IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VALDAMIR FRED MORELOS, Defendant and Appellant.	No. S051968 (Santa Clara Superior Court No. SC169362) Death Penalty Case

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

THE LATE HONORABLE DANIEL CREED, JUDGE

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

MARY K. McCOMB
State Public Defender

KATHLEEN M. SCHEIDEL
Assistant State Public Defender
California Bar No. 141290
kathleen.scheidel@ospd.ca.gov

1111 Broadway, Suite 1000
Oakland, California 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Constitutional Provisions

Court Rules

Other Authorities

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VALDAMIR FRED MORELOS, Defendant and Appellant.	No. S051968 (Santa Clara Superior Court No. SC169362) Death Penalty Case

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

I.
APPELLANT WAS DENIED HIS FUNDAMENTAL RIGHT TO CHOOSE THE OBJECTIVES OF HIS DEFENSE IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Appellant was deprived of his right to choose the objectives of his own defense when he was denied the right to plead guilty because his counsel would not consent to such a plea. In *McCoy v. Louisiana* (2018) 138 S.Ct. 1500 (*McCoy*), the U.S. Supreme Court recently held that the Sixth Amendment demands that with individual liberty – and, in capital cases, life – at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense. (*Id*. at p. 1505). "[W]hether to plead guilty" is among the fundamental decisions about the objective of the defense that is "reserved for the client" and that cannot be overruled by his attorney. (*Id*. at p. 1508.) Appellant wished to plead guilty in this

capital trial, but his counsel was permitted to usurp control of appellant's prerogative to choose his plea.

Appellant made clear from the time he was arrested that he wanted to plead guilty. He attempted to plead guilty but his counsel would not consent. The court ruled, applying Penal Code section 1018[1], that it could not accept a guilty plea from appellant without the consent of his counsel.[2] Appellant then discharged counsel and was permitted to represent himself. He again attempted to plead guilty but was informed that a self-represented capital defendant cannot enter a guilty plea. When his request for advisory counsel was denied, appellant proceeded without counsel of any kind throughout both the guilt and penalty phases of his trial. After off-the-record consultations with the prosecutor, appellant waived his right to a jury at both phases of his trial. He presented no evidence or argument at the guilt phase other than his own testimony. At the penalty phase, he once again testified, but presented no argument and no mitigation evidence.[3]

---

[1] All statutory references are to the Penal Code unless stated otherwise.

[2] Penal Code section 1018 provides in 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 defendant's counsel."

[3] Appellant has previously detailed and challenged the many other ways in which his trial did not comport with the standards of the United States and California Constitutions, including the erroneous denial of his request for advisory counsel (see Argument I, AOB 34-46 and Reply 3-15); the invalid waiver of his right to a jury at the guilt, special circumstances, and penalty phases of his trial

Penal Code section 1018's requirement of counsel's consent to a guilty plea in a capital case is, under *McCoy*, unconstitutional on its face and its application to appellant deprived him of his right to choose his plea under the Sixth Amendment. The violation of appellant's rights was "structural," and was "complete when the court allowed counsel to usurp control of an issue within [appellant's] sole prerogative." (*McCoy*, *supra*, 138 S.Ct. at p. 1511.) This Court must therefore reverse the judgment in its entirety.

(Supp. AOB 5-14; Supp. Reply 4-8); the breakdown in the adversary system that led to a trial that was inconsistent with due process (Argument III, AOB 73-114, Reply 21-38); and that the trial was fundamentally unfair and led to verdicts that were unreliable under the Eighth Amendment (Argument IV, AOB 114-120, Reply 39-67). In Argument II of his Opening Brief, appellant contends that his conviction must be reversed because he was permitted to enter a "slow plea" in violation of Penal Code section 1018's bar on guilty pleas in capital cases without the consent of counsel. (Argument II, AOB 47-62.) Appellant argues *infra*, that the high court's subsequent decision in *McCoy* has made clear that the consent requirement in section 1018 is invalid, and that this Court's prior decisions upholding the consent requirement must be reconsidered. If this Court does not invalidate the consent requirement in Penal Code section 1018, however, appellant maintains that the "slow plea" that occurred in this case violated section 1018's prohibition on accepting guilty pleas in capital cases "without the consent of counsel." Regardless of whether Penal Code section 1018 remains valid, the conduct of appellant's trial after he was barred from pleading guilty was inconsistent with the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as set out in Arguments II, III, and IV in appellant's opening brief and in his first supplemental opening brief.

A. Background and Proceedings Below

Appellant was charged in 1992 with one count of first degree murder along with three special circumstances. (2 CT 344-346.) From the time he was arrested, appellant stated his desire to enter a guilty plea. Appellant was taken into custody on October 20, 1992 and immediately admitted the crime, led officers to the victim's body, and gave two detailed confessions to police interrogators. (1 RT 163-165, 187-189, 195-198, 202-203, 251-252[4]; see also 2 SCT 1-251 [Ex. 11A, 11B, 12AA, 12BB, 12CC].) During interrogation, appellant told the officers: "I'm gonna plead guilty[.]" (Ex. 12AA, 2 SCT 158.)

