No. S140894

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSHUA MARTIN MIRACLE, Defendant and Appellant.	(Santa Barbara County Superior Ct. No. 1200303)

APPELLANT'S OPENING BRIEF

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

HONORABLE BRIAN E. HILL, JUDGE

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INTRODUCTION

Appellant and Robert Ibarra were charged with the murder of Elias Silva, found stabbed to death at the home of Ibarra's friend Robert Galindo. Appellant's case proceeded first. Although Penal Code section 1018 expressly prohibits a defendant from pleading guilty to capital murder unless he appears with counsel and has the consent of counsel, the trial court granted appellant's motion to represent himself and accepted his plea of guilty based on the consent of advisory counsel. The court also insisted appellant be visibly shackled throughout the trial, to an extent that exceeded what law enforcement personnel charged with courtroom security thought necessary. The excessive restraints inhibited appellant's ability effectively to represent himself and prejudicially fueled the prosecutor's argument that appellant would pose a danger in prison if not sentenced to death. Finally, the trial court erroneously imposed restitution fines without inquiring into

appellant's ability to pay more than the statutory minimum.

Because appellant's invalid guilty plea must be vacated, his conviction and death sentence must be reversed. The excessive and visible shackling independently warrants reversal of appellant's sentence of death. The restitution fines should be vacated or reduced to the statutory minimum.

STATEMENT OF APPEALABILITY

This appeal from a final judgment imposing a verdict of death is automatic under Penal Code section 1239, subdivision (b).

STATEMENT OF THE CASE

Appellant Joshua Martin Miracle and Robert Quinones Ibarra were indicted on March 7, 2005, for the murder of Elias Silva (Pen. Code, § 187, subd. (a)) (Count 1), alleged to have occurred late Saturday night or early Sunday morning, October 2 or 3, 2004. The indictment charged, as special circumstances, that appellant and Ibarra had intentionally committed the murder while lying in wait (Pen. Code, § 190.2, subd. (a)(15)); that in the commission of the murder appellant and Ibarra had each personally used a deadly and dangerous weapon (a knife) (Pen. Code, § 12022, subd. (b)(1)), rendering the offense a serious felony (Pen. Code, § 1192.7, subd. (c)(23)); and that appellant and Ibarra had each committed the offense for the benefit of, at the direction of, or in association with, a criminal street gang (the Santa Barbara Eastside gang) (Pen. Code, § 186.22, subd. (a)(22)).[1] Appellant was alleged to have committed the murder while an active participant in, and to further the activities of, a criminal street gang (the

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[1] At some point the cases were severed for trial, and Ibarra was tried separately in 2011. (See *People v. Robert Quinonez Ibarra* (Mar. 11, 2014, B243065) [nonpub. opn.].)

Santa Barbara East Side gang) (Pen. Code, § 190.2, subd. (a)(22)). Appellant was also charged with the September 23, 2004, attempted murder of Jaime Alfaro Lopez (Pen. Code, §§ 664 and 187, subd. (a)) (Count 2). With respect to Count 2 the indictment charged, as a lesser offense, the crime of assault with a deadly weapon (a knife) (Pen. Code, § 245, subd. (a)(1)). Finally, as to Counts 1 and 2 appellant was alleged to have previously been convicted of a serious or violent felony (Pen. Code, §§ 667, subd. (d)(1) & (e)(1), 1170.12, subd. (b)(1) & (c)(1), 1192.7, subd. (c). (1 CT 1-6.)[2]

On March 23, 2005, the prosecutor stated that he intended to seek the death penalty. (1 CT 21.) Appellant, through his appointed counsel, Michael Carty, announced his intention to file a motion to represent himself, pursuant to *Faretta v. California* (1975) 422 U.S. 806. (*Ibid.*) Mr. Carty indicated that appellant was pursuing the *Faretta* motion against his advice. (1 RT 33.)

On April 5, 2005, Mr. Carty announced that appellant wished to plead guilty to the murder and attempted murder counts and admit at least one special circumstance allegation; that he had informed appellant that Penal Code section 1018 prohibited the court from accepting a guilty plea in a capital case without the consent of counsel; and that he would not consent to the guilty plea. (1 RT 57-58.)

On April 20, 2005, the court heard and granted appellant's *Faretta* motion. (2 CT 534, 537.) The court then proceeded with the arraignment and entered a plea of not guilty and a denial of the special circumstance

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[2] "CT" refers to the Clerk's Transcript; "RT" to the Reporter's Transcript.

allegations on appellant's behalf, over appellant's objection. (1 RT 111-112.)

On April 28, 2005, the court appointed Joseph Allen as appellant's advisory counsel. (2 CT 558, 559-560.)[3]

On July 29, 2005, advisory counsel announced that he consented to appellant pleading guilty to Count 1 (murder) and admitting the special circumstance and other allegations. (2 CT 599-600.) The court accepted appellant's plea. (2 CT 599-600, 3 CT 602-610.) Appellant maintained his plea of not guilty as to Count 2 (attempted murder). (3 CT 601.)

