**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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

# APPELLANT'S SUPPLEMENTAL REPLY BRIEF

**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

Appellant tried to plead guilty in this capital case out of a sense of remorse and a desire to accept responsibility. He wanted to "put my life in front of a jury and let the jury decide whether or not I should get this death penalty or whether I should get life imprisonment."

Penal Code section 1018 requires that before a court can receive a guilty plea in a capital case, the defendant must appear with and have the consent of counsel, and defense counsel would not consent to appellant's plea. [1] That statute is the only one of its sort in this country, and interferes with both the traditional and current understanding that the plea decision is reserved exclusively to the defendant.

In this case, there was a conflict between appellant and his counsel over appellant's decision to plead guilty. Section 1018 permitted counsel to usurp that decision, and ultimately resulted in appellant discharging counsel. While self-represented, appellant again tried to plead guilty, but the lower courts would not allow him to do so. The failure to allow appellant to plead guilty affected the framework of the trial. Moreover, despite appellant's multiple attempts to plead guilty, the jury was told that he had pleaded not guilty. This incongruity unfairly distorted the number and weight of the mitigating factors at the penalty phase.

Recently, the high court in *McCoy v. Louisiana* (2018) 584 U.S. __,138 S.Ct. 1500 (*McCoy*), held that a defendant has a right to set the objectives of his defense through the entry of his plea. In light of *McCoy*, this Court

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1. All statutory references made herein are to the Penal Code.

For simplicity's sake, appellant's initial supplemental brief is referred to herein as "FASB"; and, respondent's initial supplemental brief is referred to as "FRSB."

requested supplemental briefing on the effect of *McCoy* from the parties here and in another capital case, *People v. Miracle*, S140894. On December 3, 2018, this Court issued its opinion in *Miracle* and rejected the Attorney General's arguments in that case that section 1018 was unconstitutional. (*People v. Miracle* (Cal., Dec. 3, 2018, No. S140894) 2018 WL 6273464.)

Appellant argues here that his case must be reversed under three separate legal theories. First, this Court should conclude that his desire to enter a guilty plea as part of a strategy to obtain a life sentence at the penalty phase implicated his fundamental rights such that section 1018 would not apply. Second, this Court should conclude that by compromising his right to present his own case in his own way -- to plead guilty and proceed to make a case for life at the penalty phase -- section 1018 violated his right to self-representation. Third, the Court should conclude that section 1018 also violated his Sixth Amendment right to set the objectives of his defense by pleading guilty and proceeding to the penalty phase.

Each of these errors was structural and each requires reversal of the judgment.

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## ARGUMENTS

### 1. THE BACKGROUND

#### A. The Constitutionally Significant Facts

In its initial supplemental brief, respondent omits several important facts that occurred before appellant first tried to plead guilty: the night of his arrest, appellant confessed to the crime; the following day, he admitted his guilt to a reporter; and a short time later, he again confessed to the crime. He was accepting responsibility. By the time of the *Marsden* hearing, appellant had been represented by counsel for four months, and had received counsel's advice concerning his decision to plead guilty. The fact that he received counsel's advice is evidenced by what occurred at the *Marsden* hearing.

At that hearing, on October 30, 1996, appellant *stated* that he had *decided* to plead guilty: "I'm pleading guilty, Sir. I mean, the only thing is, we have to go for a penalty phase." (Municipal Court RT 23-24.)

Respondent points to portions of the *Marsden* hearing showing that appellant was unhappy with counsel about several other subjects. But it points to nothing that shows that appellant's decision to plead guilty was made out of anything but a desire to accept responsibility.

The court denied the *Marsden* motion because it believed that appellant and counsel had a "personality conflict." (Municipal Court RT 25-26.) But a conflict over whether to plead guilty is no personality conflict. It is a conflict over the objectives and direction of the defense. Moreover, the court did not question defense counsel before denying the motion. (Municipal Court RT 26.) And although defense counsel heard appellant say that he was pleading guilty, counsel proceeded to enter a not guilty plea in the face of his client's contrary decision.

Though section 1018 was not mentioned during this hearing, subsequent hearings make clear that appellant had decided to plead guilty and

his attorneys would not give their consent. When arguing prior to the start of the guilt phase over the admission of his various attempts to plead guilty, appellant stated:

> How about the times that the defendant made -- entered the plea of guilty before the court and on public record? . . . ¶ . . . *Counsel at that time refused to join, and the court refused to accept that or acknowledge my plea of guilty*, but it was placed on record.

(RT 406-407, emphasis added.) He also stated:

> 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.

(RT 909.) The prosecutor did not disagree with either of these statements. Thus, the record plainly shows that at the *Marsden* hearing, appellant had decided to plead guilty and defense counsel would not give his consent.

One week later, at the hearing pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), the same judge stated:

> You differ with your approach toward the case from your attorney's from what little I heard from you folks last time. [¶] I didn't get into that but other than to detect that you folks had a difference of opinion as to where the case was going, how to get there.

(Municipal Court RT 34.) The statement, "What little I heard," shows that the conflict over the guilty plea, i.e., the objectives of the defense, remained unexplored. And, the judge did not ask whether appellant was discharging counsel because of the conflict over the guilty plea. Defense counsel declined the court's invitation for "input," and refused to accept appointment as advisory counsel. The record strongly suggests that appellant discharged counsel because of their disagreement over the objectives of the defense.

Six weeks after the *Faretta* hearing, on January 23, 1997, appellant asked to plead guilty and have counsel re-appointed:

> I would like to ask the Court to go public and allow me to enter a change of plea. After I enter a change of plea and

> make my plea, I would like to request a waiver of -- well, by pleading guilty, I will be waiving my preliminary examination. I'd like the Court to take my waiver of rights and schedule me on calendar for Department 5 Superior Court arraignment for schedule for trial for the penalty phase for February 5th and appoint the Public Defender's Office. I've already talked to [Deputy Public Defender] Bob Goss . . . . [Deputy Public Defender] Debra [*sic*] Barnum is willing to take the case on as soon as I plead guilty to the criminal aspect and set for Superior Court arraignment to set for trial for the penalty phase.

