IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DANIEL FREDERICKSON,** **Defendant and Appellant.**	**Capital Case** Case No. S067392 Orange County Superior Court No. 96CF1713

APPELLANT'S SUPPLEMENTAL BRIEF IN RESPONSE TO THIS COURT'S ORDER

Appeal from the Judgment of the Superior Court of the State of California for the County of Orange Honorable William R. Froeberg, Judge

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INTRODUCTION

Penal Code Section 1018 governs the entry of pleas in a criminal case and provides that a defendant's plea of guilty to a capital felony may not be received unless defense counsel is present and consents. In this capital case, appellant attempted to plead guilty but his counsel would not consent. Appellant discharged counsel and was granted the right of self-representation, but was still not allowed to plead guilty. During one of his subsequent attempts to plead guilty, the prosecutor told appellant that he could not plead guilty to a capital case, and that no judge could accept his plea.

Appellant's initial briefing argued, inter alia, that Penal Code section 1018 denied him his fundamental right to control his defense and that he should have been allowed to plead guilty after exercising his right to self-representation. He also argued that he should have been allowed to plead guilty as part of a strategy to obtain a life sentence.

On October 17, 2018, this Court directed the parties to file supplemental briefing addressing the significance of the recent decision in *McCoy v. Louisiana* (2018) 584 U.S. __, 138 S.Ct. 1500, on the issues in this case. *McCoy* held that the choice of plea is at the core of an accused's right to set the objectives of his/her defense, and that the Sixth Amendment is violated when counsel does not abide by those expressly stated objectives.

The order for supplemental briefing also cited to another capital case pending before this Court, *People v. Miracle*, S140894. In *Miracle*, defense counsel would not consent to the defendant's guilty plea, the defendant's request for self-representation was granted, and advisory counsel was appointed and consented to the plea. On appeal, the parties in *Miracle* took the exact opposite position to the parties in appellant's case: Miracle defended the constitutionality of Penal Code section 1018, while respondent maintained that it violates a defendant's fundamental rights. This Court has ordered and

received supplemental briefing from the parties in *Miracle* addressing a question similar to the one in appellant's case.

In this supplemental brief, appellant argues as follows: (1) he agrees with the contentions made by the Attorney General in its *Miracle* briefing that section 1018 is unconstitutional; and (2) with respect to the effect of *McCoy* on the issues here, that case fully supports appellant's arguments that section 1018 is unconstitutional, the constitutional violations were complete when appellant was not allowed to plead guilty, and the errors are structural and require reversal of the entire judgment.

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ARGUMENT

THE HIGH COURT'S DECISION IN *McCOY* SUPPORTS APPELLANT'S ARGUMENTS THAT SECTION 1018 VIOLATED HIS SIXTH AMENDMENT RIGHTS, THE ERRORS WERE COMPLETE WHEN HE WAS NOT ALLOWED TO PLEAD GUILTY, AND THE ERRORS ARE STRUCTURAL

A. Background

Penal Code Section 1018 has long governed the entry of pleas in criminal cases in this state.[1] In 1949, the statute was amended to provide that no plea of guilty to a felony for which the maximum punishment is death or life without the possibility of parole, could be received from a defendant who does not appear with counsel. As the instant case is a capital case, appellant will refer solely to the capital-case requirements in section 1018.

In 1996, appellant was charged in Orange County with one count of murder and an attempted robbery special circumstance. He confessed to the crime on the day that he was arrested, the day after, and two months later. (4 CT 1198-1241, 1242-1283; 8 RT 1450-1463; AOB 63.) After having been represented by counsel for four months, and just prior to the initial arraignment, appellant's motion to substitute counsel was heard at a closed hearing. He informed the court: "I'm pleading guilty, Sir. I mean, the only thing is, we have to go for a penalty phase." Counsel, however, would not consent to that plea. At the arraignment that followed, when the court asked about the plea, defense counsel entered a not guilty plea. (Municipal Court

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1. All future statutory references are to the Penal Code, unless otherwise indicated. For simplicity's sake, the supplemental briefing in *People v. Miracle*, S140894, is referred to herein as follows: Appellant's Supplemental Reply Brief, MASRB; Respondent's Supplemental Brief, MRSB; Respondent's Supplemental Reply Brief, MRSRB.

RT 23-28; AOB 64-65.) [2]

One week later, appellant's motion for self-representation was granted. (Municipal Court RT 31-34.) At two subsequent proceedings, appellant attempted to plead guilty, but was rebuffed. (Jan. 23, 1997 RT 21-24, 34-36; Municipal Court RT 126-136, 159-162; AOB 66.) At the second proceeding, appellant stated: "The 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 circumstance[]." The prosecutor spoke with appellant off the record and then informed the court: "He wants 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 your plea." (Municipal Court RT 159-162; AOB 77-79.)

Shortly before voir dire began, the prosecutor made a motion to exclude any reference at the guilt phase to appellant's attempts to plead guilty. Appellant informed the trial court that he had tried to plead guilty but that "counsel refused to join." The prosecutor, obviously referring to section

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2. At the closed hearing, appellant referred to several disagreements with counsel, and ultimately withdrew his request to substitute counsel. But the record of this hearing contains a statement made by appellant that has *constitutional significance*: "I'm pleading guilty, Sir." And the record of the arraignment shows that *counsel entered a not guilty plea*, which also has constitutional significance. These hearings and subsequent hearings establish beyond any doubt that appellant was not allowed to plead guilty because counsel refused to consent to that plea. (See AOB 64-66.)

The parties disagree over the meaning of the exchange that occurred after defense counsel entered the not guilty plea. Appellant immediately stated "Over my objection" to which counsel replied, "What he means is he would like to have the complaint read." (AOB 75 & fn. 27; RB 20.) But as will be shown, the point has little relevance in light of *McCoy*. (See § C.2, *post*.)

1018, stated: "It was placed on the record, Your Honor, but the Penal Code specifically disallows a guilty while he's in pro per, and no counsel has ever agreed to join in his plea, so technically it's an illegal, unacceptable plea." The motion was granted over appellant's objection. (3 RT 406-408.) During voir dire, the trial court told the prospective jurors that appellant had entered a plea of not guilty to the charges, "thereby denying that they are true." The juror questionnaire also stated that appellant had entered a not guilty plea. (5 RT 843; 5 CT 1481.) Shortly before the guilt phase, appellant moved that he be permitted to inform the jurors that he was not allowed to plead guilty. That motion was denied. (6 RT 909-911; AOB 92, fn. 31.)

During the guilt-phase closing arguments, when the prosecutor stated that appellant should be responsible for the crime, appellant objected that he had attempted to accept responsibility by seeking to plead guilty, and asked that he be allowed to respond by informing the jurors of that fact. The motion was denied. (10 RT 2008-2011; AOB 90-91.) Though appellant was allowed to testify at the penalty phase about his attempts to plead guilty, he made only a brief statement to that effect; and that testimony conflicted with the trial court's statements that appellant had entered a not guilty plea.

As noted, section 1018 governs the entry of pleas in a criminal case. In 1973, the Legislature amended the statute to provide, in pertinent part: "No plea of guilty [in a capital case] 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." It is this version of the statute that was in place at the time of appellant's attempts to plead guilty.