The Santa Clara County Public Defender's Office was appointed to represent appellant on October 23, 1992. (1 SCT 101; 4 SCT 160.) On February 22, 1993, the municipal court held a closed hearing to consider appellant's first motion to substitute counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). (1 SCT 114, 116.) The court denied the *Marsden* motion. (1 SCT 116.) A second *Marsden* hearing was held on June 14, 1993, after which the court deferred ruling on the motion in light of defense counsel's pending request to suspend proceedings for a determination of appellant's competency. (1 SCT 121-122; 4 SCT 165; 7/6/93 RT 7-8; 8/23/93 RT 3-4.)

---

[4] "CT" refers to the Clerk's Transcript, preceded by volume number. "SCT" refers to the supplemental Clerk's Transcript. "RT" refers to the superior court Reporter's Transcript as originally filed, preceded by the volume number. Other shorter transcripts that are not part of a Reporter's Transcript volume are referred to by the date of the proceeding, followed by the page number.

On July 6, 1993, appellant asked the trial court for "pro per status" to get more access to the law library to research "pleading guilty." (7/6/1993 RT 7.) Appellant noted that he had already talked to the court about this issue several weeks earlier. (7/6/1993 RT 7.) The court denied the request in light of the then-pending competency proceedings. (*Ibid.*) Appellant insisted that he would be found competent, fire his attorney, and plead guilty. (7/6/93 RT 8.)

After appellant was found to be competent to stand trial (1 SCT 137; 9/22/93 RT 1-2), he withdrew his *Marsden* motion (1 SCT 138; 10/4/93 RT 2-3). Appellant, through his counsel Mary Yale Fukai, reported to the municipal court that it was appellant's "desire to enter a plea of guilty to the charges, and to proceed to the penalty phase." (10/4/93 RT 3.) Fukai informed the court that she had made clear to appellant that California law barred him from pleading guilty without her consent:

> I've explained to him that under California law, he cannot represent himself and plead guilty in a death penalty eligible case and he cannot plead guilty without – with counsel – without counsel's concurrence. And I've explained to him that I believe that my ethical obligation as his attorney requires that I object to and not concur in any change of plea in this matter.
>
> . . .
>
> My understanding under 1018 of the Penal Code is that someone charged in a capital case cannot plead guilty without counsel and if they chose to plead guilty, counsel were prepared to concur in that, that that would be possible, but I think our conflict comes down to that I refuse to agree to Mr. Morelos proceeding in that fashion.

(10/4/93 RT 3-4.) The court requested briefing on whether Penal Code section 1018 barred appellant from pleading guilty without the consent of counsel. (10/4/93 RT 4-5.)

Defense counsel argued that under Penal Code section 1018 and *People v. Chadd* (1981) 28 Cal.3d 739 (*Chadd*) a trial court cannot accept a defendant's plea of guilty to a charged capital offense unless he is represented by, and has the consent of, counsel. (1 SCT 139-141; 10/4/93 RT 4.) The prosecution agreed. (10/27/93 RT 3.) Appellant submitted his own "points and authorities" to the court opposing his counsel's position. (1 SCT 143-149.) Appellant explained that he was "looking for a way to plead guilty, or get an attorney who will consent." (1 SCT 147.) He emphasized that the choice should "lay in the hands of the accused being that he is in front of the court . . . ." (1 SCT 144.) The court ruled that under section 1018 and *Chadd*, appellant could not plead guilty to the charges without his counsel's consent. (10/27/93 RT 3-4.)

A preliminary hearing was then held, and on December 16, 1993 appellant was held to answer on all charges in the superior court. (1 CT 3; 2 CT 336, 342.) On December 27, 1993, appellant, who was still represented by Fukai, waived arraignment, entered a plea of not guilty, and denied the prior conviction allegations. (2 CT 355; 12/27/93 RT 1.)

On May 18, 1994, Fukai was replaced as counsel of record by another public defender, John Aaron, who was himself subsequently replaced by public defender Francis Cavagnaro. (2 CT 360; 5/18/94 RT 1; 2 CT 388-392.) On July 5, 1995, Cavagnaro informed the superior court that appellant intended to move to discharge counsel

and represent himself.[5] (7/5/95 RT 2-3.) On July 19, 1995, the court granted appellant's request to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). (2 CT 404-409; 7/19/95 RT 3-14.)

Approximately one week later, appellant called the prosecutor and informed him that he wanted to plead guilty. (7/27/95 RT 29.) The prosecutor reported to the court that he did not "feel comfortable proceeding with a guilty plea" from appellant because the law "bar[s] a capital defendant . . . – even a capital defendant that represents himself under a *Faretta* waiver" from pleading guilty. (7/27/95 RT 29.) The prosecutor announced the same day that both parties wished to waive a jury for both phases of trial, but the superior court, Judge John T. Ball, refused to accept a waiver for the penalty phase. (7/27/95 RT 30-31.) A judge was then found who would accept a jury waiver for both phases of trial, and that judge was assigned to the case. (2 CT 427; 8/9/95 RT 46 [Judge Ball stating that he understands Judge Creed is the only judge willing to accept both a guilt and penalty phase jury trial waiver].) Appellant then waived his right to a jury at both phases of his trial.[6] (2 CT 427, 3 CT 528-530, 552-553; 8/11/95 RT 48-50; 1 RT 1-2, 2 RT 329.)