On September 8, 2005, the court granted the prosecution's motion to amend Count 2 to add the allegation that appellant had used a knife in the commission of the offense (Pen. Code, § 245, subd. (a)(1)) and to dismiss the street gang allegation (Pen. Code, § 186.22, subd. (b)(1)). Appellant then changed his plea on Count 2 to guilty and admitted the remaining special allegations. (3 CT 613-615; 618-625.)

On November 3, 2005, the court granted the Santa Barbara County Sheriff's motion to have appellant physically restrained in the courtroom. (3 CT 881-882.)

Jury selection began November 14, 2005 (3 CT 895) and was concluded December 6, 2005, with the swearing of the jurors and the alternates (4 CT 948).

The penalty phase began December 7, 2005. The court gave preliminary jury instructions and the prosecutor gave his opening statement and began presenting the state's case in aggravation. (4 CT 1008-1009.)

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[3] The court originally appointed Adam Pearlman as advisory counsel, but relieved him based on a conflict of interest arising from his former representation of a prospective percipient witness in this case. (2 CT 557.)

The prosecution and defense rested on December 15, 2005. (4 CT 1018.) The defense presented no evidence.

On December 19, 2005, the prosecutor gave his closing argument. The defense gave no closing argument. The court further instructed the jury and the jury began its deliberations. (4 CT 1063-1064.) The jury reached its death verdict the same day, after deliberating approximately an hour and a half and addressing a note to the court in writing. (4 CT 1064-1065, 1113-1115.)

On January 17, 2006, the court denied appellant's automatic motion, pursuant to Penal Code section 190.4, subdivision (e), for modification of the death sentence. On January 24, 2006, appellant was sentenced to death on Count 1 (Pen. Code, § 187); to 10 years imprisonment for the associated street gang allegation (Pen. Code, § 186.22, subd. (b)(1)), stayed pending this Court's disposition of appellant's automatic appeal; and to a total of seven years imprisonment on Count 2 (Pen. Code, §§ 245, subd. (a)(1), 12022, subd. (b)(1) and 12022.7), also stayed. (4 CT 1152.) Appellant was ordered to pay over $20,000 in restitution and parole revocation fines, pursuant to Penal Code sections 1202.4, 1202.44 and 1202.45. (4 CT 1152-1153, 1169, 1171.) The parole revocation fines, only, were stayed. (4 CT 1169, 1171.)

STATEMENT OF FACTS

I. The Circumstances Of the Silva Homicide (Count 1)

In support of his position that the "circumstances of the crimes," within the meaning of Penal Code section 190.3, subdivision (a), warranted imposition of the death penalty, the prosecutor called lay witnesses who described what they heard and saw at the apartment where the homicide occurred; law enforcement personnel who described the crime scene and the

recovery of evidence; a gang expert; and the victim's mother and wife, who described the impact of his death. Autopsy photos were introduced by stipulation. From this evidence the jury learned the following.

A. Robert Galindo

Elias Silva was stabbed to death Saturday night, October 2, 2004, at the apartment where Robert Galindo lived with his brother Rodney Galindo and Rodney's partner Phillip Alliano. Galindo pled guilty to voluntary manslaughter in exchange for testifying for the prosecution at appellant's and Ibarra's trials. (7 RT 1623-1624; People's Ex. 6.) He had not yet been sentenced when he testified at appellant's trial. (7 RT 1623.) Asked whether the plea arrangement gave him "some concern that what you say in this trial needs to be what the district attorney believes the truth is," Galindo replied, "Well, yes, of course." (7 RT 1709.)[4]

Galindo had known Ibarra and Silva for about three years. (7 RT 1620, 1622.) Ibarra used to "hang out" at Galindo's apartment and the two used "crystal meth" together. (7 RT 1621-1622, 1625.) There had been some animosity between Ibarra and Silva: they had had a girlfriend in common, and Ibarra resented that Silva had a good job and was doing well. (7 RT 1627.) Galindo also offered that nobody liked Ibarra. (7 RT 1718.) Silva sold crystal meth, including to Galindo. (7 RT 1647, 1710.)

Galindo was confused about the timing of the parties' comings and goings during the two or three days preceding the homicide. (7 RT 1631-1637.) At some point, a day or two before Silva was killed, Galindo's friend Danny Ramirez came by the apartment, with appellant. (7 RT 1628-

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[4] Galindo's plea bargain also required him to testify truthfully at Ibarra's trial. (7 RT 1709-1710.)

1630.) Ibarra and Silva apparently were already there. (7 RT 1630-1631.) Galindo did not know appellant, but Ibarra and appellant knew each other. (7 RT 1630.) Ramirez, a tattoo artist, had come because he had agreed to do a tattoo for Silva; but they decided to postpone the project and Silva left. (7 RT 1627-1629, 1631.) Ramirez asked Galindo if he and appellant could stay the night at Galindo's apartment and Galindo agreed, expecting Silva would pick them up the next morning. (7 RT 1631.)