The constitutionality of section 1018's consent-of-counsel requirement in a capital case was first addressed in *People v. Chadd* (1981) 28 Cal.3d 739 (*Chadd*), a capital case where the lower court accepted the defendant's guilty plea over the objection of defense counsel. In *Chadd*, respondent contended

that section 1018 was unconstitutional because it allowed defense counsel to "veto" a capital defendant's decision to plead guilty. And although Chadd had not exercised his right to self-representation, respondent asserted that the statute violated that fundamental right. (*Id.* at pp. 747, 750-752.) This Court rejected those contentions, upheld the statute, and reversed the judgment. (*Id.* at pp. 746-755.)

In *People v. Alfaro* (2007) 41 Cal.4th 1277 (*Alfaro*), this Court again upheld the constitutionality of the consent-of-counsel requirement in section 1018. (*Id.* at p. 1301.) However, *Alfaro* noted that two issues relating to the statute had not been decided previously by this Court. The first is whether section 1018 permits a capital defendant to discharge counsel, proceed in propria persona, and enter a guilty plea. The second undecided issue is whether a defendant whose desire to enter a guilty plea in order to accept responsibility and obtain a life sentence at the penalty phase implicates a constitutionally protected fundamental interest that might override the statute. (*Id.* at pp. 1299-1300, 1302 & fn. 4.) [3]

In his initial briefing, appellant raised two separate arguments relating to his unsuccessful attempts to plead guilty, alleged that a variety of errors occurred during the proceedings, and argued that the errors violated a host of his rights under state and federal law. [4] As relevant to this brief, he argued

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3. The parties in this case and in *Miracle* have discussed at length this Court's cases addressing section 1018. (AOB 69-70, 71-73; Resp. Brief 25-30; Reply pp. 4-7; Miracle AOB 36-42; Miracle Resp. Brief 52-54, 61-67; Miracle Reply 4-11, 17; MASB 10-11, 13-15; MASRB 5, 11; MRSRP 9, 13-14). Appellant will not repeat those discussions, except when relevant to this Court's order for supplemental briefing.

4. Appellant will not repeat here every single claim of error and every right that was violated in connection with the plea proceedings in his case. As relevant here, he maintains that his Sixth Amendment right to have his guilty

Footnote continued on next page . . .

that section 1018 was invalid because it violated his Sixth Amendment right to control his defense and make his own plea, contrary to the majority's reasoning in *Chadd*. (AOB 67-71.) He also argued that he should have been allowed to plead guilty under each of the two questions left open in *Alfaro*: (1) as part of a strategy to obtain a life sentence at the penalty phase; and (2) after exercising his right to self-representation. (AOB 71-74, 77-81.)

Respondent's initial briefing here defended section 1018 as constitutional and found no fault in the majority's reasoning in *Chadd*. (RB 25-27.) It contended that appellant did not seek to plead guilty in an attempt to obtain a life sentence, and that he was not entitled to plead guilty after having exercised his right to self-representation. (RB 27-31, 33-35.)

Five years later, however, in *People v. Miracle*, S140894, a case that shares some similarities with appellant's case, respondent's position on the constitutionality of section 1018 underwent a radical change. Before trial, Miracle made known his desire to plead guilty to the capital murder count and special circumstances, and defense counsel refused to consent to that plea. Unlike appellant's case, however, after Miracle's motion for self-representation was granted, advisory counsel was appointed and consented to the guilty plea. The trial court then accepted that plea.

On appeal, the parties in *Miracle* took the exact opposite position to the parties here. Miracle defended the constitutionality of section 1018 and the decision in *Chadd*, while respondent echoed appellant's arguments that the statute violated a defendant's fundamental right to control his/her defense, and that *Chadd*'s reasoning was faulty. Miracle argued that he did not seek to

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plea entered and accepted, and his Sixth Amendment to plead guilty after exercising his right to self-representation were violated. (See AOB 67, 75, 81, 87, 91.)

plead guilty in order to make a case for life at penalty, while respondent maintained that this was the motive for the guilty plea. Miracle denied that a defendant should be allowed to discharge his attorney, represent himself, and enter a guilty plea, while respondent claimed, as appellant argued, that a defendant has that right. (Miracle AOB 36-42; Miracle Resp. Brief 27-28, 51-66.)

Recently, the high court issued its opinion in *McCoy v. Louisiana* (2018) 584 U.S. __, 138 S.Ct. 1500, which held that the Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt. (See § C.1., *post*.) On September 26, 2018, this Court ordered the parties in *Miracle* to file supplemental briefs addressing the following:

> 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 (see *McCoy v. Louisiana* (2018) 584 U.S. __ [138 S.Ct. 1500]; *Faretta v. California* (1975) 422 U.S. 806) in light of the Eighth Amendment's requirement of reliability in death judgments (see *Woodson v. North Carolina* (1976) 428 U.S. 280; *Beck v. Alabama* (1980) 447 U.S. 625; *People v. Bloom* (1989) 48 Cal.3d 1194, 1228)?

Respondent's supplemental briefing in *Miracle* maintained that *McCoy* supported its contention that section 1018's capital-case requirements violate a defendant's rights to control his defense and to self-representation. (MRSB 7-12.) This Court has not, as of yet, issued its opinion in *Miracle*.

As noted, this Court has directed the parties here to file supplemental briefing addressing 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.)

Appellant anticipates that respondent's supplemental briefing here will change course, align itself with the position it has taken in *Miracle*, and concede that

section 1018 is unconstitutional. Whether respondent does so, this Court should hold that section 1018 is unconstitutional, as argued by respondent in *Miracle* and by appellant in this case.

B. Appellant Agrees with the Arguments Made By Respondent in *Miracle*

This Court's order for supplemental briefing here cites to the *Miracle* case. As noted above, respondent's contentions in its initial briefing in *Miracle* were aligned with those made by appellant. In its supplement briefing in *Miracle*, respondent continues to maintain that the capital-case requirements in section 1018 are unconstitutional because they violate a defendant's right to control his/her own defense, and his/her right of self-representation. (MRSB 7-12.) Appellant agrees.

It is not clear, however, whether respondent is now maintaining that a defendant's motive for pleading guilty is irrelevant in light of *McCoy*. If so, then one of the questions left undecided by this Court in *Alfaro*, *supra*, 41 Cal.4th at pp. 1299-1300, would become irrelevant: whether section 1018 would apply to a defendant who sought to plead guilty as part of a strategy to obtain a life sentence. Respondent does not cite to *Alfaro* in its supplemental briefing. But it does mention that where the defendant's objective is to accept full responsibility for his actions and plead guilty, counsel must abide by that objective. (MRSB 11; see also MRSRB 6, 9.)

In this brief, appellant continues to maintain that his motive for pleading guilty was to accept responsibility and make a case for life at penalty; and that neither defense counsel nor the courts below could usurp this decision. (AOB 62, 71-73.) However, if this Court does not agree that the record shows this motive, then appellant argues that, under *McCoy*, his right to set the objectives of his defense by pleading guilty was denied. (See § C.2, *post*.)