---

[5] During his testimony at the penalty phase, appellant stated that he had found Cavagnaro "very competent" but that Cavagnaro would not allow him to plead guilty. (2 RT 510.)

[6] (See Supp. AOB 5-14, Supp. Reply 4-8 [arguing that reversal is required because appellant did not make a valid waiver of his right to a jury trial at the guilt, special circumstances, or penalty phases of his trial].)

On December 20, 1995, appellant requested advisory counsel. (12/20/95 RT 3-6.) The court denied his request.[7] (*Ibid*.) At the guilt phase of his trial, appellant waived opening statement and cross-examination of all of the prosecution's witnesses. (3 CT 528; 1 RT 23; 1 RT 76, 105, 128, 150, 169, 173, 186, 251, 260.) Prior to appellant's testimony, the prosecutor and appellant agreed on a "line of questioning" that would cover "issues not already covered," including facts supporting the torture special circumstance. (2 RT 269.)

At the penalty phase, appellant again waived opening statement. He recalled one prosecution witness, eliciting additional aggravating evidence, and presented no mitigating evidence.[8] (2 RT 329, 454-456.) Appellant took the stand and reiterated that he had wished to plead guilty since before the preliminary hearing, but his counsel would not consent. (2 RT 510-511.)

//

//

---

[7] (See AOB 34-46, Reply 3-15 [arguing that reversal is required because the trial court erred in denying appellant's request for advisory counsel].)

[8] (See AOB 73-121, Reply 21-68 [arguing that the complete breakdown in the adversary process at appellant's trial violated due process and that the trial was lacking in fundamental fairness and reliability under the Eighth Amendment].)

B. This Court Should Decide Appellant's Challenge to Penal Code Section 1018 on the Merits

1. Appellant Preserved His Claim that Penal Code Section 1018 Improperly Barred Him from Making His Own Choice of Plea

Appellant obtained a ruling on the claim he now raises: that he should not have been barred from pleading guilty without the consent of his counsel. Appellant repeatedly informed the municipal court that he wished to plead guilty. (7/6/93 RT 7-8; 10/4/93 RT 3.) Appellant argued to the municipal court that he should be permitted to plead guilty without the consent of his counsel, while his attorney argued that Penal Code section 1018 barred him from pleading guilty. (1 SCT 139-149.) The municipal court, having read the submissions of appellant and his counsel and "reviewed Penal Code section 1018," agreed with appellant's counsel. (10/27/93 RT 3.) The court ruled that:

> . . . Mr. Morelos will not be able to enter a plea of guilty to the charges in light of the nature and the kinds of charges he's here for without the consent of [counsel]. It's clear from our previous discussions she would not consent to entry of such a plea.

(10/27/93 RT 3-4.) Appellant's claim is thus preserved, and this Court should review it on the merits. (See *People v. Cooper* (1991) 53 Cal.3d 771, 812 [holding claim adequately preserved when hearing was held in response to defendant's motion and court's ruling covered all matters disputed on appeal].)

This Court's recent decision in *People v. Frederickson* (Feb. 3, 2020, S067392) __ Cal.5th __ [2020 WL 523008] (*Frederickson*) is not to the contrary. In *Frederickson*, this Court concluded that an

unrepresented defendant who attempted to plead guilty in municipal court prior to the preliminary hearing had not preserved his challenge to Penal Code section 1018 because his "attempts to plead guilty . . . were all rejected for procedural reasons unrelated to section 1018."[9] (*Id.* at p. *19.) At the time of both the trial in *Frederickson* and appellant's trial the municipal court was not authorized to receive a plea of guilty in a capital case.[10] (*Id.* at p. *18.) According to this Court, a capital defendant who wished to plead guilty could do so by entering a guilty plea in superior court after the preliminary hearing was either conducted or waived in municipal court. (*Id.* at p. *19.) This Court held that when the unrepresented defendant in *Frederickson* attempted to plead guilty, the municipal court did not rule that Penal Code section 1018 barred the defendant from pleading guilty. (*Id.* at p. *21.) Instead, the municipal court "clearly relied on the People's right to a preliminary hearing, not section 1018, in rebuffing defendant's

---

[9] The defendant in *Frederickson* was unrepresented in municipal court when he attempted to plead guilty. Appellant attempted to plead guilty while represented by counsel and challenges section 1018's requirement that he obtain counsel's consent to his guilty plea.

[10] The proceedings in appellant's case took place before unification of the superior and municipal courts began in 1998. (See generally *Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 763, fn. 2.) At the time of appellant's trial, former California Penal Code section 1462, subdivision (b) provided that "[e]ach municipal and justice court shall have jurisdiction in all noncapital criminal cases to receive a plea of guilty or nolo contendere, appoint a time for pronouncing judgment under Section 859a, pronounce judgment, and refer the case to the probation officer if eligible for probation."

request to plead guilty," and he had therefore not preserved his claim. (*Id.* at p. *21, fn.11; *cf. People v. Gutierrez* (2017) 2 Cal.5th 1150, 1156 ["Even assuming that defendants properly made a motion . . . the issue is not preserved for appeal because counsel did not obtain a ruling from the trial court"].)

