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.

CAPITAL CASE

Case No. S051968

Santa Clara County Superior Court Case No. 169362
The Honorable Daniel Creed, Judge

RESPONDENT'S SECOND SUPPLEMENTAL BRIEF

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I. APPELLANT TURNS *MCCOY V. LOUISIANA* ON ITS HEAD

In *McCoy v. Louisiana* (2018) 584 U.S. ___, 138 S.Ct. 1500, 1505, the Supreme Court held that a defendant who has entered a plea of not guilty has the right under the Sixth Amendment to insist that his or her trial counsel refrain from admitting that he or she committed murder at the guilt phase, even if counsel reasonably believed that the honest and early admission afforded defendant the best, perhaps the only, chance to avoid the death penalty. Despite a not guilty plea and an assertion of alibi, and against the express wishes of his client, McCoy's counsel conceded his client committed the murders of his estranged wife's mother, stepfather, and son, in order to retain credibility for an argument that McCoy's mental state precluded him from forming the specific intent necessary for first-degree murder. (*Id*. at p. 1503.)

Appellant turns this crystal clear holding about when counsel must respect the wishes of a client who has entered a plea of not guilty and expressed displeasure with a plan to admit guilt, into a more general proposition that a defendant has the right to insist that his trial counsel not go against his wishes whether his preferred plea is guilty or not guilty. (ASAOB 21-24.) California's statute on this point, precluding entry of a guilty plea to capital murder without the assent of counsel, has been repeatedly upheld against constitutional challenge. *McCoy* and its imagined obverse are subject to different Sixth Amendment analyses and *McCoy* does not govern the facts of appellant's case.

A. The Claim Was Not Presented in Superior Court and Is Not Preserved

In *People v. Frederickson* (2020) 8 Cal.5th 693, this Court declined to decide a very similar issue because the claim had not been preserved by

presentation and ruling in the superior court. "If defendant wanted to challenge the constitutionality of section 1018, whether on the ground that it precluded him from using a guilty plea to lay the foundation for a penalty phase remorse argument or on some other ground, he needed to request to plead guilty in the superior court and ask that court to make a ruling based on section 1018, thus preserving the issue on appeal. He never did so. The claim is therefore forfeited." (*Id*. at p. 994.) The present issue was raised in municipal court, but not in superior court, as counsel for appellant concedes. (ASSOB 17-18.) As in *Frederickson*, the issue of the constitutionality of section 1018 has not been preserved.

B. *McCoy* Neither Invalidates Section 1018 Nor Applies to the Facts of this Case

Should this Court reach the merits, this Court's precedent establishes the constitutionality of section 1018 and the analysis is not altered by the addition of *McCoy*. The analysis in *McCoy* begins with the observation from *Florida v. Nixon* (2004) 543 U.S. 175, that "when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy," *id*. at p. 181, "[no] blanket rule demand[s] the defendant's explicit consent" to implementation of that strategy, *id*., at 192. *McCoy*, similarly, creates no blanket rule exalting the right to personally enter a guilty plea above the need for reliable outcomes and full understanding of the nature and consequences of pleas of guilty in high stakes capital trials. It "does not upend" this Court's longstanding precedent. (See *People v. Frederickson*, *supra,* 8 Cal.5th at p. 1053, conc. opn. of Liu, J.) Indeed the United States Supreme Court has long held "that a criminal defendant has (no) absolute right to have his guilty plea accepted by the court." (*Lynch v. Overholser* (1962) 369 U.S. 705, 719.)

The California Court of Appeal adopted the holding of *McCoy* in *People v. Eddy* (2019) 33 Cal.App.5th 472, 477, 479, explaining that "the right to defend is personal," and a defendant has an "absolute right to maintain innocence as the objective of his defense." Under California law, however, there is no absolute right to plead guilty in a capital case, and a capital defendant is subject to the representation and consent provisions of section 1018. (*People v. Mai* (2013) 57 Cal.4th 986, 1055 [California has recognized limited circumstances in which, as a matter of fundamental public policy, rights and decisions that are normally personal to a criminal defendant may be limited or overruled in the service of death penalty reliability]; see *People v. Daniels* (2017) 3 Cal.5th 961, 983 fn. 1 [quoting *Mai*: "Even if otherwise competent to exercise the constitutional right to self-representation [citation], a defendant may not discharge his lawyer in order to enter such a plea [of guilty to a capital felony] over counsel's objection."].)

C. This Court Has Repeatedly Upheld the Constitutionality of the Rule of Section 1018

Section 1018 provides, as relevant: "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel." In *People v. Chadd* (1981) 28 Cal.3d 739, this Court observed, "it is difficult to conceive of a plainer statement of law than the rule of section 1018 that no guilty plea to a capital offense shall be received 'without the consent of the defendant's counsel.' It is settled that 'when statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it.' (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198.)" (*Id.* at p. 746.) In *Chadd*, this Court concluded it was error to accept a guilty plea over the objection of counsel,

supporting respondent's position here, that when counsel withheld consent to entry of a guilty plea, section 1018 precluded acceptance of the proffered guilty plea.