(Jan. 23, 1997 RT 21-22; see also Jan. 23, 1997 RT 35-36.) He continued:

> I would like to enter a plea. [¶. . .¶] I do not care -- I do not care to allow the State of California, the government, to run over me. I want to just go ahead, plead guilty, go and put my life in front of a jury and let the jury decide whether or not I should get this death penalty or whether I should get life imprisonment. But as to the matter of death, I don't even want to play these games anymore. I want to just go ahead, I want to enter a plea of guilty. I have a right to do so, and I wish to do so at this time.
>
> I've spoken with counsel. And like I said, I would drop my pro per status and accept the Public Defender's Office to represent me as far as the penalty phase is concerned. And if the Court would take my waiver, I'm making a knowing and knowledgement [*sic*] -- intelligent waiver.

(Jan. 23, 1997 RT 23-24.) When appellant stated, "I'm pleading guilty and that's that," the court replied that "you haven't done that yet." Appellant responded, "Well, I'm attempting to very, very, very hard." (Jan. 23, 1997 RT 34.)

Respondent suggests that appellant's desire to plead guilty was motivated by frustrations over resources he was not receiving as "pro per." (FRSB 9, citing Jan. 23, 1997 RT 22-23.) But appellant tried to plead guilty on October 30, 1996, nearly three months *before* the January 23 1997, proceeding. And at the earlier proceeding, there were no "pro per" issues as appellant was

represented by counsel. Moreover, on January 23, 1997, the preliminary hearing had not yet occurred. Thus, appellant's requests to plead guilty and to have counsel reappointed were timely.

It is unclear why the court would not accept appellant's attempted guilty plea and ensure that counsel was appointed. Respondent does not argue that the court lacked jurisdiction to do so. Appellant tried "very, very, very hard," but the court simply stated that these requests would be placed on another court's calendar and addressed by another judge.

On January 27, 1997, appellant appeared before that other judge. He informed the court:

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

(Municipal Court RT 159.) "With a remorseful heart" means that appellant's decision to plead guilty was made, at least in part, in order to accept responsibility. But before appellant could say anything further, the prosecutor intervened and spoke to appellant off the record. Respondent's version of what occurred is truncated, so appellant repeats it in full. The prosecutor stated:

> What I did, your Honor, for the record I had a brief conversation with Mr. Frederickson in the presence of Mr. Freeman and I had suggested to Mr. Frederickson that he seriously reconsider his thoughts about what he was planning on doing.
>
> *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.
>
> Furthermore, I told him that it was my opinion Mr. Freeman would offer him the best possible representation and suggested that he follow Mr. Freeman's advice on the matter.

> It's my understanding Mr. Frederickson despite Mr. Freeman's conversations with him and my own conversations with him in Mr. Freeman's presence *Mr. Frederickson still wants to plead guilty*, although I think he realizes that he cannot.
>
> I think it's his desire to actually waive the preliminary hearing which is still scheduled for February 5th. My last suggestion to him was not to do anything today. That we just come on February 5th and have more of a chance to think about it, to talk to Mr. Freeman, or talk to his investigator and then he can decide what he wants to do on the 5th.

(Municipal Court RT 160-161, emphasis added.)

The prosecutor's categorical statement that appellant could not plead guilty by law in a capital case, that no judge could accept his plea, was not entirely correct: if counsel had been reappointed, as appellant requested, s/he might have consented to a guilty plea. The prosecutor's advice to appellant that advisory counsel "would offer him the best possible representation" was directed at appellant's attempt to have counsel reappointed. The prosecutor essentially advised appellant that he should not seek to have counsel reappointed in this capital case. That statement speaks for itself. The court said nothing to contradict the prosecutor's statements, and ignored appellant's requests to have counsel reappointed and to plead guilty.

Respondent contends that "[t]his appears to be the last time Frederickson mentioned a desire to plead guilty until the penalty phase[.]" (FRSB 11.) If this contention is meant to suggest that appellant had changed his mind, it is errant: the prosecutor stated that "Mr. Frederickson still wants to plead guilty." (Municipal Court RT 160-161.) Appellant's entry of a not guilty plea in superior court was nothing more than an involuntary assent to the inevitable. He tried to plead guilty on October 30, but was rebuffed by defense counsel and the court. After discharging counsel, he tried "very, very, very hard" to plead guilty several times on January 23, but was rebuffed yet again by the court. On January 27, he tried to plead guilty but was rebuffed by

the prosecutor and the court. When a defendant's own attorney, three judges, and the prosecutor refuse to allow him to plead guilty, the absolute futility of saying anything further on the matter is blindingly apparent.

Moreover, appellant mentioned his desire to plead guilty twice before the guilt phase began. The prosecutor ensured that no mention would be made at the guilt-phase of appellant's attempts to plead guilty. (3 RT 406-408; 6 RT 909-911.) The issue also came up 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.)

In sum, there are three uncontroverted, constitutionally significant facts here: (1) appellant attempted on multiple occasions to plead guilty; (2) he was rebuffed by defense counsel, by the lower courts, and by the prosecutor; and (3) at trial, the jurors were told that appellant pleaded not guilty.

### B. Section 1018's Consent-of-Counsel Requirement Is a Holdover from an Unconstitutional, Mandatory Death Penalty Scheme

In 1973, the Legislature added the phrase "consent-of-counsel" to that part of section 1018 that deals with guilty pleas in capital cases. In *People v. Chadd* (1981) 28 Cal.3d 739 (*Chadd*), this Court described the Legislature's addition of the phrase as:

> an integral part of the Legislature's extensive revision of the death penalty laws in response to . . . *Furman v. Georgia* (1972) 408 U.S. 238, (Stats. 1973, ch. 719, §§ 2–6, pp. 1297–1300.)

(*Chadd*, *supra*, at p. 750.) Purposes ascribed to the phrase include: "an effort to eliminate the arbitrariness that *Furman* found inherent in the operation of prior death penalty legislation" (*id.* at p. 750); an "independent safeguard

against erroneous imposition of a death sentence" (*ibid.*); to reduce "the risk of mistaken judgments" (*id.* at p. 751); and to "protect[] the state's interest in the accuracy and fairness of its proceedings (*id.* at p. 753).

Appellant does not dispute the importance of the purposes ascribed to the consent-of-counsel requirement adopted by the Legislature in 1973. However, the requirement should be placed in its proper historical context. It was an integral part of California's mandatory death penalty scheme that was enacted that year and found unconstitutional three years later by this Court in *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 445.