Finally, in *Miracle*, unlike in this case, this Court's order for

supplemental briefing directed the parties to address whether section 1018 violates the Sixth Amendment "in light of the Eighth Amendment's requirement of reliability in death judgments." Respondent contends that the state's interest in a reliable death verdict does not override a defendant's personal Sixth Amendment rights, that this Court has determined that the balance of interests favors the defendant's personal rights to represent himself and control his defense, and that a reliable death judgment can be ensured even if section 1018's appearance and consent requirements are "stricken." (MRSB 12-20; MRSRB 10-14.) Appellant agrees. (See also AOB 85, 94.) Where, as here, a guilty plea in a capital case is not induced by caprice or emotion, there is a factual basis for the plea, and it is knowing, voluntary and intelligent, that plea meets the state's interest in reliability as well as the Eighth Amendment reliability requirements.

Indeed, the perverse effect of not allowing appellant to plead guilty was to diminish the reliability of the death verdict. Appellant's attempted unconditional guilty plea was relevant to show significant and compelling mitigating factors: acceptance of responsibility, remorse, a desire to spare the victim's family the pain of an unnecessarily drawn-out legal process, honesty and candor, and a disposition and commitment to rehabilitation. (AOB 62, 84-85, 87-91.) The effect of section 1018 was to prevent the jury from giving full mitigating effect to those factors.

C. The High Court's Decision in *McCoy* Supports Appellant's Arguments that Section 1018 Violated His Sixth Amendment Rights, that the Errors Were Complete When He Was Not Allowed to Guilty Plea, and that the Errors Are Structural

As noted above, this Court's order requests supplemental briefing on the significance of *McCoy* to the issues in this case. *McCoy* supports appellant's arguments that section 1018 violated his Sixth Amendment right to choose the objective of his defense, and violated his right to self-representation. It also

confirms that the constitutional violations were complete when appellant was not allowed to plead guilty, and that the errors are structural and require reversal of the judgment.

1. The Decision in *McCoy v. Louisiana*

In *McCoy v. Louisiana*, *supra*, 138 S.Ct. 1500, the high court addressed the issue of whether it is unconstitutional for defense counsel in a capital case to admit guilt over the accused's express objections. The defendant in *McCoy* was charged with triple murder and consistently maintained his innocence. He pleaded not guilty and insisted on a jury trial. After his motion to have his public defenders removed was granted, his family hired a private attorney, English. English believed that the evidence against McCoy was overwhelming, and determined that the best strategy to spare his client's life was to concede guilt and hope for leniency during the sentencing phase. Accordingly, he advised McCoy to enter a guilty plea. McCoy, however, maintained his innocence and emphatically opposed English's proposal to concede his guilt. Several days before trial, English notified McCoy that he intended to concede guilt, and McCoy moved to discharge him. That motion was denied as untimely. During his opening statement, English told the jury that the only conclusion it could reach was that "McCoy was the cause of these individuals' death." When McCoy protested to the trial court that English was "selling him out," the court told him that he was represented by English and that no further "outbursts" would be permitted. English continued his opening statement and told the jury that the evidence was "unambiguous" and that McCoy had committed the murders. McCoy testified in his own defense, maintaining his innocence and pressing an alibi defense. In his closing argument, English reiterated that McCoy was the killer, and stated that the prosecution's burden on that issue had been met. The jury found McCoy guilty of three counts of first-degree murder. At the penalty

phase, English again conceded that his client committed the crimes, but urged mercy in view of McCoy's mental and emotional issues. That strategy was unsuccessful as the jury sentenced McCoy to death. (*Id.* at pp. 1506-1507.)

The high court reversed the judgment. The court began its discussion with the Sixth Amendment, which guarantees a defendant the right to have "the Assistance of Counsel for his defence." The court quoted *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), which noted that "the 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 pp. 1507-1508, internal quotation marks omitted.) 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.) Concomitantly, the Sixth Amendment right to discharge counsel and appear pro se affirms "the dignity and autonomy of the accused." (*Id.* at pp. 1507-1508, citing *McKaskle v. Wiggins* (1984) 465 U.S. 168, 176-177 (*McKaskle*).)

McCoy discussed the decisions that must be made by a defendant and defense counsel at a criminal trial. When a defendant proceeds with counsel, the management of the trial is within counsel's province. However, other decisions are so fundamental that they "are reserved for the client—notably, whether to plead guilty[.]" (*Id.* at p. 1508, citing *Jones v. Barnes* (1983) 463 U.S. 745, 751.) A defendant's decision whether to plead guilty is not a strategic choice about how best to achieve his/her objectives, it is a choice about "what [those] objectives in fact *are*." (*Id.* at p. 1508, emphasis in original.) In a capital case, where the defendant's life is at stake, it is his/her prerogative, not counsel's, to decide on the objective of the defense. And *McCoy* expressly recognized that one of those objectives may be "to admit guilt in the hope of gaining mercy at the sentencing stage[.]" (*McCoy*, at p. 1505.)

The high court distinguished its prior decision in *Florida v. Nixon* (2004) 543 U.S. 175, a capital case where counsel informed the defendant that the most promising means to avert a death sentence was to concede guilt. The defendant was unresponsive, neither consenting nor objecting to counsel's strategy. (*Id.* at p. 178, 186, 192.) *Nixon* held that "when a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course." (*Id.* at p. 178.) In *McCoy*, by contrast, the defendant consistently objected to any admission of guilt. (*McCoy*, *supra*, 138 S.Ct. at pp. 1505, 1509.)

Thus, *McCoy* held that the Sixth Amendment guarantees a defendant the right to choose the objectives of his defense, including whether to plead guilty, and prohibits counsel from usurping those objectives. Once the defendant informs defense counsel of those objectives, counsel must abide by them. (*Id.* at p. 1509.)

2. *McCoy* Affirms that a Defendant Has a Fundamental Right to Choose the Objectives of His Defense that Cannot Be Overridden by Counsel or the Trial Court

The facts in *McCoy* are similar in many respects to the facts here. As in *McCoy*, appellant was fully engaged with his defense and expressed the objectives of his defense to his counsel. Both appellant and McCoy were competent to make decisions about the fundamental objectives of their defense. Both McCoy and appellant were represented by counsel and received advice from counsel about which plea to enter. In both cases, there was a disagreement with their counsel regarding the objectives of the defense, and counsel's view prevailed. In each case, defense counsel believed that he had the right to overrule his client's plea. In each case, counsel usurped control of these objectives over the defendant's objection. As in *McCoy*, appellant consistently attempted to have counsel and the courts respect his fundamental

right to choose the objectives of his defense, without success. Unlike the defendant in *Nixon*, appellant did not remain quiet and unresponsive. In *McCoy*, the trial court silenced the defendant's attempts to have his choice of objectives realized. Here, the courts below and the prosecutor silenced appellant's attempts to have his choice of objectives realized.