Ibarra, Ramirez and appellant spent the night at Galindo's apartment; Galindo seemed unsure whether this was the Thursday or the Friday before the homicide. (7 RT 1631, 1636.) The next morning, while Galindo was in the shower, Silva stopped by and picked up Ramirez, but not appellant or Ibarra. (7 RT 1632.) This, and the fact that Silva had not come in to say hello, upset Galindo. (7 RT 1623, 1634-1635.) Galindo made breakfast for himself, Ibarra and appellant. (7 RT 1633.) Ibarra and appellant then left together; appellant returned to the apartment alone. (7 RT 1633-1634.)

Galindo, still upset with Silva, persuaded his friend Darren to come by and drive him to Silva's house, where he then told Silva how much the slight had bothered him. (7 RT 1634-1635.) According to Galindo, "he" – it is not clear whether this meant Silva or Ramirez – said he should "get that guy out of your house," referring to appellant, because he was "no good." (7 RT 1635.) Darren then drove Galindo back to his apartment, stopping on the way so they could buy food and get gas. (7 RT 1636.) Galindo was confused as to whether this occurred on Friday or Saturday. (*Ibid.*) Appellant was still at Galindo's apartment, but Galindo expected Ramirez would pick him up. (7 RT 1637-1638.) Galindo felt he was doing Ramirez a favor by allowing appellant to stay with him, and appellant was "not doing anything wrong." (7 RT 1638.) Appellant was quiet and they just "kicked

back" and watched television. (*Ibid.*) Ibarra apparently then also returned to the apartment. (*Ibid.*)

Galindo woke Saturday morning to find Ibarra and appellant still there. (7 RT 1638.) Galindo's brother Rodney, who worked nights at the Chumash Casino, came home from work. (7 RT 1638-1639.) Ibarra and appellant were getting along well and spent a lot of time using crystal meth together. (7 RT 1639.) At Galindo's request, they did this in the bathroom. (*Ibid.*) Galindo identified Ibarra's glass pipe shown in a photograph introduced as People's Trial Exhibit 17, noting that Ibarra always had a pipe with him. (7 RT 1699-1700.) Galindo testified that he did not use drugs that day because he was preparing to take a drug test, as part of a drug diversion program he was in as the result of a drug-related arrest. (7 RT 1639, 1708, 1713-1714.) But Galindo admitted he had used meth with Ibarra the day before appellant first came to his apartment. (7 RT 1706.)

Ibarra apparently left at some point on Saturday to visit his daughter. (7 RT 1640.) He returned in the early evening with a large black bag on wheels. (7 RT 1641-642.) Ibarra told Galindo it contained the clothes he and appellant were going to wear to a party. (7 RT 1641-1642.) Appellant was in the kitchen, fixing something to eat with the groceries he and Galindo had gotten earlier that day. (7 RT 1642-1643.)

According to Galindo, "[t]he mood changed when Ibarra got there." (7 RT 1644.) "He was pretty much like wired. He was like, you know just all, antsy. He was like, you know, ready, like, okay, let's do it, you know, let's go party, or do this, or whatever. Because he was more like [in] a very hyper mood." (*Ibid.*) Galindo moved Ibarra's black bag out to the patio. (7 RT 1644.) Although he had earlier testified that he did not see what was in the bag, he changed his testimony and said it looked like "there was a white

plastic bag in there." (7 RT 1641-1642, 1644.)

Galindo gave Ibarra some needles to use to inject crystal meth intravenously. (7 RT 1645.) Galindo had gotten them from his father (who was diabetic), at Ibarra's request. (*Ibid.*)

Galindo then overheard a conversation between Ibarra and appellant about "rats" and the need to "take care of this rat," which he understood referred to people who cooperated with law enforcement by "ratting out" people, "like for drugs." (7 RT 1646.) Ibarra and appellant also talked about "some girls, or whatever, you know . . . ." (*Ibid.*) Galindo did not recall hearing them discuss "taking somebody down, or something along those lines." (*Ibid.*) Nor did he recall Ibarra or appellant saying much about Silva. (7 RT 1715.)