In 1972, the high court, in *Furman v. Georgia* (1972) 408 U.S. 238, held that the nation's existing death penalty schemes were unconstitutional. Three of the justices found that the existing death penalty schemes were arbitrary because they provided unclear or insufficient guidance to those who must decide whether to impose a sentence of death. (Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes* (1983) 74 J. Crim. L. & Crim. 1067, 1068.) In 1973, in response to *Furman*, California (and several other states) enacted a *mandatory* death penalty scheme. (Stats.1973, ch. 719, p. 1297; *Rockwell v. Superior Court*, *supra*, 18 Cal.3d 420.) This was an extensive legislative enactment, and included changes to a number of provisions in the Penal Code. Under this scheme, the guilt determination was made first, followed by the special circumstance determination. Death was mandatory for any person found guilty of first degree murder and a special circumstance.

The 1973 adoption of a mandatory death penalty scheme contained several provisions mandating that the accused be represented by counsel. Section 190.1 provided that at the guilt determination, "the person charged shall be represented by counsel." It also provided that at the special circumstance determination, "the person shall be represented by counsel."

And the consent-of-counsel requirement was added to section 1018. In fact, *Rockwell* notes that the 1973 legislation included "specific rules regarding representation by counsel[.]" The *Rockwell* court stated: "We express no opinion on the validity of this requirement which was enacted prior to *Faretta v. California* (1975) 422 U.S. 806." (*Rockwell*, *supra*, 18 Cal.3d at p. 442, fn. 14.)

Other mandatory-counsel statutes were passed the year before. In 1972, this Court unanimously found no state or federal constitutional right to self-representation. (*People v. Sharp* (1972) 7 Cal.3d 448, 453, disapproved of by *Faretta*, *supra*, 422 U.S. 806.) In that year, the California Constitution was amended to permit the Legislature to require that felony defendants be represented by counsel. (*People v. Sharp*, *supra*, at p. 463.) Accordingly, the Legislature modified sections 686, 859 and 987 and added section 686.1. (*Ibid*; see generally Note, *People v. Sharp: Death Knell for Pro Se Representation in Criminal Trials in California?* (1973) 24 Hast. L.J. 431.) The right to proceed without counsel would not be decided until 1976, in *Faretta*. "These statutes still exist, although obviously *Faretta* rendered them invalid. The courts of this state properly ignore them today." (*People v. Dent* (2003) 30 Cal.4th 213, 224 (conc. opn. of Chin, J.).)

Three years later, in *Woodson v. North Carolina* (1976) 428 U.S. 280, the high court struck down mandatory death penalty schemes. That same year, this Court struck down California's 1973 mandatory scheme. (*Rockwell v. Superior* Court, *supra*, 18 Cal.3d at p. 445.) But the amendment to section 1018 requiring the consent of counsel before a defendant could plead guilty persisted.

The current death penalty scheme in California is vastly different from the 1973 mandatory scheme that was abolished. For one thing, a guilty plea to first degree murder and a special circumstance does not automatically result in death. Instead, a penalty phase follows at which a guilty plea can save the

defendant's life by establishing important mitigating factors. And the purposes purportedly served by the consent-of-counsel requirement are served by other aspects of the current scheme. A mandatory death penalty scheme poses reliability problems, which is one reason why they were stricken. (See *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305 [striking a mandatory death penalty scheme in part because of the "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"].)

**C. "Reliability" and Sixth Amendment Autonomy Rights**

Respondent contends that certain of a defendant's rights "may be limited or overruled in the service of death penalty reliability." (FRSB 12.) In support of this proposition, it cites to the fact that a capital defendant is not permitted to waive his/her automatic appeal of a death judgment, and that under section 1018, a plea of guilty to a capital charge may not be taken except with counsel's consent. (FRSB 12.) With respect to the unwaivable automatic appeal, the Sixth Amendment autonomy rights at issue here cast no doubt on that rule: the high court has concluded that a defendant's Sixth Amendment right to self-representation does not extend to appeals. (*Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152, 154, 161.) Nor does *Martinez* mention the concept of reliability.

Which means that the "limited circumstances" under which a defendant's fundamental rights may be overruled in the service of death penalty reliability is really just one circumstance: section 1018's consent-of-counsel requirement. And appellant has made clear that the application of that statute here reduced the reliability of the death verdict by upsetting the framework of the trial and distorting the mitigating factors at the penalty phase.

Sixth Amendment reliability is not the same as Eighth Amendment

reliability. In *McCoy*, the high court did not weigh a defendant's Sixth Amendment right to set the objectives of his/her defense against the reliability of the procedure. In fact, it acknowledged that Sixth Amendment autonomy rights may result in an adverse consequence for the accused. And although it was a capital case, *McCoy* said not one word about Eighth Amendment reliability.

Under the Sixth Amendment, if a guilty plea has a factual basis, is knowing, intelligent, and voluntary, and the defendant is mentally competent, then it is deemed reliable. The high court has recognized that, because of these requirements, there is 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, even in capital cases. (*Brady v. United States* (1970) 397 U.S. 742, 749, 757-758.) This Court has concluded that "the state's interest in ensuring a reliable penalty determination may not be urged as a basis for denying a capital defendant his fundamental right to control his defense by representing himself." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1074, citations and quotation marks omitted.)

Reliability under the Eighth Amendment is ensured by different factors, as this Court has concluded:

> a verdict is constitutionally reliable when the prosecution has discharged its burden of proof at the guilt and penalty phases 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.

(*People v. Mai* (2013) 57 Cal.4th 986, 1056, internal quotation marks omitted.) For a defendant who pleads guilty in a capital case, with or without counsel, three additional protections ensure a reliable death verdict: the penalty phase trial, an automatic motion to modify the death verdict before the trial court (§

190.4, subd. (e)), and an automatic appeal to this Court (§ 1239).

## 2. THERE ARE THREE THEORIES UNDER WHICH APPELLANT SHOULD PREVAIL

### A. Appellant's Desire to Plead Guilty Was Part of a Strategy to Obtain a Life Sentence at the Penalty Phase

Appellant has argued that the question left open in *People v. Alfaro* (2007) 41 Cal.4th 1277 (*Alfaro*) -- whether section 1018 would apply where, as here, the defendant's desire to enter a guilty plea is part of a strategy to obtain a life sentence at the penalty phase -- requires reversal of the judgment. (AOB 71-74; Reply 5-8; FASB 13, 20.)