By contrast, the municipal court in appellant's case clearly relied on Penal Code section 1018's consent requirement in holding that appellant would not be able to plead guilty. (10/4/93 RT 4-5 [requesting briefing on section 1018]; 10/27/93 RT 3-4 [holding that in light of section 1018 and *Chadd*, appellant will not be able to plead guilty without counsel's consent].) Neither the municipal court nor either counsel suggested at any time that there was any bar to appellant's desire to plead guilty other than section 1018, and neither suggested that the request for a ruling on section 1018 was premature. Appellant and his counsel sought a ruling on the effect of the consent requirement, and the municipal court ruled on the effect of the consent requirement.

Appellant needed to do no more to preserve the issue for review. In *Frederickson*, this Court held that the defendant "needed to request to plead guilty in the superior court and ask that court to make a ruling based on section 1018" to preserve it for appeal. (*Frederickson*, *supra*, 2020 WL 523008 at p. *17.) But appellant had no reason to continue to press for a ruling on his desire to plead guilty without the consent of his counsel – he had received a ruling that he could not. Appellant diligently pursued his desire to plead guilty until the municipal court explicitly ruled that because of Penal Code section 1018 he "will not be able to enter a plea of

guilty." This Court should decide whether the consent requirement in Penal Code section 1018 deprived appellant of his Sixth Amendment right to choose his plea.

2. This Court Should Excuse Any Forfeiture of Appellant's Challenge Arising From Failure to Obtain a Ruling in Superior Court

Even if this Court concludes that appellant's objection to the consent requirement in Penal Code section 1018 was forfeited because he did not obtain an explicit ruling on it from the superior court, this Court should decide the claim on the merits.

"Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237; see also *People v. Seumanu* (2015) 61 Cal.4th 1293, 1366, fn. 20 ["Because we agree an objection to the victim impact evidence would have been futile in light of the long line of cases permitting the admission of such evidence, we find the issue is properly before us despite the absence of an objection"].) Both types of futility are present here. Given the clear ruling from the municipal court that appellant could not plead guilty without the consent of his counsel, appellant reasonably would have believed that it would be not just unnecessary but futile to continue to attempt to plead guilty in superior court. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1291 [holding forfeiture excused when defendant "could have reasonably believed" that joining in his co-defendant's motion would be futile].)

There is also no doubt that given the substantive law at the time of appellant's trial that he would not have been permitted to plead guilty in superior court. The law when appellant attempted to plead guilty was that no judge could accept a guilty plea from a defendant in a capital trial without the consent of counsel. (See *People v. Massie* (1985) 40 Cal.3d 620, 624-626 [conviction reversed under section 1018 where the defendant was allowed to plead guilty over the objection of defense counsel].) Penal Code section 1018 forbade it, and this Court had upheld section 1018 in *Chadd*. Had appellant attempted to plead guilty without the consent of his counsel when he arrived in superior court, the outcome would be the same.

Moreover, this Court frequently excuses forfeiture when an appellant's claim is a "'pure question of law which is presented by undisputed facts.'" (*People v. Hines* (1997) 15 Cal.4th 997, 1061, quoting *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Excusing forfeiture is particularly appropriate when a claim "present[s] important questions of constitutional law." (See *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061.) Appellant has presented just such a claim: he argues that a recent United States Supreme Court decision makes clear that the consent requirement in Penal Code section 1018 violates the Sixth Amendment to the United States Constitution, and his claim does not depend on any disputed facts.

The constitutional question raised by appellant is sufficiently important that it has repeatedly arrived at this Court. In two cases decided since *McCoy*, this Court has avoided resolving similar claims regarding Penal Code section 1018 on the merits. (See

Frederickson, *supra*, 2020 WL 523008 at p. *15 [noting defendant "contends he was denied his personal and fundamental right to control his defense when the trial court, acting under compulsion of section 1018, refused to permit him to plead guilty without the consent of counsel," but finding the claim was forfeited]; *People v. Miracle* (2018) 6 Cal.5th 318, 339-340 [construing statute to avoid serious constitutional question of whether Penal Code section 1018 is inconsistent with *Faretta*].) This Court should take this opportunity to address an important and recurring pure legal question of constitutional law.

C. Penal Code Section 1018's Requirement of Counsel's Consent to Entry of a Guilty Plea Is Unconstitutional and Deprived Appellant of His Sixth Amendment Right to Autonomy

Penal Code section 1018's prohibition on accepting a guilty plea from a capital defendant without the consent of his counsel is inconsistent with the Sixth Amendment to the United States Constitution. The Sixth Amendment guarantees to a defendant the right to "*his* defence." (U.S. Const., 6th amend., emphasis added.) Interpreting this language, the United States Supreme Court has repeatedly concluded that the "right to defend is *personal*." (*Faretta*, 422 U.S. at p. 834, italics added; see also *McCoy*, *supra*, 138 S.Ct. at p. 1507, quoting *Faretta*, *supra*, 422 U.S. 806.) It "is given directly to the accused; for it is he who suffers the consequences if the defense fails." (*Faretta*, *supra*, 422 U.S. at pp. 819-820.) Because it is the accused's defense and his fate that hangs in the balance, "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the

defendant by a surrogate." (*Florida v. Nixon* (2004) 543 U.S. 175, 187 (*Nixon*).) Among these decisions is "whether to plead guilty." (*Jones v. Barnes* (1983) 463 U.S. 745, 751 (*Jones*).)