At some point Galindo was asked to call Silva, to have him bring drugs over. "Ibarra wanted to get some drugs because he just got his check." (7 RT 1647.) When Galindo called, Silva declined the request, reminding Galindo that he "d[idn]'t want anything to do with them" and telling Galindo to "get them out of [his] house." (7 RT 1648.) Ibarra, whose cell phone was losing its charge, urged Galindo to go use a pay phone to try calling Silva again, because he wanted drugs to "party with the girls." (*Ibid.*) Galindo agreed to go call Silva again and left the apartment, but he did not call Silva. (7 RT 1649.) When he returned he was surprised to find Ibarra and appellant again in the bathroom using drugs, even though Ibarra had made it seem they had exhausted their supply and needed Silva to provide more. (*Ibid.*)

Ibarra and appellant again asked Galindo to call Silva: "Ibarra is all, 'Just f--ing call him again,' he's all, 'you know, and we'll be out of here.'" (7 RT 1650.) Galindo reminded Ibarra that his phone was dying and asked,

"how am I supposed to call?" (*Ibid.*) Ibarra persisted, "Just give him a call, you know, call him." Galindo told Ibarra he had already called Silva more than once. (*Ibid.*) Galindo then took the phone (presumably Ibarra's dead or dying cell phone) and pretended to call Silva. (7 RT 1650-1651.) Ibarra urged Galindo to "keep on trying." (7 RT 1651.) Galindo then left, saying he would try Silva again from the pay phone, and get some cigarettes while he was out. (7 RT 1652.) When Galindo returned Ibarra was still "persisting" on his calling Silva. (*Ibid.*) Galindo told Ibarra he had been trying and had left messages for Silva on his voicemail. (*Ibid.*) Galindo initially testified that appellant was in the kitchen taping the loose handle of a kitchen knife (7 RT 1652-1653), but later acknowledged he did not see appellant put tape on the knife (7 RT 1716). Ibarra, who had become "pushy" and angry, again urged Galindo to call Silva, and again Galindo responded that he had already called many times. (7 RT 1653.) Ibarra and appellant were both getting agitated, repeatedly telling Galindo to call Silva. (7 RT 1654.)

Galindo left the apartment once again, but decided not to call Silva. (7 RT 1655-1656.) He smoked a cigarette and contemplated how to get Ibarra and appellant to leave his apartment: "[B]ecause the way Ibarra was already, like, agitated and jumpy, and I was just like sh-t, you know. And I knew how Ibarra is, you know, I seen how he got, you know, I've been around him and that's why I didn't stay." (7 RT 1656.)

When Galindo returned to his apartment this time, two pieces of furniture had been moved into the kitchen, leaving more open space in the living room. (7 RT 1656, 1658.) When Galindo asked Ibarra why, Ibarra told him to shut up and call Silva. (7 RT 1657.) Appellant also told Galindo to call Silva. (*Ibid.*) When Galindo asked Ibarra why they were

"doing this" to him, Ibarra again told Galindo to shut up and call Silva. (*Ibid.*) At that point appellant brought out a knife from the kitchen, held it up to Galindo's throat and told him to call Silva. (7 RT 1657-1658.) Appellant threatened to stab him if he did not, and said, "Just call. The only reason I'm not going to do this is because you didn't disrespect me." (7 RT 1659.) Appellant was standing behind Galindo; Ibarra was facing the two of them. (7 RT 1660.) There was a lot of "cussing" and yelling, and Galindo began to cry. (7 RT 1660-1661.)

Ibarra's cell phone then rang; it was Silva calling. (7RT 1663-1664.) Galindo spoke to him and repeated what he had said in the message he had left earlier, in an effort to get Silva to bring drugs: that his cousins wanted Silva to bring drugs over because they were going with some girls to "party." (*Ibid.*) Galindo asked Silva to pick him up in the back of the apartment complex, which he thought might signal Silva that "something was up." (7 RT 1664-1665.) Galindo suspected Ibarra was intending to steal drugs from Silva. (7 RT 1665.)

Silva called again and said told Galindo he was just getting off the freeway. (7 RT 1665.) Appellant told Galindo not to go outside but to wait for Silva to come to the door. (7 RT 1665-1666.) Galindo "kept on telling Ibarra, 'Why are you doing this to me, you know, why?'" (7 RT 1666.) Silva called again. He was coming up to Galindo's front door and asked why Galindo had not met him out back. (*Ibid.*) Appellant, still holding the knife to Galindo's throat, told Galindo to let Silva in. (7 RT 1666-1667.)

Silva started to enter the apartment and Ibarra struggled to pull him into the living room. (7 RT 1669, 1671, 1681.) Appellant then pushed Galindo to the side, still holding the knife, to help Ibarra get Silva into the room, and told Galindo to lock the door. (7 RT 1670, 1681, 1768.) Ibarra

said, "Whatever comes in that f—ing door . . . [w]e'll kill him, you know, I'll kill whoever comes in that door. . . . [¶] I don't care if it's Phillip [Alliano], whoever. . . . You don't let nobody in." (*Ibid.*) Silva asked, "What the f--- did I do?" (7 RT 1677.)

Galindo ran out the door and across the street to where Silva used to live, to look for Silva's "homeboys," because "these guys had weapons, [and he] didn't have nothing." (7 RT 1670-1671, 1686, 1689.) Galindo was also looking for Phillip (his brother's partner), "because Ibarra knew my family, he didn't like Phillip, and Phillip lived with me . . . ." (7 RT 1689.) Phillip was due to be coming home, and Ibarra had said he would kill anyone who came to the door. (7 RT 1689-1690.)