The reasoning in *McCoy* also fully support appellant's arguments. *McCoy* reasoned that some decisions in a criminal trial are so fundamental that they are "reserved for the client." (*McCoy*, *supra*, 138 S.Ct. at pp. 1507-1508.) Appellant argued the same point and cited the same cases. (AOB 67.) *McCoy* held that one of the decisions reserved to the defendant is which plea to enter. (*Id.* at p. 1508.) Appellant argued that decision whether to plead guilty is "personal" and belongs to the accused. (AOB 67.) *McCoy* held that the Sixth Amendment guarantees an accused the right to control the defense by choosing the objective of the defense, including the choice of plea. (*Ibid.*) Appellant argued that the right to choose his plea lies at the heart of a defendant's Sixth Amendment right to control his/her defense. (AOB 67-68.) *McCoy* held that when defense counsel is presented with express statements of the client's will regarding the plea, counsel may not "steer the ship the other way." (*Id.* at p. 1509.) Appellant argued that he, not defense counsel had the right to enter his plea. (AOB 74-75.) *McCoy* held that it was error for counsel to usurp the defendant's fundamental right to choose the objectives of his defense through his plea. (*Id.* at p. 1511.) Appellant argued that defense counsel usurped his fundamental right to choose the objectives of his defense through the entry of his plea. (AOB 67-68.) *McCoy* held that with life at stake in a capital case, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense, including whether to admit guilt in the hope of gaining mercy at the sentencing stage. (*Id.* at pp. 1505, 1511) Appellant made the same argument. (AOB 71-72.) *McCoy* held that the trial court's actions in

permitting counsel's to override the defendant's choice of plea were "incompatible with the Sixth Amendment." (*Id.* at p. 1512.) Appellant argued that the lower courts erred in not allowing him enter and accept his choice of plea. (AOB 74-76.) *McCoy* made no suggestion that a guilty plea in a capital case was unreliable. Appellant argued that the acceptance of his guilty plea would have increased the reliability of the death verdict. (AOB 92-95.) *McCoy* held that the error was structural; appellant argued that the errors in his case were structural. (*Id.* at p. 1511; see § C.4, *post*) In short, *McCoy* held that a defendant has the right to choose the objectives of his/her defense, including whether to plead guilty. That holding provides direct support for appellant's arguments.

McCoy also supports appellant's argument that section 1018 violated his Sixth Amendment right to self-representation. (AOB 71-74, 77-81.) The right to self-representation can be denied wholesale, as when a defendant is erroneously denied the right to represent himself or herself. (E.g., *Faretta*, *supra*, 422 U.S. at p. 836.) That right can also be violated when the defendant is subject to restrictions which disallow him/her from exercising "actual control over the case he chooses to present to the jury." (*McKaskle*, *supra*, 465 U.S. at p. 178.) A pro se defendant must be allowed to control and present his/her own defense. (*Id.* at p. 174.) Accordingly, "[i]n determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way." (*Id.* at p. 178.) These principles are in accord with the holding in *McCoy*: the right to control the objectives of the defense in a criminal case, including whether to plead guilty, belongs exclusively to the defendant.

Here, after appellant exercised his *Faretta* right, his objective was to plead guilty and make a case for life at the penalty phase. But section 1018 precluded him from doing so. The statute did not allow appellant, as a self-

represented defendant, to control the objectives of his defense by pleading guilty, and as a result, he was not allowed to present his own case. When a not guilty plea and a trial are forced upon a defendant who seeks to plead guilty unconditionally, the defense is stripped of the personal character guaranteed by *Faretta* and the Sixth Amendment. (Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty* (2001) 65 Alb. L.Rev. 181, 202.)

On its face, section 1018 affords a right to represented defendants that it withholds from self-represented defendants: the former may plead guilty with counsel's consent; the latter are denied that right. For a defendant, such as appellant, who exercises the right of self-representation and seeks to plead guilty, the statute has the effect of forcing counsel on an unwilling defendant. That is a core violation of the Sixth Amendment. (*Faretta*, *supra*, 422 U.S. at p. 817.) Section 1018 is inconsistent with *McCoy* and violated appellant's Sixth Amendment right to self-representation.

McCoy is also consistent with appellant's argument that his desire was to plead guilty in order to accept responsibility and make a case for life at the penalty phase. As noted above, in *Alfaro*, *supra*, 41 Cal.4th 1277, this Court stated that it had not decided whether the fundamental rights implicated in such circumstances would override the requirements of section 1018. (*Id.* at pp. 1299-1300.) *McCoy* supports a defendant's fundamental right to control the objectives of his defense. In light of *McCoy*'s holding, if the defendant's objective is, as it was here, to plead guilty in order to accept responsibility and as part of a strategy to obtain a life sentence at the penalty phase, the Sixth Amendment would protect that objective. Accordingly, appellant's Sixth Amendment right to plead guilty as part of an effort to obtain a life sentence was violated when counsel usurped appellant's plea and the lower courts refused to allow appellant to plead guilty.

There is little dispute that in certain capital cases, a guilty plea may be the best and only realistic way to avoid the death penalty. *McCoy* suggests as much when it refers to the defendant's prerogative to plead guilty in the hope of gaining mercy at the sentencing phase. It also stated that "[c]ounsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as [McCoy's defense counsel] did in this case." (*McCoy*, *supra*, 138 S.Ct. at p. 1508.) In *Florida v. Nixon*, *supra*, 543 U.S. 175, the high court stated that when the evidence is overwhelming and the crime heinous, making a case for life at penalty may be "the best and only realistic result possible." (*Id.* at p. 191.) Similarly, in *Bradshaw v. Stumpf* (2005) 545 U.S. 175, the court noted that a guilty plea in a capital case allowed the defendant "to assert his acceptance of responsibility as an argument in mitigation." (*Id.* at p. 186.) In *State v. Louviere* (La. 2002) 833 So.2d 885, the court recognized that "denying a defendant the choice to plead guilty arguably would impermissibly deprive the defendant, per the federal Constitution, of his strategic choice to acknowledge his crime and thereby appear remorseful before his jury." (*Id.* at p. 894) Commentators have noted that precluding capital defendants from pleading guilty results in the loss of an important right at the penalty phase:

> The use of a guilty plea to show acceptance of responsibility can have a great impact on a defendant's jury sentence. Studies of capital juries have found that lack of remorse plays an enormous part in sentencing a defendant to death. Acceptance of responsibility can strongly influence a jury to sentence a defendant to life without parole rather than death. Notably, however, acceptance of responsibility is only likely to affect jurors if the defendant expresses it before the penalty proceedings.

(Note, *Pleading Guilty to Death: Protecting the Capital Defendant's Sixth Amendment Right to a Jury Sentencing after Entering a Guilty Plea* (2013) 98 Cornell L.Rev. 1245, 1261-1262, footnote omitted.) These authorities support appellant's argument that a guilty plea in a capital case demonstrates significant mitigating factors. (AOB 91-93.)

The right to plead guilty in a capital case has its roots in the common law and the early history of this country. (See *State v. Louviere*, *supra*, 833 So.2d at p. 894; Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty* (2001) 65 Alb. L.Rev. 181, 183-184.) That right 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*, *supra*, 65 Alb. L.Rev. at pp. 190-191 [only three states refuse to allow a defendant to plead guilty in a capital case]; *South Carolina v. Passaro* (S.C. 2002) 567 S.E.2d 862, 866.) Appellant is aware of no other jurisdiction that conditions the acceptance of a guilty plea in a capital case upon the consent of counsel. [5] The overwhelming practice in other states should inform this Court's decision as to the constitutionality of the capital-case requirements in section 1018. (See *Faretta*, *supra*, 422 U.S at pp. 813-814.)