The record is clear that appellant sought to plead guilty in order to make a case for life at penalty. Before entering any plea, he informed he lower court: "I'm pleading guilty, Sir. I mean, the only thing is, we have to go for a penalty phase." (Municipal Court RT 23-24.) While self-represented he told the court:

> I want to just go ahead, plead guilty, go and put my life in front of a jury and let the jury decide whether or not I should get this death penalty or whether I should get life imprisonment.

(Jan. 23, 1997 RT 23-24.) Two days later, he tried to plead guilty and began:

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

(Municipal Court RT 159.)

And, at the penalty phase, he tried to obtain a life sentence. He called witnesses, including an expert witness who testified to the PET scan of appellant. Appellant testified, although haltingly, to the fact that he had attempted to plead guilty. And at the penalty phase closing arguments both he and advisory counsel argued that his life should be spared.

In *Alfaro*, the guilty plea would not have cast doubt on potentially critical mitigating evidence. (See *Alfaro*, *supra*, 41 Cal.4th at p. 1301.) Here, appellant's guilty plea would have established a number of crucial mitigating factors. (See § 3.B., *post*)

*McCoy* supports appellant's right to accept responsibility and as part of a strategy to obtain a life sentence at the penalty phase. Appellant's decision to plead guilty and his attempts to do so are equivalent to *McCoy*'s references to the decision to control the objectives of the defense through the plea. Accordingly, appellant's attempts to plead guilty as part of an effort to obtain a life sentence implicated his fundamental Sixth Amendment right.

### B. Appellant's Right to Self-Representation Was Violated When He Was Not Allowed to Present His Case in His Own Way By Pleading Guilty

As appellant has noted, this Court has recognized that statutes requiring the defendant to have counsel in a criminal case are inconsistent with *Faretta*. (§ 1.B.; FASB 25.) However, section 1018's requirement of the consent of counsel for a guilty plea in a capital case has been upheld. (*Chadd*, *supra*, 28 Cal.3d at pp. 747-757; *Alfaro*, *supra*, 41 Cal.4th at pp. 1299-1302.)

Yet, the Court has not decided whether a self-represented defendant could plead guilty in a capital case under section 1018. In *Alfaro*, the Court made clear that it had not yet decided that issue:

> Because the defendant in *Chadd* did not ask to be relieved of counsel, we did not consider the Attorney General's contention that section 1018 permits a capital defendant to discharge his or her attorney, represent himself or herself, and enter a guilty plea. [Citation.] Similarly, because defendant in the present case did not request that counsel be relieved and that she be allowed to represent herself, we need not and do not consider whether section 1018 may be so construed.

(*Alfaro*, *supra*, 41 Cal.4th at p. 1299, fn. 4.) The issue was not addressed in *People v. Mai*, *supra*, 57 Cal.4th 986. [2] Nor was it addressed in *People v. Miracle*, where Miracle was granted the right to self-representation and his advisory counsel consented to the guilty plea. (*People v. Miracle* (Cal., Dec. 3, 2018, No. S140894) 2018 WL 6273464, at *13.)

In *Chadd*, this Court recognized that by subjecting a defendant's right to plead guilty in capital cases to the requirement of defense counsel's consent, section 1018 constituted a "minor infringement of the right of self-representation[.]" (*Chadd*, *supra*, 28 Cal.3d at p. 751.) More recently, however, the Court has recognized the potential serious constitutional issues involved when section 1018 bars a self-represented defendant from pleading guilty:

> Interpreting the operative portion of section 1018 to bar defendant from pleading guilty would raise a serious question about whether section 1018 is compatible with defendant's constitutional rights under *Faretta*.

(*People v. Miracle* (Cal., Dec. 3, 2018, No. S140894) 2018 WL 6273464, *13.)

This case presents that issue. On November 7, 1996, appellant discharged counsel and proceeded in propria persona. On January 23 and January 27, 1997, he attempted to plead guilty. On each occasion, the court rebuffed his attempt to do so. (Jan. 23, 1997 RT 21-22, 23-24, 35-36;

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2. In *Mai*, the Court stated:

> [A] defendant may not discharge his lawyer in order to enter such a plea over counsel's objection. (E.g., *People v. Chadd* (1981) 28 Cal.3d 739, 747-757; see *People v. Alfaro* (2007) 41 Cal.4th 1277, 1299-1302.)

(*People v. Mai*, *supra*, 57 Cal.4th at p. 1055.) This statement is dictum because *Mai* did not exercise his right to self-representation. Moreover, in *Chadd*, this Court "did not consider the Attorney General's contention that section 1018 permits a capital defendant to discharge his or her attorney, represent himself or herself, and enter a guilty plea." (*Alfaro*, *supra*, 41 Cal.4th at p. 1299, fn. 4.) Nor did the defendant in *Alfaro* seek self-representation. (*Ibid.*)

Municipal Court RT 159-161.)

Appellant was allowed to represent himself here. But simply because a defendant is granted the right to self-representation does not end the inquiry. Once the right to self-representation is granted, a "pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury[.]" (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 (*McKaskle*).) This may occur where restrictions are imposed on a self-represented defendant which preclude him from exercising control over the case he chooses to present to the jury. (See *id.* at p. 178; see also *People v. Hamilton* (1989) 48 Cal.3d 1142, 1165, fn. 14 [advisory counsel may not compromise a self-represented defendant's right to present his case in his own way].) If a self-represented defendant is not permitted a fair chance to present his case in his own way, the right to self-representation is denied. (*Id.* at pp. 173-174.) "In 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. 174.)

Here, as a self-represented defendant, the case that appellant chose to present to the jury was to accept responsibility, plead guilty, and proceed to make a case for life at penalty. But he had no fair chance to present his case in his own way. Section 1018 forbade him to make his case: under that section, a self-represented defendant is precluded from pleading guilty. (Cal. Judges Benchguides 98, Death Penalty Benchguide: Pretrial and Guilt Phase (CJER 2007 rev.) § 98.4, p. 98-7 ["A pro per defendant cannot plead guilty; a represented defendant can"].) The statute not only interfered with appellant's control of the case that he had chosen to present to the jury, it actually precluded him from making that case. It destroyed appellant's control over the case he chose to present to the jury, deprived him of the ability to conduct his defense "in his own way," and thereby violated his right to self-

representation. (*McKaskle*, *supra*, 465 U.S. at p. 177.) The application of section 1018 was no minor infringement of appellant's rights, but rather a dagger to the heart of his right of self-representation.