When Galindo went back to his apartment about 20 to 25 minutes later he saw a trail of bloody footprints and drops of blood leading from the front door toward the parking lot. (7 RT 1690-1692.) He opened the door but did not go in. (*Ibid.*) Looking into the apartment he saw blood, a damaged piece of furniture and Silva, on the floor in the center of the living room. (7 RT 1692, 1694.) He did not step inside the apartment because he did not want to leave his footprints in the blood. (7 RT 1727.) He "freaked out" and "went into shock." (7 RT 1695.)

Galindo again went to look for Phillip, whose uncle was a sheriff. He cut through nearby San Marcos High School and ended up at the home of Elia Alvarado. (7 RT 1695.) Although there was a pay phone at the high school gym, Galindo did not stop to call 911, because he was scared. (7 RT 1722.) Galindo did not tell Alvarado what had happened, nor did he call 911 from her residence. He asked Phillip (who apparently was there) to call his uncle, so that he or someone else from the Sheriff's Department could go to Galindo's apartment. (7 RT 1696, 1723.) Instead of calling his uncle,

Phillip called Megan Pope. (7 RT 1724.) They eventually called 911. (7 RT 1695, 1745.)

When asked whether he thought the police might have been able to help Silva if summoned earlier, Galindo acknowledged that he had personal reasons for taking the time to seek out Silva's friends, instead of immediately calling the police: "I didn't want to get the police involved, and I didn't need to add more trouble to – at the time, I was thinking of me, too, so I didn't you know." (7 RT 1725.)

Galindo testified that the taped-up knife that appellant had held to his throat was still missing from his residence. (7 RT 1682.) He identified a small knife, shown in People's Exhibit 13, as appellant's, and testified that he had seen appellant using it to clean under his fingernails. (7 RT 1683-1684.) Galindo could not recall whether Ibarra had a knife. (7 RT 1670.)

Galindo also testified that he recognized Ibarra in a Home Depot security camera surveillance video shown to the jury, in which Ibarra is seen standing in line at a check-out counter. (7 RT 1701; People's Trial Ex. 16.) A receipt for the purchase of plastic sheeting, vinyl gloves and a tool described by the prosecutor as "medieval" looking "weapon," was later introduced into evidence. (8 RT 1759, People's Ex. 26.)

B. Nicole Palicios

Galindo testified that 14-year-old Nicole Palicios, who knew Galindo and Ibarra and was staying in the same apartment complex, came to his apartment on Saturday evening, before the homicide. (7 RT 1697.) Galindo asked Ibarra to ask her to leave, which he did. (7 RT 1697-1698.) Palicios herself testified that she was "on the run" at the time, staying at her friend's grandmother's apartment. (7 RT 1736.) She acknowledged that she knew Galindo and Ibarra and testified that she had gone to Galindo's

apartment Saturday morning, to pick up her purse, which she had left there the day before. (7 RT 1732.) She said she did not go inside the apartment and did not recall seeing appellant there. (7 RT 1732-1734.) Nor did she remember telling the police that Ibarra had said she should leave because something very bad was going to happen, or that Ibarra in fact had said this. (7 RT 1735.) She also denied ever seeing anyone use crystal meth at Galindo's apartment, and said she did not recall telling the police she had seen Galindo, Ibarra or Silva using crystal meth in Galindo's bathroom. (7 RT 1736-1738.)

However, Deputy Sheriff Victor Alvarez testified that when he interviewed Palicios within hours of the homicide she quoted Ibarra as having said, "Meja, you need to leave. You can't be here. Something bad is going to happen. I don't want you to get hurt." (7 RT 1741.)[5]

C. Law Enforcement and Forensics Personnel

When Sheriff's Deputies Hess and Esparza arrived at the scene, Phillip Alliono and Megan Pope were there, standing outside Galindo's apartment; but Galindo was not. (7 RT 1745-1746.) Deputy Hess noticed a trail of bloody footprints and blood drops outside; inside the furniture was in disarray and Silva's body lay on the living room floor. (*Ibid.*)

Former senior identification technician Lisa Hemman went to the crime scene and took photos of the victim; of the apartment and its contents, including a cell phone and a blood-stained knife on the floor; and of the contents of Ibarra's black bag. (7 RT 1749-1756.) The bag, found on the balcony, contained a hatchet-like item, two tarps or rolls of plastic sheeting,

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[5] Detective Alvarez explained that "meja" is a term of endearment in Spanish, literally meaning "my girl." (7 RT 1741.)

duct tape, a workman's knife and a dark jacket of some sort. (7 RT 1751, 1757.) None of the items in the duffel bag had blood on them, no duct tape was found on Silva, and nothing in the duffel bag was ever connected to the homicide. (7 RT 1757-1758.)

A number of autopsy photos were admitted, by stipulation, because the pathologist who performed the autopsy was on vacation. (8 RT 1824, 1872-1874.)