In *Chadd*, this Court indicated that a State could completely bar guilty pleas in capital cases, then explained why conditioning such pleas on the assent of counsel was a minor infringement that did not violate the Sixth Amendment right to self-representation. (*Chadd*, *supra*, 28 Cal.3d at p. 747.) This Court recognized the "larger public interest at stake in guilty pleas in capital offenses, as well as the Legislature's 'increasing concern to insure that no defendant enter a guilty plea in our courts without fully understanding the nature and consequences of his act.' (*Chadd, supra*, 28 Cal.3d at pp. 748-749.)" (*People v. Frederickson, supra*, 8 Cal.5th at p. 991.) Since both the defendant and the state have "an indisputable interest in correct judgments in capital cases," this Court concluded, nothing in *Faretta v. California* (1975) 422 U.S. 806, "either expressly or impliedly, deprives the state of the right to conclude that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right to self-representation resulting when defendant's right to plead guilty in capital cases is subjected to the requirement of his counsel's consent." (*Chadd, supra*, 28 Cal.3d at p. 751.) The Court cautioned against standing *Faretta v. California* (1975) 422 U.S. 806 on its head. "[I]n capital cases . . . the state has a strong interest in reducing the risk of mistaken judgments. Nothing in *Faretta*, either expressly or impliedly, deprives the state of the right to conclude that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plead guilty in capital cases is subjected to the requirement of his counsel's consent." (*Chadd, supra*, 28 Cal.3d at pp. 750–751.)

This Court affirmed the holding and reasoning of *Chadd*, in *People v. Alfaro* (2007) 41 Cal.4th 1277, quoting *Chadd* at some length. *Alfaro* reaffirmed that "[t]he consent requirement of section 1018 has its roots in the state's strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings." (*Alfaro*, *supra*, 41 Cal.4th at p. 1300, citing *Chadd*, *supra*, 28 Cal.3d at pp. 750, 753.) This Court acknowledged Alfaro's argument that as a general rule, "a defendant has the ultimate, fundamental right to control his or her own defense," but concluded that section 1018 was "one of several exceptions to the general rule." (*Alfaro*, *supra*, 41 Cal.4th at p. 1298.)

Appellant relies on *McCoy* to establish that the decision whether to plead guilty is personal. However, standing *McCoy* on its head is no more advisable than standing *Faretta* on its head. The right of a defendant to make a desired defense does not equate to a right not to make a defense at all or indeed to preclude the need for a defense. As noted above, "Nothing in *Faretta*, either expressly or impliedly, deprives the state of the right to conclude that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plead guilty in capital cases is subjected to the requirement of his counsel's consent." (*Chadd*, *supra*, 28 Cal.3d at pp. 750–751.) *McCoy*'s holding is that "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." (*McCoy*, at p. —— [138 S.Ct. at p. 1505].) Nothing in that holding precludes the right of a state, which can eliminate the plea of guilty to capital crimes entirely (see, *Chadd*, *supra*, 28 Cal.3d at p. 747; see also *North Carolina v. Alford* (1970) 400 U.S. 25, 27 fn. 1 [law amended to

provide a defendant cannot plead guilty to capital murder in North Carolina]), to condition such a plea on counsel's consent in order to support the reliability of death judgments. One can support the conclusion that defense counsel cannot concede a capital defendant's guilt over the defendant's objection and plea of not guilty without rejecting the premise that safeguards like the consent requirement of section 1018 reduce the danger of erroneously imposing death judgments without unnecessarily infringing on rights of self-representation. Whether viewed as an exception to the general rule that the defendant has some control over the defense, as in *Alfaro, supra*, 41 Cal.4th at p. 1298, or as a recognition that there is no defense to control once an ill-advised guilty plea is accepted, as in *Chadd, supra*, 28 Cal.3d at pp. 748–751, this Court has long recognized that the general rule of defendant's degree of control over the defense may be harmonized with the rule that guilty pleas in capital cases are subject to counsel's consent.

Recently in *People v. Frederickson, supra*, 8 Cal.5th 963, this Court reviewed the history of the consent of counsel issue, but concluded it had been forfeited in that case for failure to seek to plead guilty in superior court. (*Id*. at pp. 994-1000.) This Court noted the "no plea of guilty" portion of section 1018 was added in 1973 as part of an extensive revision to the death penalty laws. (Stats.1973, ch. 719, § 11, p. 1301.) " 'The fact that the requirement of counsel's consent to guilty pleas in capital cases was enacted as part of [an extensive revision of the state's death penalty laws in response to *Furman v. Georgia* (1972) 408 U.S. 238] demonstrates that the Legislature intended it to serve as a further independent safeguard against erroneous imposition of a death sentence.' (*People v. Chadd* (1981) 28 Cal.3d 739, 750.)" (*People v. Frederickson, supra*, 8 Cal.5th at p. 990.) This Court presented *Chadd* and *Alfaro*, and their harmonization of *Faretta*, then presented the *McCoy* holding as follows: "a defendant who 'insist[s]