McCoy is also relevant to this Court's decision in *Chadd*, where the majority held that the requirements of section 1018 did not violate the Sixth

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5. Respondent here does not deny that section 1018's consent-of-counsel requirement is "a unique exception to the traditional understanding that decisions about what plea to enter are reserved exclusively to the client" and is also arguably incompatible with the Sixth Amendment right to self-representation. (AOB 68-69, quoting Bonnie, *The Dignity of the Condemned* (1988) 74 Virg. L.Rev. 1363, 1370, fn. 18.) Indeed, respondent in *Miracle* cited this authority with approval. (Miracle Resp. Brief 51, fn. 20.)

Amendment. The *Chadd* majority recognized that a defendant has the right to control his/her defense, but held that the "larger public interest at stake in pleas of guilty to capital offenses" outweighed the defendant's interest. (*Chadd*, *supra*, 28 Cal.3d at p. 747; see AOB 69-70.) That conclusion is inconsistent with *McCoy*, which held that a defendant's fundamental right to choose the objectives of his or her defense, including the choice of what plea to enter, is guaranteed by the Sixth Amendment. *McCoy* held that that right cannot be usurped by counsel or the courts; there is no reason to believe that it can be usurped by a statute.

The *Chadd* majority conceded that section 1018 infringes a defendant's Sixth Amendment right to self-representation, but viewed the infringement as "minor." (*Chadd*, *supra*, 28 Cal.3d at p. 751.) As argued above, however, the statute's effect on appellant's right to self-representation was far from minor. Once appellant exercised that right, section 1018 disallowed him from controlling the objectives of his defense: it forced him to plead not guilty, when his objective was to plead guilty unconditionally. His defense was stripped of the personal character guaranteed by *Faretta* and the Sixth Amendment.

The *Chadd* majority characterized the argument that section 1018 violates the right to self-representation as an attempt to turn *Faretta* on its head: from the right to make a defense, to the right to make no defense. (*Chadd*, *supra*, 28 Cal.3d at p. 751.) But since *Chadd* was decided, this Court has held that a defendant has a right to make no defense in a capital case. (See MRSB 17-18 [listing cases].)

Chadd concluded that section 1018's differential treatment of self-represented defendants in capital cases was supported by the state's interests in reliable and unmistaken death verdicts. (*Chadd*, *supra*, 28 Cal.3d at p. 751.) But forcing a lawyer on an unwilling defendant cannot be justified by the

state's interest in the reliability of death sentences. In *People v. Taylor* (2009) 47 Cal.4th 850, the Court held that "we are not free to hold that the government's interest in ensuring the fairness and integrity of defendant's trial outweighed defendant's right to self-representation. [Citation]" (*Id.* at p. 866.) More recently, in *People v. Daniels* (2017) 3 Cal.5th 961, the Court explicitly stated that reliability interests in a death judgment do not outweigh a defendant's right to self-representation. (*Id.* at pp. 985-986 (lead opn. of Cuellar, J.).) The reasoning by the *Chadd* majority is at direct odds with this Court's holdings in *Taylor* and *Daniels*.

In *Daniels*, the right to self-representation outweighed reliability interests where the defendant had chosen not to participate in the defense. In this case, appellant not only participated in his defense, he sought to save his life. By not allowing appellant to plead guilty, section 1018 decreased the reliability of the death verdict here: it distorted a number of crucial mitigating factors, and prevented the sentencing jury from giving full effect to what should have been significant mitigating factors in this case. (AOB 92-93; see also MRSB 12.) As noted in an influential law review: "Once one accepts the Court's holding [in various cases] that the decision whether to plead guilty rests with the defendant, not his lawyer, one necessarily has concluded that at least under some circumstances, autonomy is a more important value than paternalism and reliability." (Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case* (2010) 90 Bost. L.Rev. 1147, 1178.)

The majority in *Chadd* also observed that section 1018 had one provision for capital cases and a separate provision for non-capital cases. It reasoned that if section 1018 were construed to allow guilty pleas without the consent and appearance of counsel, that distinction would become redundant. (*Chadd*, *supra*, 28 Cal.3d at p. 747.) But since *Chadd* was decided, this Court has rejected that reasoning in cases involving other mandatory presence-of-

counsel statutes. For instance, section 686.1 requires defendants in capital cases to be represented by counsel during all stages of the preliminary and trial proceedings. As with the capital-case requirements in section 1018, that statute predates *Faretta*; yet this Court has held that it may only be applied where *Faretta* is not implicated. (*Daniels*, *supra*, 3 Cal.5th at p. 986 (lead opn. of Cuellar, J.), citing *People v. Johnson* (2012) 53 Cal.4th 519, 526; see also *People v. Ingels* (1989) 216 Cal.App.3d 1303, 1307-1308 [§ 859a violates *Faretta*]; *Thomas v. Superior Court* (1976) 54 Cal.App.3d 1054, 1056-1059 [statutes requiring representation in felony cases violate *Faretta*]; *People v. Dent* (2003) 30 Cal.4th 213, 224 (conc. opn. of Chin, J.) [same.].) The *Chadd* majority was correct that reading section 1018 without the capital-case requirements would result in a redundancy. But that result is required by the Sixth Amendment.

The *Chadd* majority also relied on a statement by the high court in footnote 11 of its opinion in *North Carolina v. Alford* (1970) 400 U.S. 25 (*Alford*): "A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court [citation], although the States may by statute or otherwise confer such a right." (*Id.* at p. 38, fn. 11.) Once again, the positions taken by the parties in this case regarding *Alford* are directly opposite to the positions taken by the parties in *Miracle*. Here, appellant argues that *Chadd*'s reliance on *Alford* was incorrect, and that he had a right to plead guilty; respondent contends that *Chadd* correctly recognized that a state's power to bar guilty pleas includes the lesser power to condition those pleas in a capital case. (AOB 75-76; Resp. Brief 34). In *Miracle*, however, the defendant cited *Alford* as supporting his argument that *Chadd* was correctly decided; but respondent maintained that *Alford* does not bar a guilty

plea in California. (Miracle Resp. Brief 41; MRSRB 8-10.) [6]

The opinion in *McCoy* did not cite *Alford*, but it could be read as limiting *Alford*'s observation that there is no absolute constitutional right to have a guilty plea accepted. *McCoy* relied on the well-established rule that a defendant's Sixth Amendment right to control his defense includes the decision whether to plead guilty. If, as in *McCoy*, a defendant's plea decision in a capital case cannot be overruled by counsel or the trial court, then it may be argued that a defendant has a right to plead guilty unconditionally, assuming that all the requirements for a valid guilty plea have been otherwise been met.

But this Court need not address that issue here. *Alford* does not say that states may offer the "option" or an "opportunity" to plead guilty, or that they may "allow" defendants to plead guilty; it says that states may confer the "*right*" to plead guilty. In California, the state has conferred that *right* where, as here, the plea is unconditional and all of the requirements for a valid guilty plea have been met. (AOB 76.) Although the federal Constitution may not afford a particular right to a defendant, once the state confers it, the right

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6. In its supplemental brief in *Miracle*, respondent contends that:

> [T]he defendant in *Alford* pleaded guilty to a non-capital crime to avoid the death penalty; the Court therefore did not consider or discuss the reliability of death judgments in footnote 11 or elsewhere in the opinion. Moreover, the two imagined state statutes mentioned in footnote 11 did not contemplate that the validity of a guilty plea could be based on whether a defendant had counsel or his counsel consented to the plea.