D. Statements By Appellant

James Nalls, the prosecutor's investigator, testified that on October 25, 2005, during pretrial proceedings, he was present in the courtroom and heard appellant make the following statements: "I believe in accepting the consequences of my actions, good or bad, and maintaining my principals (*sic*) regardless of the cost, including death. I feel that if I'm willing to kill I should also be willing to die." (8 RT 1838.)[6] Nalls also quoted appellant having said, "I didn't show any mercy, so I'm not going to ask for any mercy." (*Ibid.*) Finally, Nalls testified he overheard appellant say the following, at the jail, to someone on the phone: "The way I see it, if I'm willing to kill I should be willing to die, too." (8 RT 1839.)

II. The Lopez Assault (Count 2)

Jaime Lopez testified that he had known appellant for four years and had been a member of the Eastside gang for 10 years. (6 RT 1595.) However, while he acknowledged getting "wounded" and stabbed at the Circle K market on September 23, 2004, he repeatedly either denied, or did not recall, appellant being there or being involved in the incident, or saying

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[6] Appellant had made these statements in an effort to explain why he did not wish to present evidence in mitigation. (2 RT 421-422.)

so to Detective Gary Siegel at the time. (6 RT 1597-1606.)

Detective Siegel, with the Youth Services Section of the Santa Barbara Sheriff's Department, testified that he primarily handled gang crimes and was familiar with the Eastside gang. (6 RT 1609.) He knew appellant and Jaime Lopez to be Eastside gang members. (6 RT 1608-1609.) Detective Siegel testified that Lopez identified appellant from a photo line-up as the one who had stabbed him, said he was afraid to testify for fear of gang retaliation, and described how appellant had stabbed him while he was sitting in his car in the Circle K parking lot. (6 RT 1612, 1615-1618.)

III. Prior In-Custody Incidents

Deputy Sheriff Jesse Ybarra testified as to an incident that occurred when appellant was being shackled at the wrists, with a lock box, in a holding cell in the courthouse, preparatory to being taken to court. (7 RT 1771, 1765-1768.) Appellant complained that the shackles were on too tight and that he was in pain, threatened to harm Deputy Ybarra and others, and ultimately was returned to his cell at the county jail. (7 RT 1768-1771.)

Correctional officer Paul Deslaurier described an incident that took place in a hallway at the county jail when appellant "bolted" after two other inmates who were being escorted back to their cells. (7 RT 1776-1778.) Although officer Deslaurier did not see appellant assault either of the inmates, one of them ended up with an abrasion and complained he had been struck. (7 RT 1778.)

Several correctional officers testified about an incident when a "cell extraction" team, also known as a jail SWAT team, forcibly removed appellant from his jail cell, using a taser gun and a "pepper ball launcher." (7 RT 1785-1796, 1789.) Appellant had essentially barricaded himself in

his cell and refused to "cuff up." (7 RT 1783-1788, 1790.) Appellant resisted aggressively, but eventually was subdued by multiple pepper ball shots and was moved bodily to a "safety cell," described as a hard rubber room where the prisoner is left in boxer shorts and a paper gown, pending consultation with a mental health professional. (7 RT 1714, 1792-1793, 1795, 1787, 1790.) A DVD of the cell extraction, narrated by one of the participating officers, was played for the jury. (7 RT 1799-1812; People's Ex. 35].)[7]

James Nalls read from a list of 27 incidents involving appellant, to which appellant had stipulated (8 RT 1863-1864, 1910-1913; 4 CT 1089-1090 [jury instructions]), including: 13 incidents in which appellant was fighting or making threats while in the custody of the California Youth Authority (CYA); one felony conviction for battery on a peace officer, resulting in a commitment to the CYA; one conviction of felony assault on a youth counselor at the CYA; one conviction (by plea) to a misdemeanor assault on appellant's then girlfriend; one conviction of threatening a witness to a gang-related crime; and the cell extraction described above. (8 RT 1840-1844.) Mr. Nalls also read from incident reports regarding 25 of the 27 incidents. (8 RT 1844-1861, 1865-1872.)

IV. Gang Expert Testimony

Detective Siegel was called to testify a second time, about the local gang culture, lifestyle and rivalries (8 RT 1876-1893), and appellant's membership in the Eastside gang (8 RT 1893-1986). According to Detective Siegel, both the assault on Lopez and the murder of Silva would

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[7] A previous cell extraction was mentioned but not described. (7 RT 1797-1798.)

benefit the Eastside gang. (8 RT 1897.) The Eastside gang would benefit from Silva's murder because Silva was a Goleta gang member. (8 RT 1897-1898.)

V. Victim Impact Testimony

Deanna Garcia, Silva's wife, testified she and Silva had been together 12 years prior to his death and had three children together. (8 RT 1900.) Silva had been a good father and had taken an active part in the children's lives, and they missed him. (8 RT 1901.) Her own life had changed since Silva's death; she was trying to be strong for her children. (8 RT 1902.) Silva's mother, Suzanne Silva, testified she had been close to her son and had never known him to be violent. (8 RT 1903.) When he was younger he was associated with the Goleta gang, but had essentially left that behind. (8 RT 1903-1904.) She testified that she missed her son very much and that his death was very difficult for her grandchildren to understand. (8 RT 1905-1906.)