In *McCoy*, *supra*, 138 S.Ct. 1500, the United States Supreme Court recently applied these precepts in a capital case and held that the choice of plea is at the core of a capital defendant's right to set the objectives of his defense. In *McCoy*, the capital defendant pleaded not guilty and insisted on a jury trial. (*Id*. at pp. 1506-1507.) His attorney believed that the evidence against McCoy was overwhelming, and advised McCoy to concede guilt and request leniency at the penalty phase. (*Id*. at p. 1506.) McCoy refused. (*Ibid*.) At trial, during his opening statement, counsel for McCoy conceded that McCoy had killed the victims, and reiterated this concession in closing argument. (*Id*. at pp. 1506-1507.) McCoy was convicted of three counts of first degree murder. (*Id*. at p. 1507.) At the penalty phase, counsel again conceded that his client committed the crimes, but urged a life sentence in light of McCoy's mental and emotional issues. (*Ibid*.) The jury sentenced McCoy to death. (*Ibid*.)

The high court reversed. The Court began with the principle that the Sixth Amendment right to defend is "personal" and a "defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law." (*McCoy*, *supra*, 138 S.Ct. at p. 1507, internal quotation marks omitted.) As the Court explained, the Sixth Amendment refers to the "assistance" of counsel, "and an assistant, however expert, is still an assistant." (*Id*. at p. 1508, quoting *Faretta*, *supra*, 422 U.S. at pp.

819-820.) A criminal defendant and his client therefore have different purviews. When a defendant proceeds with counsel, the management of the trial is within counsel's province. Other decisions, however, are so fundamental that they "are reserved for the client – notably whether to plead guilty[.]" (*Id.* at p. 1508, citing *Jones*, *supra*, 463 U.S. at 751.) A defendant's decision whether to plead guilty is not a strategic choice about how best to achieve his objectives, it is a choice about what his "objectives in fact *are*." (*Id.* at p. 1508, original italics.) *McCoy* thus held that the Sixth Amendment guarantees a capital defendant the right to choose the objectives of his defense, including whether or not to plead guilty, and prohibits counsel from usurping that right. (*Id.* at p. 1509.)

The high court made clear that a capital defendant's right to autonomy is not dependent on whether he will exercise it in a way that increases the likelihood of a life sentence. The Court did not question that McCoy's counsel "reasonably assess[ed] a concession of guilt as best suited to avoiding the death penalty." (*McCoy*, *supra*, 138 S.Ct. at p. 1508.) But, as the Court explained, "an accused may insist upon representing herself—however counterproductive that course may be," (*Id.* at p. 1507), and may similarly "refuse to plead guilty in the face of overwhelming evidence[.]" (*Id.* at p. 1508.) It is the client, not counsel, that decides what his own best interests are, and whether they include prioritizing the likelihood of a life sentence. (See *Ibid.*) McCoy was entitled to claim his innocence even if his choice made a death sentence more likely.

While *McCoy* involved a defendant who wished to assert his innocence, its reasoning applies equally to defendants who wish to

plead guilty. *McCoy* characterized the Sixth Amendment guarantee at issue as the right to "autonomy" and to choose the objectives of one's own defense, not merely the right to assert one's innocence. (*McCoy*, *supra*, 138 S.Ct. at p. 1511 [characterizing the issue as "violation of McCoy's protected autonomy right"]; see also *id*. at pp. 1508-1511 [repeatedly referring to the right at issue as "autonomy"].) According to *McCoy*, "whether to plead guilty" is a decision for the client, not his counsel, in accordance with his autonomy to decide the objective of the defense. (*Id*. at p. 1508.)

In a case decided last year, this Court recognized that the right to autonomy set out in *McCoy* necessarily extends not only to assertion of innocence but to the choice *not* to present a defense at all. In *People v. Amezcua and Flores* (2019) 6 Cal.5th 886 (*Amezcua*), defendants argued on appeal that their counsel had erred in acquiescing in their desire not to present any defense at the capital phase of their trial. Citing *McCoy*, this Court disagreed. The "choice of the defense objective" is "the client's prerogative," and includes the decision "to present *no* penalty phase defense." (*Id*. at p. 926, italics added.) Any other conclusion would be inconsistent with the Sixth Amendment and the high court's decision: "[t]o accept [defendant's] argument" that counsel should have overruled their clients and presented a defense "would be to read out of existence the allocation of responsibilities the high court recognized in *McCoy*." (*Ibid*.) *Amezcua* demonstrates that the autonomy right protected by *McCoy* is not limited to those defendants who wish to protest their innocence – the autonomy right also must extend to those who wish to present *no* defense at the guilt phase of their trial.