(MRSRB 8.) Respondent also notes that *Alford* supports the position that it is the defendant's choice whether to plead guilty, as long as the requirements for a guilty plea are met. (*Alford*, *supra*, 400 U.S. at p. 31.) And *Alford* stated that a defendant facing overwhelming evidence may make the "free and rational choice" to plead guilty. (MRSRB 8-9, citing *id.* at pp. 28, 31, 37-38.) Appellant agrees with these contentions.

becomes subject to the requirements of the federal Constitution. For example, there is no federal constitutional right to appeal from a criminal conviction. But once the states confer that right, it becomes subject to the requirements of the federal Constitution. (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 310; *Evitts v. Lucey* (1985) 469 U.S. 387, 393; *Teague v. Lane* (1988) 489 U.S. 288, 307 [referring to the "Sixth Amendment right to counsel on appeal"]; *People v. Barton* (1978) 21 Cal.3d 513, 517.) The same is true of plea bargaining: there is no federal constitutional right to a plea bargain, but once that right is conferred by state, a defendant has a Sixth Amendment right to effective assistance of counsel. (See *Lafler v. Cooper* (2012) 566 U.S. 156, 162; *Hill v. Lockhart* (1985) 474 U.S. 52, 56-57.) In *Missouri v. Frye* (2012) 566 U.S. 134, where the issue was whether the Sixth Amendment right to counsel extended to the negotiation and consideration of plea offers, the government asserted, as the majority in *Chadd* did regarding the right to plead guilty, that there was no federal constitutional right to plea bargain. (*Id.* at p. 142.) But the *Frye* court rejected that assertion and confirmed that the Sixth Amendment right to counsel applies to plea bargaining. (*Id.* at pp. 140-144.)

Since appellant's initial briefs were filed nearly a decade ago, this Court has relied on *Chadd* in upholding section 1018's application to capital cases. (See *People v. Mai* (2013) 57 Cal.4th 986, 1054-1056 [where counsel objects to a guilty plea, a defendant may not discharge counsel in order to plead guilty].) But as argued above, the majority's reasoning in *Chadd* is faulty and its persuasiveness has been diminished by subsequent developments in the law. Respondent, in its supplemental briefing in *Miracle*, agrees that this Court has not wavered in its commitment to a capital defendant's Sixth Amendment's rights to control his defense and to self representation. (MRSB 16-18; MRSRB 13-14.) Appellant agrees. Section 1018 violated appellant's Sixth Amendment right to control the objectives of his defense, and violated his

right to self-representation.

3. Under *McCoy*, the Constitutional Violation Here Was Complete when Appellant Was Not Allowed to Enter His Own Plea

Four months after his arrest and the appointment of counsel, appellant tried to plead guilty but was not allowed to do so because counsel refused to consent to the plea. One week later, appellant exercised his right to self-representation and advisory counsel was appointed. (AOB 63-65.) Three months later, appellant again tried to plead guilty. On that occasion, the prosecutor spoke to appellant off the record and then informed the court of what had transpired:

> I told [Mr. Frederickson] by law he cannot plead guilty to a special circumstances allegation case. He understands that, but I told him no judge can accept your plea.

The prosecutor did not stop there. He also advised appellant not to ask that counsel be re-appointed:

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

The court did not address appellant's request to withdraw the not guilty plea and enter a plea of guilty. The result was that appellant was not allowed to plead guilty. (AOB 77-79.)

These facts establish that appellant made multiple early and unsuccessful attempts to plead guilty. These were attempts to choose the objectives of his defense and they were rebuffed by his counsel, by the courts, and by the prosecutor.

Respondent concedes that appellant's attempted guilty pleas were timely, as they were made before the preliminary hearing. (Resp. Brief 30.) In fact, respondent either acknowledges or does not dispute most of the pertinent facts. Appellant immediately and repeatedly confessed to the crime.

He was represented by counsel for several months before the plea proceeding. He received counsel's advice regarding the plea, but decided to plead guilty unconditionally and proceed to the penalty phase. He was competent to make that decision. His decision to plead guilty was knowing, intelligent and voluntary. A factual basis existed for a guilty plea. He informed the lower court before the plea proceeding that he intended to plead guilty and proceed to the penalty phase. At the subsequent plea hearing, when the court asked about the plea, appellant's counsel entered a not guilty plea that was accepted by the court. And, after discharging counsel, appellant twice attempted to plead guilty: on January 23, 1997, and again on January 27, 1997. (Reply 3.)

But respondent focuses on actions and statements made by appellant *after* he was thrice denied the right to plead guilty. For instance, respondent asserts that:

> The record does not reflect that Frederickson attempted to plead guilty in Superior Court, or that he made any attempt to obtain the consent of counsel, either from his appointed counsel, or from his advisory counsel, to plead guilty.

(Resp. Brief 30.) [7] In other words, respondent asserts that events that occurred after appellant was denied the right to choose the objectives of his defense by pleading guilty are relevant to determining whether error occurred. The assertion is contrary to *McCoy* and should be rejected.

The determination of when a violation of an accused's constitutional

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7. On January 27, 1997, during a proceeding that is currently sealed, advisory counsel made a statement that bears on this contention. On September 28, 2018, after this Court sent a letter to the parties stating that it was considering unsealing that proceeding, neither party lodged an objection. However, until the Court rules on this matter, appellant cannot reveal the contents of that proceeding in this brief. (Calif. Rules of Court, rule 8.46(f)(1).)

rights occurs depends on the right in question. In *United States v. Gonzalez–Lopez* (2006) 548 U.S. 140, 150, the issue involved a defendant's Sixth Amendment right to counsel of choice. Having found error, the high court addressed whether proving the Sixth Amendment violation depended on a further showing that the error compromised the defendant's right to a fair trial. The government in *Gonzalez–Lopez* argued that the Sixth Amendment violation was not "'complete'" unless the defendant [could] show that substitute counsel was ineffective[.]" The Supreme Court squarely rejected that argument:

> Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

(*Id.* at p. 148.) In other words, the constitutional violation was complete at the time of its denial, and no additional showing was required to make the violation "complete." (*Id.* at p. 146.) As far as the high court was concerned, events that occurred after the constitutional violation were irrelevant.

In *McCoy*, the high court followed *Gonzalez–Lopez* and held that "the violation of McCoy's protected autonomy right was *complete* when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative." (*McCoy*, *supra*, 138 S.Ct. at p. 1511, emphasis added.)