*McCoy* supports that conclusion. In that case, the high court held that a defendant's right to set the objectives of his/her defense is a fundamental and personal Sixth Amendment right that cannot be usurped by counsel or the lower courts. A defendant sets his/her objectives at a criminal trial in large part by the choice of plea. Thus, the choice of plea is arguably the most important decision that a defendant will make in a criminal case. Here, section 1018 precluded appellant, as a self-represented defendant, from choosing the plea that would have set the objectives of his defense: a guilty plea. *McCoy* noted the similarities in two of the autonomy based rights in the Sixth Amendment: the right to self-representation and the right to set the objectives of the defense. Here, those two rights came together and were violated by section 1018's requirement that a defendant cannot plead guilty unless she has counsel who consents to that plea.

Respondent contends that the right of self-representation may be outweighed by "by countervailing considerations of justice and the state's interest in efficiency." (FRSB 16-17.) But it does not explain how section 1018 relates to "the state's interest in efficiency." Respondent also contends that limitations have been imposed on the right to self-representation. (*Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, *supra*, 528 U.S. at p. 163 [no right of self-representation on direct appeal] & *McKaskle*, *supra*, 465 U.S. at pp. 178-179 [appointment of standby counsel against a defendant's wishes is permissible].) Appellant agrees, but the restrictions that may be imposed on the right to self-representation (gray-area defendants, the timing of the motion, courtroom behavior, etc.) are far from what is involved here: section 1018 compromised appellant's right to exercise control over the case he chose

to present to the jury, and gave him no chance to present his case in his own way.

### C. Appellant's Right to Set the Objectives of His Defense by Pleading Guilty and Proceeding to the Penalty Phase Was Violated

In *McCoy*, *supra*, 138 S.Ct. 1500, the high court decided that defense counsel cannot concede a capital defendant's guilt over the defendant's explicit objection. The case is discussed at length in the initial supplemental briefs. (FASB 15-17; FRSB 14-17.)

Respondent contends that *McCoy* did not address the ability of states to regulate the acceptance of guilty pleas. (FRSB 14.) That is true: the impediment to McCoy's right to set the objectives of his defense was his own counsel and the lower courts. Thus, there was no need to discuss the states' regulation of pleas. But *McCoy* did discuss a defendant's fundamental Sixth Amendment right to plead guilty, the issue involved here.

*McCoy* cannot be confined to the cramped reading that respondent would impose. In its reasoning, the Supreme Court equated the right to assert innocence with the right to plead guilty. In the second paragraph of the opinion, the Supreme Court stated:

> 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: 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*, 138 S.Ct. at p. 1505.) By the term "prerogative," the high court meant "right." (See *id.* at p. 1511.) Thus, the paragraph states that a defendant has the right "to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage[.]" (*McCoy*, p. 1505.)

The high court also equated the right to plead not guilty and the right to plead guilty further in the opinion when it reasoned that the "autonomy to

decide that the objective of the defense" includes not just the right to assert innocence, but also the defendant's right "whether to plead guilty," a decision that is "reserved for the client." (*McCoy*, *supra*, 138 S.Ct. at p. 1508.) These decisions, reasoned the court, constitute "choices about what the client's objectives in fact *are*." (*Ibid.*, emphasis in original.) Nowhere did the high court limit the right of a defendant to set the objectives of her defense to the right to assert innocence. Integral to the Supreme Court's reasoning was the flip side of the coin: the defendant's right to plead guilty.

In other words, "*McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense." (*State v. Horn* (La. 2018) 251 So.3d 1069, 1076.) In fact, *Horn* concluded that:

> [B]ased on the Supreme Court's ruling in *McCoy*, there is no question that a criminal defendant's decision whether to concede guilt implicates fundamental constitutional rights and the right to exercise that decision is protected under the Sixth Amendment.

(*Ibid.*)

In light of *McCoy*'s reasoning, section 1018's consent-of-counsel requirement violated appellant's Sixth Amendment right to set the objectives of his defense by pleading guilty and proceeding to the penalty phase. *McCoy* states that the right to plead guilty belongs to the defendant. In that case, trial counsel and the lower courts usurped the defendant's right to set the objectives of his defense. Here, section 1018, defense counsel and the lower courts usurped appellant's prerogative to set the objectives of his defense by pleading guilty in the hope of gaining a life sentence at penalty.

After acknowledging that California has other procedural protections to ensure heightened reliability in capital cases," respondent contends that section 1018 is unique in that it "protects reliability at the beginning of proceedings. (FRSB 17-18, fn. 1.) But reliability at the beginning of the proceedings is set first by statutes requiring the lower courts to inform

defendants of their right to counsel at the first proceeding. And defendants are entitled to waive that right, as respondent must concede. Respondent offers no logical reason why a defendant must be permitted to waive the earlier right to counsel, but not the requirement of counsel imposed by section 1018.

## 3. THE ERRORS HERE WERE STRUCTURAL

Respondent contends that even if this Court were to conclude that section 1018 is unconstitutional, any error in precluding appellant from pleading guilty is amenable to harmless error review under *Chapman v. California* (1967) 386 U.S. 18. (FRSB 5, 18.) These contentions are wrong as they are inconsistent with the high court's holdings.

### A. The Errors Were Complete and Appellant's Rights Were Violated When He Was Not Allowed to Plead Guilty

Autonomy-based rights under the Sixth Amendment, such as the right to counsel of choice and the right to self-representation are complete when they are denied. *McCoy* added another: the right to set the objectives of the defense. The violation of the defendant's Sixth Amendment right to set the objectives of his defense was complete when the lower court "allowed counsel to usurp control of an issue within McCoy's sole prerogative." (*McCoy*, *supra*, 138 S.Ct. at p. 1511; FASB 28-31.)

Here, the failure to allow appellant to plead guilty violated his Sixth Amendment rights to set the objectives of his defense and to self-representation. Those errors here were complete when appellant was not allowed to plead guilty: on October 30, 1996, and January 23 and January 27, 1997. They cannot be refashioned as "incomplete" based on reference to subsequent portions of the record. (FASB 30-31.)

Respondent says nothing about this point of law; the word "complete" is absent from its brief.

