 had its roots in the state's strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings. This Court also stated the statute constituted legislative recognition of the severe consequences of a guilty plea in a capital case and provided protection against an ill-advised guilty plea and the erroneous imposition of a death sentence. (*Alfaro*, *supra*, 41 Cal.4th at p. 1300.) The Court concluded that counsel's refusal to consent to the defendant's guilty plea was within the purview of its holding in *Chadd* and that "[a] guilty plea entered under such circumstances might very well lead to the erroneous imposition of the death penalty — precisely the outcome section 1018 is intended to prevent." (*Alfaro*, *supra*, 41 Cal.4th at p. 1301.)

C. In Holding That Defense Counsel Cannot Concede the Guilt of a Defendant Over the Defendant's Objection, *McCoy* Did Not Address the Ability of States to Regulate the Acceptance of Guilty Pleas

In *McCoy*, the defendant was charged with killing the mother, stepfather, and son of his estranged wife. The defendant's state-appointed

trial counsel determined that the evidence against his client "was overwhelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase." (*McCoy*, *supra*, 138 S.Ct. at p. 1506, footnote omitted). McCoy strongly disagreed with that strategy, and told his attorney not to concede guilt, but rather to pursue an acquittal. (*Ibid*.) Nevertheless, in his opening statement, counsel stated that after hearing the prosecution case, the only reasonable conclusion for the jury would be that his client caused the victims' deaths. (*Ibid*.) Outside the jury's presence, the trial court rejected McCoy's objections that his counsel was "'selling [him] out.'" Counsel resumed the statement, telling the jury that the evidence "'unambiguous[ly]'" established that his "'client committed three murders.'" (*Id* at pp. 1506-07.) At trial, McCoy testified in his own defense as to his innocence, pressing an alibi that the Supreme Court described as "difficult to fathom." In his closing argument, McCoy's attorney "reiterated that McCoy was the killer, and "told the jury that he 'took [the] burden off of [the prosecutor].'" (*Id.* at p. 1507.) The jury found McCoy guilty of first-degree murder on all three counts, and returned three death verdicts, rejecting counsel's penalty-phase argument that his client committed the murders while suffering from "'serious mental and emotional issues.'" (*Ibid*.)

The high court held that it is "unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." (*McCoy*, *supra*, 138 S.Ct. at p. 1507.) The Court recognized that "[t]rial management is the lawyer's province," but that "[s]ome decisions ... are reserved for the client — notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." (*Id.* at p. 1508.) *McCoy* held that the "autonomy to decide that the objective of the defense is to assert innocence" is a decision reserved for the

client, as it is "not a strategic choice about how best to achieve a client's objectives," but instead, it is a "choice[s] about what the client's objectives in fact are." (*Ibid.*)

McCoy confirmed that "a defendant has the right to insist that counsel refrain from admitting guilt." (*McCoy*, *supra*, 138 S.Ct. at p. 1505.) It explained that the Sixth Amendment guarantees a defendant "the right to have the *Assistance* of Counsel for *his* defense" (italics in original), and that "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." (*Ibid.*) Accordingly, "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." (*Ibid.*)

McCoy found this error to be structural and not subject to harmless-error review, explaining that "such an admission blocks the defendant's right to make the fundamental choices about his own defense" and also that its effects are too hard to measure "because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." (*McCoy*, *supra*, 138 S.Ct. at p. 1511.)

D. *McCoy* Does Not Prohibit Every Limitation on a Defendant's Right to Plead Guilty

There is no dispute that the right of self-representation is not absolute. (*Indiana v. Edwards* (2008) 554 U.S. 164, 171.) Although this Court has declined to find that a defendant's autonomy and dignity interests are outweighed *as a matter of law* whenever the criminal trial happens to be a capital one (see, e.g., *People v. Taylor* (2009) 47 Cal.4th 850, 865), the autonomy and dignity interests underlying the right of self-representation

may be outweighed, on occasion, by countervailing considerations of justice and the state's interest in efficiency. (See, e.g., *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152, 163 [no right of self-representation on direct appeal]; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 178-179 [appointment of standby counsel against defendant's wishes is permissible]; see also *North Carolina v. Alford* (1970) 400 U.S. 25, 39 [states may regulate, and even prohibit, the entry of guilty pleas].)

In *McCoy*, the Court held that pleading guilty was a right "reserved for the client." (*McCoy*, *supra*, 138 S.Ct. at p. 1508.) However, the Court in *McCoy* addressed neither *Edwards* nor the Eighth Amendment's heightened reliability requirement for capital cases. Thus, *McCoy* should not be read to confer an *absolute* right on a capital defendant's ability to plead guilty in every circumstance.

The *McCoy* Court specifically stated that it "granted certiorari in view of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." (*McCoy*, *supra*, 138 S. Ct. at p. 1507.) This is a separate question from the issue presented in the case at hand — which is whether California may constitutionally restrict a defendant's desire to plead guilty within the bounds of *Faretta*.

As set forth above, this Court has consistently held that the Legislature's regulation of guilty pleas in capital cases is a minor and justifiable limitation on a defendant's rights that furthers the Eighth Amendment's concern for heightened reliability[1] in capital cases. Nothing in *McCoy* compels a different conclusion.