The holdings in *McCoy* and *Gonzalez–Lopez* are based on the violation of protected autonomy rights under the Sixth Amendment. Here, appellant's protected autonomy right under the Sixth Amendment to choose the objectives of his defense by pleading guilty was violated. That right was violated when defense counsel refused to consent to appellant's guilty plea, and when the courts below refused to allow appellant to plead guilty. In other

words, when the courts allowed defense counsel to usurp control of an issue within appellant's sole prerogative—the right to control his defense and to choose the objectives of his defense by pleading guilty—the violation of appellant's protected autonomy rights under the Sixth Amendment was complete. When the courts refused to allow appellant to plead guilty after he exercised his right to self-representation, the violation of his protected autonomy rights under the Sixth Amendment was complete. Thus, contrary to respondent's assertions (Resp. Brief 23-25, 30-31, 36), events that occurred after the constitutional violations here were complete are irrelevant to an analysis of the errors. Those subsequent events are also irrelevant as to whether the errors are subject harmless-error review because, as shown in the next section, the errors here are structural.

4. *McCoy* Makes Clear that the Errors Here Are Structural and Require Reversal of the Judgment

In his opening brief, appellant argued that the errors here are structural and require reversal of the entire judgment. As such, this Court should return the proceedings to the point at which the municipal court first erred: the initial plea proceeding. (AOB 76-77.) [8] *McCoy* confirms that a violation of a defendant's Sixth Amendment right to control the objectives of his defense, including the choice of what plea to enter, is structural error. (*McCoy*, *supra*, 138 S.Ct. at pp. 1510-1511.) Once a structural error is complete, reversal is required without regard to other evidence in the record. (See *id.* at p. 1511.)

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8. Appellant also argued that if the errors here are not viewed as structural, then reversal of the entire judgment is required under principles that govern the analogous situation of relief from an invalid or infirm guilty plea. In such cases, the appellate court should "return the proceedings to the point at which the court erred and reroute them to the proper track." (AOB 77, citing cases.)

Recent cases decided by the United States Supreme Court and by this Court support the conclusion that the errors here are structural. In *Weaver v. Massachusetts* (2017) 582 U.S. __, 137 S.Ct. 1899, 1907 (*Weaver*), the high court identified three categories of structural error. The categories "are not rigid," and more than one may apply in a given case. (*Id.* at p. 1908.) In this case, at least two and possibly all three categories apply. Standing alone or taken together, they demonstrate that the failure to allow appellant to control the objectives of his defense by pleading guilty and the denial of his right to self-representation are structural errors.

Weaver's first category of structural errors includes cases where "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." (*Weaver*, *supra*, 137 S.Ct. at p. 1908.) This category includes errors affecting a defendant's autonomy, such as the right to self-representation and the right to choose the objectives of the defense. (*Ibid.*, citing *McKaskle*, *supra*, 465 U.S. at p. 177, fn. 8; see also *McCoy*, *supra*, 138 S.Ct. at p. 1511.) Harmless error review, which looks to the effect of an error on the outcome of a case, is inappropriate in such cases. Autonomy-based rights do not protect a defendant from an erroneous conviction; in fact, the exercise of these rights may increase the likelihood of an unfavorable outcome. (*Id.* at p. 1508; *Weaver*, *supra*, 137 S.Ct. at p. 1908.) A defendant's right to choose the objectives of his/her defense and the right to self-representation are not designed to ensure a fair trial or to protect against erroneous conviction. Instead, they protect "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*, 422 U.S. at p. 834.) The errors in this case clearly fall within *Weaver*'s first category of structural errors: appellant's core autonomy rights were violated: the right to choose the objectives of his defense, and the right to

self-representation.

Weaver's second category of structural errors includes cases where the effects of the error cannot be ascertained or are too hard to measure. (*Weaver*, *supra*, 137 S.Ct. at p. 1908.) For example, the denial of the right to counsel of choice results in "consequences that are necessarily unquantifiable and indeterminate[.]" (*Gonzalez–Lopez*, *supra*, 548 U.S. at p. 150.) Similarly, *McCoy* held that the violation of the defendant's Sixth Amendment right to control the objectives of his defense is structural error because the effects are immeasurable. (*McCoy*, *supra*, 138 S.Ct. at p. 1511.) Here, the effects resulting from the denial of appellant's right to control the objectives of his defense are unquantifiable and immeasurable. 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 discharged counsel and was forced to enter a not guilty plea. The errors then distorted significant mitigating factors at penalty phase. It is impossible to predict with any degree of certainty the effect that an unconditional guilty plea would have had on the jury. 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.)

Weaver's third category of structural errors includes errors that always result in fundamental unfairness, such as a failure to give a reasonable-doubt instruction. (*Weaver*, *supra*, 137 S.Ct. at p. 1908, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) The errors here, by disallowing the accused to choose his own objectives for the defense, particularly when his life is at stake, resulted in fundamental unfairness.

Since the initial briefing here, this Court has clarified the application of harmless error review to state law errors. In *People v. Lightsey* (2012) 54 Cal.4th 668, a failure to appoint counsel to represent the defendant during mental

competency proceedings violated state law and was found to be structural error. (*Id.* at pp. 699-702.) *Lightsey* explicated that some errors are not susceptible to the ordinary standard for state law errors: whether "it is reasonably probable that a result more favorable to [the defendant] would have been reached in the absence of the error." (*Id.* at p. 699, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) *Lightsey* was followed in *People v. Blackburn* (2015) 61 Cal.4th 1113, where this Court held that a state law error in failing to obtain a valid jury waiver defies ordinary harmless-error analysis because it would pose insurmountable difficulties in speculating about the effect of the errors on the outcome of the trial. (*Id.* at p. 1134; accord, *People v. Tran* (2015) 61 Cal.4th 1160, 1169.) These cases follow *Weaver*'s second category of structural errors: where the effects of the error cannot be ascertained or are too difficult to measure. In addition *Blackburn* explicated that errors which deny a defendant an "orderly legal procedure" can result in a "miscarriage of justice" under article VI, section 13 of the California Constitution, and therefore, require automatic reversal. (*Blackburn*, *supra*, at p. 1133.)

Here, to the extent that any of the errors arising from the plea proceedings are deemed to be violations of state law, appellant argues that the errors defy ordinary harmless-error review, denied him the "orderly legal procedure" to which he was due, and are, therefore, structural errors.

In its initial brief here, respondent for the most part simply denies that the errors occurred, and does not address whether they were structural. If respondent's supplemental briefing here aligns with its briefing in *Miracle*, then it may agree that appellant's Sixth Amendment right to control the objectives of his defense was denied, and that the errors requires automatic reversal. In the event that this change of position does not occur here, appellant addresses several contentions made by respondent in its initial brief.

First, respondent contends that the record is "devoid of facts" showing

that appellant attempted to plead guilty as part of a strategy to demonstrate responsibility and make a case for life at penalty. (Resp. Brief 37.) As appellant argued in his reply brief, that contention is contradicted by the record. Appellant stated:

> I'm pleading guilty, sir. I mean, the only thing is, we have to go for a penalty phase.

(Municipal Court RT 23; RB 19.) He then stated: "I'm afraid of losing all of my protections and rights by going pro per and allow[ing] the prosecutor, to just walk all over me, you know, that's tantamount to just executing me." Those statements show that appellant sought to plead guilty and make a case for life at penalty, not to give up and make no penalty defense. Other statements show that his reason for pleading guilty was out of a sense of remorse and a desire to accept responsibility:

> The 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 circumstance[s] and waive all appellate rights at this time.