ARGUMENT

I. APPELLANT'S GUILTY PLEA IS INVALID UNDER PENAL CODE SECTION 1018 BECAUSE APPELLANT WAS PROCEEDING IN PRO. PER. AND HAD ONLY THE CONSENT OF ADVISORY COUNSEL

A. Introduction

Penal Code section 1018 expressly prohibits a trial court from accepting a plea of guilty to a felony punishable by death from a defendant who does not appear with counsel, or, if represented by counsel, who does not have the consent of counsel.[8] From the start, appellant made clear he wanted to plead guilty to the murder count and admit the special circumstance allegations. When his appointed counsel, Michael Carty, refused to give his consent and expressed concern about appellant's wish to forgo presenting mitigation, appellant sought to represent himself. He hoped that, without counsel, he could enter a guilty plea, admit the special circumstances and take control of the penalty phase. Although the trial court seemingly understood the constraints of section 1018, it nonetheless relieved Mr. Carty, granted appellant's *Faretta* motion, appointed Joe Allen as advisory counsel and accepted appellant's plea of guilty to capital murder based on Mr. Allen's consent. Under section 1018 and a line of decisions by this Court appellant's plea is invalid.

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[8] Penal Code section 1018 provides in relevant part:

> Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court. 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.

The original and longest standing provision of section 1018 applicable to capital cases states that no guilty plea shall be received in a capital case from a defendant "who does not appear with counsel." Here, because appellant appeared in pro. per., after the court discharged his counsel, the prohibition against receiving appellant's guilty plea was absolute. The acquiescence of advisory counsel did not satisfy section 1018's express requirement of consent of counsel. Advisory counsel is not "counsel," and Mr. Allen was never appellant's counsel.

The remedy for this violation is to reverse the judgment of death and "strike from its records" appellant's plea of guilty and admission of the special circumstances. (*People v. Chadd* (1981) 28 Cal.3d 739, 754.) Additionally, the trial court's acceptance of appellant's plea deprived appellant of his Fifth Amendment privilege against self-incrimination, his Sixth Amendment right to trial by jury and to confront and cross-examine witnesses, his Eighth Amendment right to a reliable, non-arbitrary sentencing determination, his Fourteenth Amendment right to due process and his analogous rights under article I, sections 7, 15, 16, and 17 of the California Constitution.

B. Procedural Background

On March 29, 2005, when appellant appeared for arraignment, his counsel, Michael Carty, announced that appellant wished to represent himself pursuant to *Faretta v. California*, *supra*, 422 U.S. 806. (1 RT 27.) The court cautioned appellant against self-representation, directed Mr. Carty to discuss with appellant the implications of proceeding in pro. per., and indicated it would research whether a defendant could represent himself in a capital case. (1 RT 30-31.) Mr. Carty explained that he had discussed the disadvantages of self-representation with appellant at some length and

opined that appellant was competent to represent himself. (1 RT 31.) Mr. Carty also stated that appellant was pursuing the *Faretta* motion against his advice. (1 RT 31.) The court continued the matter. (*Ibid.*)

On April 5, 2005, Mr. Carty informed the court that appellant intended to plead guilty to the murder count (Count 1) and admit at least one of the special circumstance allegations, and to plead guilty to the attempted murder count (Count 2) as well. (1 RT 57-58.) Mr. Carty added that he had explained to appellant that section 1018 prohibited the court from accepting a guilty plea in a capital case without the consent of counsel, and that he "could not ethically support his change of plea." (*Ibid.*) Mr. Carty proposed the court appoint advisory counsel and condition acceptance of the plea on the consent of advisory counsel. (1 RT 58-59.)

When the court suggested Mr. Carty take more time to review the record before deciding whether to consent to a guilty plea, appellant spoke up, making clear that he did not think Mr. Carty would ever consent, and that in any event Mr. Carty would "interfere with what [he] want[ed] to do." (1 RT 61.) Mr. Carty clarified that, independent of their disagreement about the guilty plea, appellant had "very strong opinions about what type of evidence should be presented on his behalf at the penalty phase," and that appellant "want[ed] to control what sort of mitigating evidence is presented . . . ." (1 RT 64.) The court continued the arraignment. (1 RT 67.)

When proceedings resumed two weeks later, Mr. Carty announced that appellant was making "an unequivocal and timely" *Faretta* motion and wished to enter a guilty plea on all counts and admit the special circumstance allegations. (1 RT 72-73.) Appellant wanted advisory counsel and was willing to continue the arraignment for two weeks to allow advisory counsel time to review the record. (1 RT 73.) The court continued

the matter to the next day. (1 RT 74.)