### B. As the Errors Here Affected the Framework of the Trial and it Is Impossible to Measure the Effects, They Are Structural

*McCoy* held that the violation of a defendant's right to set the objectives of his/her defense is structural error. (*McCoy*, *supra*, 138 S.Ct. at p. 1511.) In fact, the State of Louisiana never suggested that the error could be excused as harmless under *Chapman*. (*Id.* at p. 1511, fn. 4.) In *Faretta*, *supra*, 422 U.S. 806, and *McKaskle*, *supra*, 465 U.S. at p. 177, fn. 8, the high court held that the violation of the right to self-representation is structural error. Respondent concedes that a violation of these protected autonomy rights under the Sixth Amendment is structural error. (FRSB 18.)

However, respondent claims that appellant was not deprived of his *Faretta* rights. (FRSB 18.) As explained above, the *Faretta* right means more than self-representation, it means "actual control over the case [the defendant] chooses to present to the jury[.]" (*McKaskle*, *supra*, 465 U.S. at p. 177.) Restrictions which preclude the defendant from exercising control over the case s/he chooses to present to the jury can violate the right. (See *id.* at p. 178.) "In 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. 174.) If a self-represented defendant is not permitted a fair chance to present "his case in his own way," the right to self-representation is denied. (See *id.* at pp. 173-174.)

Here, appellant was granted the right to self-representation, and the objective of his defense was to plead guilty and make a case for life at penalty. The capital-case requirements in section 1018, however, would not allow him to do so without having both the presence of defense counsel and counsel's consent. Those requirements not only interfered with appellant's control of the case that he had chosen to present to the jury, they actually precluded him entirely from making that case. Thus, appellant's Sixth Amendment right to conduct his defense "in his own way" was violated. (*McKaskle*, *supra*, 465 U.S.

at p. 177.) And a violation of that right, as respondent concedes, is structural error.

With respect to *McCoy* and the Sixth Amendment right to set the objectives of the defense, respondent claims that the errors are not structural because the sole consequence of not allowing appellant to plead guilty was to preclude him from using that plea as mitigating evidence at the penalty phase. (FRSB 18 [appellant "was at most denied an opportunity to present a single factor in mitigation at his penalty phase trial."].)

By conceding that appellant was precluded from using an unconditional guilty plea in mitigation, respondent has conceded that appellant's Eighth Amendment rights were violated. A capital sentencing jury may not be precluded from considering any constitutionally relevant mitigating evidence. (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246-250; *Eddings v. Oklahoma* (1982) 455 US 104, 110-112.) Evidence is mitigating when it tends logically to prove or disprove some fact or circumstance which would give the jury "a reason to impose a sentence more lenient than death." (*Smith v. Texas* (2004) 543 U.S. 37, 44-45.) An unconditional guilty plea is clearly mitigating evidence because it tends to prove acceptance of responsibility and remorse, factors which a sentencer could reasonably find warrant a sentence less than death. (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 186 [guilty plea allowed defendant to assert acceptance of responsibility in mitigation]; *State v. Ketterer* (Oh. 2006) 855 N.E.2d 48, 63 [guilty plea is substantial mitigation evidence of remorse]; *People v. Montour* (Colo. 2007) 157 P.3d 489, 500 [guilty plea is mitigating evidence of remorse and acceptance of responsibility in capital sentencing].) The Eighth Amendment forbids imposition of a death sentence if the jury is precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than

death. (*Smith v. Spisak* (2010) 558 U.S. 139, 144, internal quotation marks omitted.)

Moreover, the consequences that resulted from refusing to allow appellant to plead guilty are as difficult to measure as the consequences of denying a defendant the right to set the objectives of his defense, as occurred in *McCoy* . In each case, the defendant's right to make the fundamental choice about the objectives of his own defense were blocked: in *McCoy* by defense counsel's concessions of guilt; here, by section 1018 precluding appellant from pleading guilty. In *McCoy*, the effects of the concessions were immeasurable "because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." (*McCoy*, *supra*, 138 S.Ct. at p. 1511.) In this case, the effects were immeasurable because section 1018 swayed the jury to believe that appellant had pleaded not guilty, when in fact he had tried repeatedly to plead guilty. Further, a defendant's plea decision sets the objectives of the entire defense and affects the unfolding of the entire case. If a defendant's plea is frustrated, the resulting trial is vastly different from what should have occurred, whether that plea is guilty or not guilty. By precluding appellant from pleading guilty, section 1018, completely changed the adversarial framework of the proceeding. In such a case, as *McCoy* made clear, the consequences are impossible to measure, the errors are structural, and reversal of the judgment is required. (*McCoy*, *supra*, 138 S.Ct. at p. 1512)

### C. If Harmless-Error Analysis Were to Apply, the Errors Here Cannot Be Said to be Harmless Beyond a Reasonable Doubt

Even if this Court were to conclude that the errors here were not structural, respondent has not proven, as he is required to do, that they were harmless beyond any reasonable doubt.

Respondent claims that the failure to allow appellant to plead guilty precluded the jury from considering only "a single" mitigating factor. It fails to understand, however, that a single mitigating fact can give rise to multiple

mitigating factors. For example, evidence that a defendant has brain damage or a low IQ can establish multiple mitigating factors: such evidence can establish multiple statutory mitigating factors (§ 190.3, factors (d), (h) and (k)); it can reduce the defendant's moral culpability for the circumstances of the offense (§ 190.3, factor (a)); and it can explain the misleading impression of a lack of remorse (*Atkins v. Virginia* (2002) 536 U.S. 304, 320-321). (See also *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [evidence of a defendant's good behavior in jail permits the jury to draw favorable *inferences* regarding two mitigating factors: his character and probable future conduct].)

In this case, the failure to allow appellant to plead guilty affected his right to have the jury consider and give the appropriate weight to several mitigating factors: acceptance of responsibility; remorse; a desire to spare the victim's family the pain of an unnecessarily drawn-out legal process; a disposition and commitment to rehabilitation, and the likelihood of a peaceful adjustment to life in prison; and honesty and candor, showing that appellant had come to appreciate the gravity of his actions. (See AOB 88-91.)