(Municipal Court RT 159; RB 27.) This is confirmed by what he told the trial court immediately before trial began:

> [A] clear and distinct part of my testimony and evidence is the fact of my remorse and confession. It would appear to a trier of fact that I am playing a game by pleading not guilty yet introducing evidence of my confessions of guilt. Just because my attorneys have refused to join my plea pursuant to 1018 does not alter the truth. The truth is that I have attempted to plead guilty and accept responsibility for the 187.

(6 RT 909 see also 3 RT 406-407.)

Second, respondent contends that the consent-of-counsel requirement in section 1018 did not prejudice appellant because at his penalty-phase testimony, he 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.

(Resp. Brief 37.) The most telling rebuttal to this contention is as follows: appellant's brief statement that he tried to plead guilty and accept responsibility was *contradicted* by the trial judge's statement to the prospective jurors, and the statement in the juror questionnaire, that appellant had pleaded not guilty. In these circumstances, who was the jury most likely to believe? (AOB 94, fn. 32.)

In *Alfaro*, this Court concluded that any error was harmless because (1) the defendant's offer to plead guilty was *conditional*, and (2) "extensive evidence of defendant's remorse" that was presented to the capital sentencing jury. In appellant's case, however, his attempt to plead guilty was *unconditional*; he sought nothing in return for his willingness to plead guilty. And the evidence of appellant's remorse and acceptance of responsibility was limited to appellant's own brief statement, a statement that was contradicted by other statements to the jury. (AOB 94, fn. 32.)

Respondent here fails to appreciate that the qualitative difference between a defendant entering an unconditional guilty plea and proceeding directly to the penalty phase, versus taking the stand to confess guilt. But in *Miracle*, respondent understands this distinction quite well:

> Proceeding through a trial at which a defendant presents no defense or takes the stand to confess guilt simply does not have the same force and effect as pleading guilty in terms of accepting responsibility. (See 1 RT 243-244 [putting jury through the "charade" of a trial with no defense irritates them and works against the defendant at the penalty phase].)

(MRSRB 6.)

Respondent asks why appellant would put on a defense at the guilt

phase if he wanted to plead guilty. (Resp. Brief 31.) The record does not provide a definitive answer to that question. But it does show that appellant was told by his lawyer, the judge, and the prosecutor that he could not plead guilty. And he was presumably aware that the jurors were informed that he had pleaded not guilty. In addition, appellant was precluded by the trial court from mentioning at the guilt phase the fact that he had tried to plead guilty. Perhaps appellant believed that if was prohibited from pleading guilty, he was required or expected to defend at the guilt phase. Perhaps his actions were in response to advice from advisory counsel. One can only speculate, and speculation cannot form the basis of a harmless-error inquiry.

Respondent also points out that during the penalty phase, appellant asked the jury to recommend that he receive the death penalty, and views this statement as inconsistent with a desire to make a case for life at penalty. (Resp. Brief 31.) Here is the portion of the reporter's transcript to which respondent refers:

> Q. What's your recommendation to this jury regarding how -- what sort of a -- what sort of a sentence they should impose upon you? Should they impose the death penalty or should they impose a life sentence without parole?
>
> A. I would -- I would -- I would recommend death.
>
> Q. All right. That's your personal wish?
>
> A. At this time.

(16 RT 3065.) First, a defendant's statement that he would recommend that the jury impose death is consistent with a sense of remorse and acceptance of responsibility. Second, appellant stated that this was his recommendation "at this time." That time was December 2, 1997, fully 11 months after his initial attempt to plead guilty on October 30, 1996. Even if respondent were correct that this testimony is inconsistent with a desire to plead guilty in order to save his life, all that is shown is that appellant may have changed his mind after 11

months in jail, frustrated plea attempts, and a trial for his life that he was forced to conduct without counsel, and that violated his fundamental right to control the objectives of his defense. Again, any attempt to discern appellant's motives or state of mind at this point in the proceedings is pure speculation.

Appellant was uneducated in the law, confined in the Orange County Jail, and appearing in propria persona in a case where his life was at stake. He was denied his fundamental right to control the objectives of his defense by his own attorney and by the courts below. His autonomy over the objectives of his case were undermined and disregarded. He was subject to the intense stress and pressures that are part of a capital case. Under these conditions, appellant's state of mind may have changed over the course of the trial. But the record contains multiple indications of the facts that truly matter, the facts that are constitutionally significant: his desire to plead guilty out of an acceptance of responsibility and remorse, and to proceed to make a case for life at penalty.

In any event, respondent's attempts to apply a harmless-error analysis are simply in vain. *McCoy* held that the denial of a defendant's right to set the objectives of his trial is *complete* when it is overridden by counsel. Accordingly, the violation of appellant's Sixth Amendment rights were complete when he was not allowed to plead guilty. Events that occurred after the violation are not only irrelevant to the determination of whether error occurred, they are irrelevant to a harmless-error inquiry because they are structural.

Section 1018 distorted this case, from pillar to post. The Legislature anticipated that section 1018 would be "liberally construed" to effect its "objects and to promote justice." (§ 1018.) Where, as here, the blind application of the statute's requirements results in the very mischief against which it was designed to protect, its purposes are not served, its objects are not effected, and justice is denied.

CONCLUSION

If relief is not granted, appellant will be facing execution "in service of a conviction that is constitutionally flawed." (*Wearry v. Cain* (2016) 577 U.S. __,136 S.Ct. 1002, 1008.) Respondent offers no lawful justification for such a result, and there is none. For the reasons stated in appellant's briefing, and in respondent's *Miracle* briefing, this Court should reverse the judgment in this case.

Dated: November 16, 2018.

Respectfully submitted,

/s/ Douglas G. Ward
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Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Initial Supplemental Brief in Response to this Court's Order uses a 13 point Garamond font and contains 11,200 words, including footnotes.

Dated: November 16, 2018

DOUGLAS G. WARD

/s/ Douglas G. Ward
DOUGLAS G. WARD

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Re: *People v. Frederickson*, No. S067392

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause. I am employed in the county where the mailing took place. My business address is 363 DiMaggio Ave, Pittsburg, California, 94565. I served a true copy of the following document(s):

APPELLANT'S INITIAL SUPPLEMENTAL BRIEF IN RESPONSE TO THIS COURT'S ORDER

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. 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 November 16, 2018, as follows:

Daniel Frederickson
K81800 CSP-SQ, 2-EB-3
San Quentin, California 94974

Hon. William R. Froeberg
Department C40
Orange County Superior Court
700 Civic Center Dr W
Santa Ana, California 92701

The following were served the aforementioned document(s) electronically via TrueFiling on November 16, 2018:

Ms. Tami Falkenstein Hennick
Deputy Attorney General
110 W. "A" Street, Suite 1100
San Diego, California 92101
Tami.Hennick@doj.ca.gov

California Appellate Project
101 2nd Street, Suite 600
San Francisco, California 94105
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Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland California 94607
Peter.Silten@ospd.ca.gov

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 16, 2018, at Oakland, California.

/s/ Neva Wandersee

Neva Wandersee

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: **wardhere@icloud.com**

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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.

11/16/2018
Date

/s/Douglas Ward
Signature

Ward, Douglas (133360)
Last Name, First Name (PNum)

Douglas Ward, Attorney at Law
Law Firm