on maintaining her innocence at the guilt phase of a capital trial' cannot be forced by counsel to concede guilt. Defense counsel can make strategic choices regarding how best to achieve a defendant's objectives, but the defendant chooses those objectives." (*Id*. at pp. 990-993.) Having found the issue forfeited, no further harmonization was attempted. Concurring, Justice Liu explained he would have reached the merits. (*Id*. at p. 1028, conc. opn. of Liu, J.) Justice Liu reviewed in detail the history from the 1973 Briggs Initiative through the *Chadd* and *Alfaro* holdings that section 1018 is constitutional and protects the interests of the public and the parties in reliable capital judgments. He concluded that even if broad dicta in *McCoy* appears to recognize a defendant's right to make the decision what plea to enter, McCoy did not consider the question at hand and does not justify rejection of the reasoning in *Chadd*. (*Id.* at pp. 1028-1037, conc. opn. of Liu, J.)

We note finally that two years ago, Justice Liu made a similar analysis of *Chadd* and *Alfaro* in dissent from a majority decision not to reach this issue, concluding *McCoy* no more invalidated section 1018 than had *Faretta*. He distinguished *McCoy*, noting it had a broader statement of its holding than necessary to resolve its issue: "But *McCoy* did not weigh a defendant's autonomy interests against countervailing reliability interests; it did not address whether a capital defendant may enter a guilty plea against the advice of counsel in the face of a state statute requiring counsel's consent as a measure to lessen the risk of a mistaken judgment. (See *People v. Ghobrial* (2018) 5 Cal.5th 250, 285 ['"a decision is not authority for propositions not considered"'].)" (*People v. Miracle* (2018) 6 Cal.5th 318, 365, dis. opn. of Liu, J., see also, *People v. Frederickson, supra*, 8 Cal.5th at p. 1036, conc. opn. of Liu, J.)

This Court has rejected appellant's Sixth Amendment claim in *Chadd*, and *Alfaro*. Quite recently in *Frederickson*, this Court laid the analytical

framework for distinguishing the new Sixth Amendment case, *McCoy*. If not forfeited, the issue is squarely presented in the present case. We urge the Court to again reject the claim that section 1018 is unconstitutional.

D. There Is No Logical Remedy Superior to the Status Quo

Given that, as noted above, the United States Supreme Court does not recognize an absolute right to plead guilty, and that the option of entering a guilty plea need not even be offered in capital cases, the error, if it exists, is not structural. The error in McCoy was structural because it infringed upon the defendant's right to maintain innocence at trial after a plea of not guilty, not a right to admit guilt and preclude trial. Harmless error analysis applies.

Even assuming it was error to reject appellant's offer to plead guilty, there is no obvious remedy in the present situation any better than the status quo. Appellant sought to plead guilty, admit the special circumstances, and seek the death penalty. He has been found guilty, the special circumstances have been found true, and he has been sentenced to death. The congruence of aim and result is complete. A limited remand to accept the guilty plea, despite section 1018, would not affect the validity of the penalty phase, where the result is also as appellant wished. Appellant made it quite clear to the jury that he was not seeking their sympathy. His aim, clearly stated, was to admit his guilt to the charge of first degree special circumstance murder and be sentenced to death. He has achieved that end.

Since refusal to accept a guilty plea has long been accepted as valid under California law, there are few clues on what the remedy would be if section 1018 were not applicable under the present circumstances. The federal courts, subject to Federal Rules of Civil Procedure, rule 11, which requires acceptance of a guilty plea so long as compliance with the rule is shown, have more precedent, but guidance is limited in this situation. This

is not a complicated plea situation, where a bargain has fallen apart or an opportunity to seek the benefit of an early admission factor in sentencing has been foregone. (See *United States v. Hector* (9th Cir. 2009) 577 F.3d 1099, 1103 [since plea was statutorily valid, should have been accepted, and would have rendered defendant eligible for an early admission consideration at sentencing, remand to a different judge of the district court to accept plea and resentence]; see also *In re Vasquez-Ramirez* (2006) 443 F.3d 692, 700-701 [mandamus lies to require trial court to accept guilty plea to lesser charge, not require trial on greater charge, followed by appeal].) Where the desire in pleading guilty was reduced exposure or penalty mitigation, there is the prospect of harm in rejecting the plea of guilty and a remand is required. In the present case, however, standing on a principle that appellant should have been allowed to plead guilty, rather than be found guilty, establishes no remediable harm. The guilt phase trial, even if found to be unnecessary, reached the desired determination.

That there is no superior remedy in this situation provides further argument that there is no prejudicial error.

CONCLUSION

For the foregoing reasons, and those stated in Respondent's Brief, the People request that the judgment be affirmed.

Dated: April 1, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SECOND SUPPLEMENTAL BRIEF** uses a 13 point Times New Roman font and contains 2,849 words.

Dated: April 1, 2020

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No.: **S051968**

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 1, 2020, at San Francisco, California.

A. Bermudez	*/s/ A. Bermudez*
Declarant	Signature

STATE OF CALIFORNIA
Supreme Court of California

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