On the other hand, a not guilty plea in the face of overwhelming evidence -- whether freely chosen by the defendant, or forced upon him, as occurred here -- can cause a loss of credibility with the sentencing jurors, and thereby damage his mitigating evidence. (See *Florida v. Nixon* (2004) 543 U.S. 175, 184, 191-192.) In fact, the dissent in *McCoy* observed that:

> few rational defendants facing a possible death sentence are likely to insist on contesting guilt where there is no real chance of acquittal and where admitting guilt may improve the chances of avoiding execution

(*McCoy*, *supra*, at pp. 1514-1515 (disn. opn. of Alito, J.).) Yet, that is what occurred here: appellant was forced to plead not guilty in the face of

overwhelming evidence. As Justice Alito observed, that fact improved the chances that appellant would be sentenced to death. [3]

The failure to allow appellant to plead guilty also affected his ability to weaken the prosecution's aggravating factors and case for death. (See *In re Steele* (2004) 32 Cal.4th 682, 698 [evidence that weakens the strength of the prosecutions' aggravating factors is considered mitigating evidence].) In his penalty-phase closing argument here, the prosecutor questioned appellant's remorse. (16 RT 3118-3119.) He argued that appellant blamed others, thereby suggesting that he refused to accept responsibility for his actions. (16 RT 3107, 3141, 3143) And, while telling the jurors that they were required to assess appellant's credibility, he attacked it. (16 RT 3107-3108, 3146.) Each of these aggravating factors would have been weakened by the fact that appellant pleaded guilty unconditionally.

Further proof that the error here was not harmless can also be seen in the fact that appellant sought to accept responsibility *early* in the proceedings. The weight that the jury would have given to such a guilty plea would have been enhanced. (See *United States v. Sampson* (D. Mass. 2004) 335 F.Supp.2d 166, 234, fn. 41 ["The fact that remorse developed later rather than sooner may properly influence the weight a juror assigns to this mitigating factor"].)

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3. Appellant was aware of this at trial. When he was not allowed to introduce at the guilt-phase evidence that he had decided early on and had attempted to plead guilty, he told the court:

> By the court's order that the defendant not be able to introduce these showings of remorse and attempt to reconcile the issue of guilt, it's going to prejudice the jury. The jury is going to feel like well, if he's confessing and now coming in front of us and saying he's not guilty, he's pulling the wool over our eyes. My veracity is at stake here, Your Honor.

(RT 909-910.)

Appellant's plea was not a "conditional" plea in exchange for a benefit, such as a life sentence. This Court has held that evidence of such pleas does not necessarily demonstrate acceptance of responsibility or remorse and can be excluded from the penalty phase, whether the plea is instigated by the defendant, or by the prosecutor. (See *People v. Wall* (2017) 3 Cal.5th 1048, 1068-1071; *People v. Fauber* (1992) 2 Cal.4th 792, 855-857). Here, by contrast, appellant's plea was an unconditional offer to plead guilty in a capital case. It was an "open plea"; that is, one under which the defendant is not offered any promises. (See *People v. Cuevas* (2008) 44 Cal.4th 374, 381, fn. 4.) In *People v.* (*Michael*) *Williams* (1988) 45 Cal.3d 1268, abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176, 1190, the defendant complained that California's death penalty law violates the Eighth Amendment by preventing the introduction of his expressed willingness to plead guilty. This Court rejected that claim, stating that *nothing* in the death penalty law bars the admission of such evidence. (*Williams*, *supra*, at p. 1332.) Respondent has conceded that appellant's attempt to plead guilty was a "factor in mitigation." (FRSB 18.) This Court should make clear that evidence of an unconditional offer to plead guilty in a capital case is mitigating in that that bears on the defendant's character and the sentencer could reasonably find warrants a sentence less than death. (See *Tennard v. Dretke* (2004) 542 U.S. 274, 285) The weight to be accorded such evidence is for the jury to decide.

The erroneous failure to allow appellant to plead guilty limited the number and weight of his mitigating factors, and adversely affected his ability to address the prosecution's case in aggravation. Respondent has failed prove that this error did not affect the sentencing balance reached by one or more jurors. (See *Wiggins v. Smith* (2003) 539 U.S. 510, 537.)

Respondent claims that "it is highly improbable that the trial court would have accepted a guilty plea" because appellant attempted to plead guilty

due to restrictions on his so-called pro per "privileges" while in jail for the trial. (FRSB 19.) However, the frustration to which it refers occurred at the proceeding on January 23, 1997. Appellant *first* attempted to plead guilty nearly three months earlier than that proceeding.

Respondent also claims that it is "highly improbable" that the lower courts would have accepted appellant's his guilty plea. However, it points to nothing in the record to substantiate this claim. But the record does show the following.

Factual basis. Although respondent contends that the lower courts would not have found an adequate factual basis for appellant's attempted guilty plea (FRSB 19), its own brief characterizes the evidence of guilt as "overwhelming." (FRSB 20.) Had the lower courts made an inquiry in to the factual basis, there would have been ample evidence in the police reports and appellant's confessions to support his guilty plea. Respondent also contends that a lower court would not have found a factual basis for a guilty plea in a capital case where the defendant is unrepresented. (FRSB 20.) But when appellant first tried to plead guilty, he had been represented by counsel for four months.

Competence. Nothing in the record suggests that appellant was incompetent to plead guilty. During the *Faretta* hearing, the lower court stated to appellant, "you strike me as a very bright person, mentally alert." (Municipal Court RT 34.) The issue of competence was not raised by either defense counsel, the courts below, advisory counsel, or respondent.

Knowing, Intelligent, and Voluntary. The record contains sufficient indications to conclude that appellant's decision to plead guilty was knowing, intelligent, and voluntary. His repeated attempts to plead guilty in the face of opposition suggest that the decision was voluntary. His decision to plead guilty was reached by himself for valid reasons. He also was aware of the

consequences of pleading guilty: that he would have conceded his guilt and the case would proceed to the penalty phase. The *Marsden* hearing, during which appellant first announced his intent to plead guilty, contains no indication that his attempted plea was less than knowing, intelligent, and voluntary. At that hearing, defense counsel did not aver that appellant's decision to plead guilty was anything but valid. And defense counsel did not mention any potential or viable defense that might make a guilty plea less than desirable. One week later, when the lower court allowed appellant discharge counsel and proceed with self-representation, it necessarily found that his decision to was knowing, intelligent and voluntary. Later, when appellant tried to plead guilty and the prosecutor talked with him off the record, the prosecutor then informed the court had occurred. The prosecutor did not inform the court that appellant's plea was not knowing, intelligent, and voluntary. Respondent has failed to identify any part of the record showing that appellant's decision to plead guilty was less than knowing, intelligent, and voluntary.