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[1] To be sure, and as noted above, California has other procedural protections acting to ensure heightened reliability in capital cases. However, unlike those protections, section 1018's requirement that a

(continued…)

III. EVEN IF THIS COURT FINDS THAT SECTION 1018 IS UNCONSTITUTIONAL, ANY ERROR IN PRECLUDING FREDERICKSON FROM PLEADING GUILTY TO A CAPITAL CHARGE WAS HARMLESS BEYOND A REASONABLE DOUBT

The United States Supreme Court has held that the deprivation of the right to self-representation cannot be harmless as this right "is either respected or denied." (*McKaskle v. Wiggins*, *supra*, 465 U.S. at p. 177, fn. 8.) In *McCoy*, the Court found that the error in allowing defense counsel to concede guilt over the defendant's objections resulted in structural error as the trial court "allowed counsel to usurp control of an issue within [the client]'s sole prerogative." (*McCoy*, *supra*, 138 S.Ct. at pp. 1510-1511.)

In the present case, however, Frederickson was *not* deprived of his right to self-representation. And here, unlike in *McCoy*, the only consequence of precluding Frederickson from pleading guilty to a capital charge occurred at the penalty phase, where he was not able to portray his foreclosed guilty plea as evidence in mitigation of penalty. In *McCoy*, the effect of erroneously allowing counsel to admit his client's guilt was impossible to assess because the evidence that might have been adduced in the absence of error could not known. Here, on the other hand, Frederickson was at most denied an opportunity to present a single factor in mitigation at his penalty phase trial.

If that be error at all, it was assuredly harmless. (See *People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032 [applying *Chapman v. California* (1967) 386 U.S. 18, 24, to jury instructions barring consideration of relevant mitigating evidence].) First, given Frederickson's stated

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(…continued)
capital defendant needs the consent of counsel before pleading guilty helps to ensure this reliability from the very *beginning* of a capital trial.

reasons for his desire to plead guilty, it is highly improbable that the trial court would have accepted a guilty plea, even in the absence of section 1018. A defendant's waiver of representation and guilty plea must be competent, knowing, voluntary, and intelligent, and there must be an adequate factual basis for the plea. (See *Bradshaw v. Stumpf* (2005) 545 U.S. 175, 183.) Here, during the penalty phase, Frederickson told the jury about his "acceptance of responsibility":

> I'd like to apologize. From the day that this has happened, I have never tried to deny to anybody, and I have thought it was a joke for anybody – the Public Defender's Office or anybody to stand up on my behalf and answer not guilty to the charges that I'm accused of.
>
> I've attempted to plead guilty. I've attempted to acknowledge full responsibility to all of the charges, including the special circumstances, *even though I don't believe in my mind that they're true.*

(16 RT 3069, emphasis added.) Given this denial of actual responsibility, coupled with the other indications in the record that Frederickson sought to plead guilty because he was unhappy with the office supplies he was furnished and the restrictions imposed on his telephone use (MRT 22-23), it is unlikely that the trial court would have found an adequate factual basis for a plea of guilty by an unrepresented defendant to a capital charge.

However, even if such a plea would have been accepted by the trial court, the record is devoid of any facts indicating that Frederickson sought to use his guilty plea as evidence *in mitigation*, or even that he was *aware* that such a plea could be used in that way. (See RB 27-28.) Rather, during the penalty phase, Frederickson actually asked the jury to return a *death* verdict. (16 RT 3065, 3069.) Simply put, Frederickson could not have been prejudiced by being denied the opportunity to develop evidence in support of an objective he had no interest in pursuing. (See RB 37-38.) Under these circumstances, his guilty plea, had it been allowed, would not

have affected the penalty verdict. (*People v. Gay* (2008) 42 Cal.4th 1195, 1223.)

In any event, the overwhelming evidence of Frederickson's guilt and the wealth of evidence introduced in aggravation ensured a death verdict. Even if the trial court would have accepted Frederickson's guilty plea and moved directly to a penalty phase trial, the prosecution would have been able to introduce all of the circumstances of Frederickson's crime and special circumstance under Penal Code section 190.3, subdivision (a).

Accordingly, even if Frederickson had pleaded guilty and then urged the jury to ascribe that plea mitigating effect, the penalty verdict would have been no different.

CONCLUSION

For the aforementioned reasons, the judgment should be affirmed.

Dated: November 15, 2018

Respectfully submitted,

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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 4,804 words.

Dated: November 15, 2018

XAVIER BECERRA
Attorney General of California

/s/ *Tami Falkenstein Hennick*

TAMI FALKENSTEIN HENNICK
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF ELECTRONIC SERVICE & 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. 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.

On November 15, 2018, I electronically served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by transmitting a true copy *via* this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on November 15, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

HON WILLIAM R FROEBERG
DEPARTMENT C40
ORANGE COUNTY SUPERIOR COURT
700 CIVIC CENTER DR W
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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 15, 2018, at San Diego, California.

STEPHEN MCGEE	/s/ *Stephen McGee*
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. FREDERICKSON (DANIEL CARL)**
Case Number: **S067392**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Tami.Hennick@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/15/2018

Date

/s/Tami Hennick

Signature

Hennick, Tami (222542)

Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General-San Diego

Law Firm