The overwhelming practice of other states also supports the conclusion that the autonomy right recognized in *McCoy* extends to the choice to plead guilty in a capital case. The right to plead guilty in a capital case has been and continues to be recognized by the overwhelming majority of jurisdictions that have capital punishment: as of 2014, "the federal government and thirty of the thirty-two states that allow the death penalty permit the accused to plead guilty to the charged offense." (Kostik, *If I Have to Fight for My Life—Shouldn't I Get to Choose My Own Strategy? An Argument to Overturn the Uniform Code of Military Justice's Ban on Guilty Pleas in Capital Cases* (2014) 220 Mil. L. Rev. 242, 286 & fn. 276; see also Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty* (2001) 65 Alb. L. Rev. 181, 190-191 [only three states bar a defendant from pleading guilty in a capital case].) Penal Code section 1018's consent-of-counsel requirement, on the other hand, appears to be "a unique exception to the traditional understanding that decisions about what plea to enter are reserved exclusively to the client," (see Bonnie, *The Dignity of the Condemned* (1988) 74 Va. L. Rev. 1363, 1370, fn. 18.); appellant is aware of no other jurisdiction that conditions the acceptance of a guilty plea in a capital case upon the consent of counsel.

McCoy confirms that the consent-of-counsel requirement in Penal Code section 1018 violates the Sixth Amendment, and that it deprived appellant of his Sixth Amendment rights in this case. Section 1018's requirement cannot be reconciled with the Sixth Amendment's guarantee that the choice whether to plead guilty is

"reserved for the client." (*McCoy*, *supra*, 138 S.Ct. at p. 1508.) The consent requirement deprived defendant of his constitutionally-protected "[a]utonomy to decide . . . the objective of the defense" and permitted it to be usurped by counsel. (*Ibid.*) As in *McCoy*, appellant received advice from his counsel about which plea to enter. As in *McCoy*, counsel and client disagreed about the appropriate plea. Appellant, like the defendant in *McCoy*, was clear and vocal about which plea he wished to enter. And, as in *McCoy*, the trial court unconstitutionally permitted defense counsel to usurp control of appellant's decision whether or not to plead guilty.

D. The State's Interest in Increasing the Reliability of Death Judgments Does Not Justify Permitting Counsel to Usurp a Defendant's Choice of Plea

In ruling that defense counsel could usurp appellant's right to choose whether to plead guilty, the municipal court relied on this Court's prior decision in *Chadd*, *supra*, 28 Cal.3d 739, which held that Penal Code section 1018's infringement on a defendant's right to control his or her own defense was justified by the state's interest in reliable and unmistaken death judgments. The *Chadd* majority allowed that "the decision as to how to plead to a criminal charge is personal to the defendant." (*Id.* at p. 747.) But it rejected the Attorney General's argument that the statute unconstitutionally allows counsel to "veto" his client's fundamental decision to plead guilty, holding that that contention "fail[ed] to recognize the larger public interest at stake in pleas of guilty to capital offenses" (*ibid.*), including the state's strong interest in reliable and unmistaken death judgments. (*Id.* at pp. 748-750, 753.)

Justice Richardson, joined by Justice Clark in dissent, did not agree with the majority's conclusion regarding the constitutionality of the consent-of-counsel requirement in Penal Code section 1018. He observed that the "right to defend is personal" and "necessarily encompasses the . . . decision whether to mount a defense at the guilt phase." (*Id.* at p. 759 (conc. & dis. op. of Richardson, J).) Since that right is protected from state interference under the principles announced in *Faretta*, Justice Richardson reasoned,

> then surely the comparable right to appear at the arraignment and plead guilty is likewise so protected, for in both cases the defendant makes the personal, fundamental decision, which is his alone to make, to acknowledge his guilt of a criminal offense.

(*Id.* at p. 760 (conc. & dis. op. of Richardson, J.).) While cognizant of the state's interests in capital case guilty pleas, Justice Richardson concluded that they were not "sufficiently compelling to override defendant's constitutionally protected freedom of choice in the matter of his own plea . . . ." (*Id.* at p. 761 (conc. & dis. op. of Richardson, J.).)

McCoy has made clear that Justice Richardson was correct, and that the *Chadd* majority did not strike the appropriate balance between a capital defendant's autonomy rights and the state's interest in reliability.[11] In reaching its erroneous conclusion, the

---

[11] The *Chadd* majority, citing the United States Supreme Court's decision in *North Carolina v. Alford* (1970) 400 U.S. 25, 38-39, fn. 11, also reasoned that because the legislature could constitutionally prohibit *all* guilty pleas to murder charges it necessarily had the lesser power to condition guilty pleas on counsel's consent. (*Chadd*, *supra*, 28 Cal.3d at pp. 751-752.) That a state might permissibly bar all guilty pleas in capital cases does not

Chadd majority gave insufficient weight to the defendant's interest in choosing his own plea. The majority recognized that "the decision as to how to plead . . . is personal," but also viewed Penal code section 1018's infringement on that personal decision as "minor." (*Id*. at pp. 747, 751.) Following this Court's decision in *Chadd*, however, the United States Supreme Court has repeatedly emphasized that "the accused has the ultimate authority to make certain fundamental decisions regarding the case," including "whether to plead guilty." (*Jones*, *supra*, 463 U.S. at p. 751; see also *Nixon*, *supra*, 543 U.S. at p. 187.)