If, as the record shows, appellant's attempted guilty plea was valid, the lower courts would have recognize the gain in efficiency that results from a guilty plea in a capital case, as the need for a guilt-phase is obviated. Thus, there is no reason to doubt that the lower courts would have accepted appellant's guilty plea, were it not for the unconstitutional requirements of section 1018. And although there is no requirement that the prosecution consent to a guilty plea where the defendant pleads guilty to all charges (*People v. Clancey* (2013) 56 Cal.4th 562, 570), respondent points to no reason why the prosecutor in this case would have opposed an unconditional guilty plea. Lawyers can never be certain what a jury will do. And, as respondent acknowledges in its brief, the prosecutor's case would not be harmed by a guilty plea because he would be able to introduce "all of the circumstances of"

the crime and special circumstance under section 190.3, factor (a). (FRSB 20.)

Respondent points to two brief passages in appellant penalty phase testimony which purportedly demonstrate that he asked the jury to return a death verdict. As noted above, the violation of appellant's Sixth Amendment rights was complete when he was not allowed to plead guilty. Subsequent events cannot "undo" the error. But even if harmless-error analysis were to apply the brief passages relied upon by respondent, they hardly advance its burden to show that the errors were harmless beyond a reasonable doubt.

In the first passage, the following occurred:

> 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.

(FRSB at p. 19, citing 16 RT 3065.) In his supplemental brief, appellant pointed out that (1) a defendant's statement that he would recommend that the jury impose death is in fact consistent with a sense of remorse and acceptance of responsibility; and (2) appellant's statement that this was his recommendation "at this time" occurred on December 2, 1997, eleven months after his initial attempt to plead guilty was rebuffed. (FASB 37-38.)

In the second passage, appellant stated that

> 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.*

(FSRB 19, citing 16 RT 3069, emphasis in original.)

In this brief portion of his testimony, appellant tried to convey to the jury that he had attempted to plead guilty and accept responsibility from day one. But as far as the jury was concerned, that testimony came from a person who, according to the trial judge, had pleaded not guilty. In this context, who were the jurors likely to believe, appellant or the trial judge? And even if the jurors believed appellant's last-minute testimony that he tried to accept responsibility for his crime early and consistently, it is unlikely that they would have given that testimony its full mitigating weight.

Respondent's proposition comes to this: the violation of a defendant's Sixth Amendment right to set the objectives of his defense can be found harmless if the defendant testifies to his true objectives. But if that were true, then the repeated concessions of guilt by McCoy's counsel would have been harmless because McCoy was allowed to testify that he was innocent. Instead, the high court rejected this sophistry and found the error structural and not amenable to harmless-error analysis. This Court should do the same.

Finally, respondent repeats a contention that it made in its initial brief, but with a change of emphasis:

> even if such a plea would have been accepted by the trial court, the record is devoid of any facts indicating that Frederickson sought to use his guilty plea as evidence *in mitigation*, or even that he was *aware* that such a plea could be used in that way.

(FRSB 19, emphasis in original; cf. RB 37 [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].)

Respondent's statement that appellant never "sought to use his guilty plea in mitigation" makes no sense as appellant was not allowed to plead guilty. There was no guilty plea to "use."

Its assertion that the record is "devoid of any facts indicating that

Frederickson sought to use his guilty plea as evidence *in mitigation*, or even that he was *aware* that such a plea could be used in that way," is contradicted by the record. The *Marsden* hearing, during which appellant first announced his intent to plead guilty, shows that he was clearly aware that a guilty plea would lead to a penalty phase where a life or death decision would be made. In addition, shortly before trial, the prosecutor successfully prevented appellant from mentioning at the guilt-phase his attempts to plead guilty. As the trial court was unaware of these attempts, appellant explained:

> How about the times that the defendant made -- entered the plea of guilty before the court and on public record? . . . ¶ in division 311 and on several occasions the defendant has attempted to plead guilty, and the prosecution has refused to accept that. Counsel at that time refused to join, and the court refused to accept that or acknowledge my plea of guilty, but it was placed on record.

(RT 406-407.) When the trial court asked the prosecutor whether he was trying to preclude admission of the attempted guilty pleas at both the guilt and penalty phase, the prosecutor conceded that appellant could use his attempts to plead guilty at penalty. (RT 407.) Appellant then asked whether the topic was "open to argument" at the guilt phase, and the trial court responded, "Yes." (RT 408.) This passage shows appellant's awareness that a guilty plea was mitigating evidence.

The admissibility of the attempted guilty pleas was discussed again before the guilt phase and appellant stated:

> 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.

(RT 909.) He continued:

> By the court's order that the defendant not be able to introduce these showings of remorse and attempt to reconcile the issue of guilt, it's going to prejudice the jury. The jury is going to feel like well, if he's confessing and now coming in front of us and saying he's not guilty, he's pulling the wool over our eyes. My veracity is at stake here, Your Honor.

(RT 909-910.) Again, this shows appellant's awareness that a guilty plea was mitigating evidence. Then, as respondent pointed out, appellant testified at the penalty phase that he had attempted to plead guilty and acknowledge responsibility for the crimes. (16 RT 3069) And during his penalty-phase closing argument, defendant declared that he had taken responsibility for the crimes, and that the jury could "consider that in making your determination of whether I should get the death penalty or life without the possibility of parole." (16 RT 3205.) These passages also show unequivocally that appellant was aware that a guilty plea was mitigating evidence.

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## CONCLUSION

Appellant should have been permitted to do what he clearly wanted to do and what he was entitled to do: accept responsibility, plead guilty, and make a case for life at the penalty phase. Instead, he was forced to plead not guilty, and ended up at a penalty phase where his case for life was distorted.

For the reasons stated in appellant's briefing, this Court should reverse the judgment in this case.

Dated: December 17, 2018.

Respectfully submitted,

/s/ Douglas G. Ward
DOUGLAS G. WARD
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 10,240 words, including footnotes.

Dated: December 17, 2018

DOUGLAS G. WARD

/s/ Douglas G. Ward
DOUGLAS G. WARD

## DECLARATION OF SERVICE

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 SUPPLEMENTAL REPLY 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. 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 December 17, 2018, as follows:

Daniel Frederickson
K81800 CSP-SQ, 2-EB-3
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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 December 17, 2018:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 17, 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:

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12/17/2018
Date

/s/Douglas Ward
Signature

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

Douglas Ward, Attorney at Law
Law Firm