In *McCoy*, the high court applied these decisions and held that the choice of the objectives of the defense, including the choice of plea, is "personal" to the defendant *and* "guarantee[d]" by the

---

suggest, however, that, having conferred the right to plead guilty, any limitation a state subsequently places on that right is constitutional. Although the federal Constitution may not afford a particular right to a defendant, once the state confers it, it is subject to constitutional requirements. There is no federal constitutional right to an appeal, but once conferred, it becomes subject to the requirements of the federal Constitution (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 310 [states not required to establish appellate review, but having done so it is subject to Equal Protection Clause]; *Evitts v. Lucey* (1985) 469 U.S. 387, 393) [no constitutional requirement for states to grant appeals as of right to criminal defendants, but once created must comport with Due Process and Equal Protection], and though there is no federal constitutional right to a plea bargain, once that right is conferred by a state, a criminal defendant is entitled to effective assistance of counsel during plea bargaining (*Missouri v. Frye* (2012) 566 U.S. 134, 140-144 [defendant has no right to plea bargain but where plea bargaining permitted Sixth Amendment right to effective assistance of counsel applies]; *Lafler v. Cooper* (2012) 566 U.S. 156, 162) [Sixth Amendment right to counsel extends to plea bargaining process]).

Sixth Amendment. (*McCoy*, *supra*, 138 S.Ct. at p. 1505.) The high court repeatedly emphasized that the Sixth Amendment protects a defendant's right to choose his own plea even when his choice is "counterproductive," and held that reversal is required regardless of whether defendant is prejudiced by denial of his right to plead guilty. (See *McCoy*, *supra*, 138 S.Ct. at pp. 1505, 1507-1508, 1511.) The Court thus acknowledged that permitting a defendant to exercise his autonomy right to choose his own plea may lead to adverse consequences for the defendant, but a defendant must nonetheless be permitted to choose the objective of his defense.

McCoy was, moreover, a capital case. McCoy's preferred course of vigorously protesting his innocence in the face of overwhelming evidence might well have substantially harmed his interests at the penalty phase of the trial, as well as the state's interest in the reliability of the death judgment. The high court nonetheless held that the choice of the objectives of the defense is for the defendant, not counsel. (*McCoy*, *supra*, 138 S.Ct. at p. 1505.) The choice of plea in a capital case is thus personal and fundamental to the accused and must be respected – even if counsel does not agree, and even if the defendant's choice has some impact on the state's interest in the reliability of death judgments.

This is not to suggest that a guilty plea in a capital case will be necessarily or inherently unreliable. Defendants may plead guilty in capital cases in California. (See Pen. Code, § 1018; *People v. Rices* (2017) 4 Cal.5th 49, 54 (noting that defendant pled guilty).) And there are a variety of protections other than the consent requirement that are intended to ensure that guilty pleas are

reliable. Counsel in every case has a duty to investigate, confer, and advise his client regarding what plea to enter. (*In re Williams* (1969) 1 Cal.3d 168, 175.) A guilty plea must be knowing, intelligent, and voluntary. (See *Boykin v. Alabama* (1969) 395 U.S. 238, 240-244; *People v. Collins* (2001) 26 Cal.4th 297, 308.) The defendant must be competent to enter a plea. (See *Godinez v. Moran* (1993) 509 U.S. 389, 396.) The high court has recognized that, in light of the requirements applying to guilty pleas, there is generally no more reason to "question the accuracy and reliability" of guilty pleas than there is to question the soundness of the results reached at trial. (*Brady v. United States* (1970) 397 U.S. 742, 749, 757-758.)

For a defendant who pleads guilty in a capital case a reliable death verdict is also ensured by a penalty trial where the prosecution discharges its burden of proof:

> . . . pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present.[12]

(*People v. Mai* (2013) 57 Cal.4th 986, 1056, internal quotation marks omitted.) *McCoy* simply establishes that the state cannot seek to

---

[12] As appellant sets out in Argument IV of his opening brief, appellant's guilt and penalty phase trials were not conducted in accordance with these basic requirements for reliability, as the prosecution did not discharge its burden under the rules of evidence, the trial court abdicated its duty to ensure a fair trial, and the adversarial process collapsed. (Argument IV, AOB at pp. 114-118.)

further ensure reliability by permitting counsel to usurp his client's Sixth Amendment right to choose his own plea.

The majority's reasoning in *Chadd* has thus been undermined by subsequent developments in the law. The United States Supreme Court has embraced the view that the right to choose whether to plead guilty is guaranteed by the Sixth Amendment, and that infringement on that right cannot be justified by the state's interest in the reliability of death sentences.

E. The Error Was Structural and Requires Reversal of the Entire Judgment

Appellant wanted to plead guilty but the trial court allowed counsel to overrule appellant's choice regarding the objective of his defense. *McCoy* confirms that such an error is structural. (*McCoy*, *supra*, 138 S.Ct. at pp. 1510-1511.) As the *McCoy* Court explained, "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review." (*McCoy*, *supra*, 138 S.Ct. at p. 1511.)

McCoy identified two rationales for its conclusion, each of which applies with equal force here. (*McCoy*, 138 S.Ct. at p. 1511, citing *Weaver v. Massachusetts* (2017) 137 S.Ct. 1899, 1907 (*Weaver*)].) First, an "error may be ranked structural . . . 'if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest.'" (*Id.* at p. 1511, quoting *Weaver*, *supra*, 137 S.Ct. at p. 1908].) The Sixth Amendment right to autonomy does not protect a defendant from an erroneous conviction. (*Id.* at p. 1508; see also *Weaver*, *supra*, 137

S.Ct. at p. 1908.) Instead it protects "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." (*McCoy*, *supra*, 138 S.Ct. at p. 1511, citing *Faretta*, *supra*, 422 U.S. at p. 834.).

Second, an error may be structural when the effects of the error cannot be ascertained or are too hard to measure. (*McCoy*, *supra*, 138 S.Ct. at p. 1511, quoting *Weaver*, *supra*, 137 S.Ct. at p. 1908.) For example, the denial of the right to counsel of choice is a structural error because it results in "consequences that are necessarily unquantifiable and indeterminate[.]" (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150 (*Gonzalez-Lopez*).) The effects of the denial of appellant's right to control the objectives of his defense were both enormous and indeterminate. Defense counsel's refusal to accede to appellant's right to choose the objectives of his defense led to a series of events that changed the entire character of the proceeding: appellant was forced to enter a not guilty plea and then discharged counsel. He proceeded without counsel throughout the guilt and penalty phases of his trial, at which, among other things, he worked with the prosecutor, purportedly waived his right to a jury, and twice gave damaging testimony. It is impossible to predict with any degree of certainty the effect that continuing with counsel might have had on the rest of the case – appellant might not have waived his jury trial rights or taken the stand, and could at the penalty phase have replaced his damaging guilt phase testimony with evidence of an unconditional guilty plea. Any attempt to apply a harmless-error analysis in this case "would be a speculative inquiry into what might have occurred

in an alternate universe." (*Gonzalez-Lopez*, *supra*, 548 U.S. at p. 150.)

Once a structural error is complete, reversal is required without regard to other evidence in the record. (See *McCoy*, *supra*, 138 S.Ct. at p. 1511.) The error here "was complete when the court allowed counsel to usurp control of an issue within [appellant's] sole prerogative," that is, when appellant was denied his right to plead guilty. (*Ibid*.) The guilt and penalty verdicts should be reversed, and appellant must be returned to the trial court to enter the plea of his choice.

//

//

CONCLUSION

For the reasons stated in this brief and in appellant's opening and reply briefs and first supplemental opening and reply briefs, the judgment must be reversed.

Dated: February 28, 2020

Respectfully submitted,

Mary K. McComb
State Public Defender

/s/ Kathleen M. Scheidel
KATHLEEN M. SCHEIDEL
Assistant State Public Defender

Attorneys for Appellant

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

I, Kathleen M. Scheidel, am the Assistant State Public Defender assigned to represent appellant, Valdamir F. Morelos, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of the computer generated word count, I certify that this brief is 7,157 words in length excluding the tables and this certificate.

Dated: February 28, 2020

Respectfully submitted,

/s/ Kathleen M. Scheidel
KATHLEEN M. SCHEIDEL
Assistant State Public Defender

Attorney for Appellant

DECLARATION OF SERVICE

Case Name: ***People v. Valdamir Fred Morelos***
Case Number: **Supreme Court Case No. S051968**
Santa Clara County Superior Court No. SC169362

I, **Lauren Emerson**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

by enclosing it in envelopes and 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.

The envelopes were addressed and mailed on **February 28, 2020**, as follows:

Mr. Valdamir F. Morelos No. J97900, 2-EY-48 CSP-SQ San Quentin, CA 94974	Clerk of the Court Santa Clara County Superior Court 191 N. First Street San Jose, CA 95113

The following were served the aforementioned document(s) electronically via TrueFiling on **February 28, 2020**:

Attorney General – San Francisco Catherine Rivlin, D.A.G. 455 Golden Gate Ave., Suite 11000 San Francisco, CA 94102-3664	California Appellate Project 345 California St., Suite 1400 San Francisco, CA 94104

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **February 28, 2020**, at Sacramento, CA.

/s/ Lauren Emerson

LAUREN EMERSON

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. MORELOS (VALDAMIR FRED)**
Case Number: **S051968**
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: **kathleen.scheidel@ospd.ca.gov**

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

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION	Application_to_File_Supp_AOB_Final
SUPPLEMENTAL BRIEF	2020_02_28_Morelos_2nd_Supp_AOB_Final

Service Recipients:

Person Served	Email Address	Type	Date / Time
Catherine A. Rivlin Office Of The Attorney General 115210	Catherine.Rivlin@doj.ca.gov	e-Serve	2/28/2020 10:40:55 AM
Office Office Of The State Public Defender-Sac Timothy J. Foley, Sr. Deputy State Public Defender 000000	docketing@ospd.ca.gov	e-Serve	2/28/2020 10:40:55 AM
California Appellate Project	FILING@CAPSF.ORG	e-Serve	2/28/2020 10:40:55 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

2/28/2020
Date

/s/Lauren Emerson
Signature

Scheidel, Kathleen (141290)
Last Name, First Name (PNum)

Office of the State Public Defender
Law Firm