On April 20, 2005, Mr. Carty informed the court that, having completed his review of the record, including the transcript of the grand jury proceedings and "all of the thousands of pages of police reports," he remained unwilling to consent to appellant's entry of a guilty plea. (1 RT 84.) He noted that he and appellant also continued to disagree fundamentally regarding the penalty phase. Mr. Carty reiterated his concerns about appellant's "strong preferences" as to what material, if any, he would agree to present in mitigation, and about whether or not appellant would cooperate with a penalty phase investigation or agree to the participation of expert witnesses. (1 RT 84-85.) Thus, "part of Mr. Miracle's desire to represent himself has to do not only with guilt, but with penalty phase presentation of the evidence." (1 RT 85.) Mr. Carty surmised that no attorney would be willing to represent him on his terms: "I don't believe Mr. Miracle will find any attorney that will agree not to present mitigating materials, case law prevents that, I believe, with certain tactical decisions which can be agreed on. (*Sic.*)" (1 RT 85.)

Apparently believing that appellant and Mr. Carty disagreed principally about the penalty phase, the trial court suggested to appellant that he could allow Mr. Carty to represent him at the guilt phase, then represent himself at the penalty phase, should there be one. (1 RT 86.) Mr. Carty clarified that appellant wished to represent himself at the guilt phase (in order to plead guilty) and at the penalty phase (in order to ensure no mitigation would be presented). (1 RT 87.)[9] Mr. Carty told the court that

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[9] Mr. Carty also told the court that appellant had refused to agree to provide mitigating evidence to the prosecutor, which Mr. Carty had sought (continued...)

he had given appellant a copy of section 1018 and of *People v. Chadd*, *supra*, 28 Cal.3d 739. (*Ibid.*)

The court then engaged in a colloquy with appellant in which appellant stated that he had read the indictment; that he understood the penalty for murder with special circumstances was "[a] sentence of death or possibility of life without parole (*sic*);" that he had some experience with the criminal justice system, but had no legal training and had never represented himself; that he was 26 years old; that while his full-time formal education had ended in seventh grade he had attended high school sporadically, had taken some college courses while at the CYA and had completed some trade school classes; and that he could read and write. (1 RT 89-91.) Asked why he wanted to represent himself appellant stated: "I believe up to this point [Mr.] Carty's just been interference." (1 RT 91.) Appellant reiterated that he and Mr. Carty disagreed both on the guilty plea and on the presentation of mitigating evidence at the penalty phase:

> THE DEFENDANT: Well, like – like he pointed out, I wish to plead guilty to all of the charges, I don't want to present a defense. [Mr.] Carty has strong objections to that. [¶] And we honestly have a disagreement over the mitigating evidence that he would like to present when we proceed to the penalty trial. I have strong objections to the mitigating evidence that he would like to present. [¶] And I also – I am not inclined to cooperate with any professional help that – that – that he would want me to – to talk to, to any professional investigator or psychologist or anything like that. I don't intend on cooperating with any of them.

(1 RT 91.)

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[9] (...continued)
to do in an effort to dissuade him from seeking the death penalty. (1 RT 106.)

The court next advised appellant that even if he were permitted to represent himself, there "was still going to be a trial":

> THE COURT: You understand that even if I grant your motion to represent yourself in this matter that there's still going to be a trial in this case? I can't accept – under the law of the State of California, I can't accept a guilty plea or no contest plea from you in a capital case like this, do you understand that? [¶] So you have a right under some circumstances to represent yourself, but even if I grant you that right in this case there's still going to be a trial, do you understand that?

(1 RT 92-93.) Appellant said he had "been led to believe" there were other options: "If you were so inclined to appoint an assistant counsel and he was willing to consent to my guilty plea, then that's just as legitimate as Mr. Carty consenting to my plea." (1 RT 93.)

The court responded that, with or without advisory counsel, there was going to be "a trial":

> THE COURT: Let me stop you right there. . . . I think it's highly unlikely that if you're permitted to represent yourself that an advisory counsel is going to be in a position to consent to your entering a guilty plea and admitting the special allegations. So whether you represent yourself without any advisory counsel, or if you represent yourself and I appoint advisory counsel to assist you on an as needed basis, okay, and that would be – that would be the way that I would appoint advisory counsel, in either case there's going to be a trial. . . . So there's going to be a trial either with you – with you representing yourself with the assistance of advisory counsel or with you having counsel appointed like Mr. Carty.

(1 RT 93-94.) Appellant said he understood, but did not agree. (1 RT 94.) He reiterated that if the case proceeded to trial he would not present a defense. (1 RT 94.)

In the course of giving various admonishments regarding the risks

and disadvantages of self representation, the court asked appellant whether he understood that he would be "much better off" if he had an attorney representing him. (1 RT 96.) Appellant responded: "No. Because like I said – well, I understand what you're saying, but I don't feel that's a valid point because I don't intend on offering a defense anyways." (*Ibid.*) Mr. Carty reiterated that he believed appellant was competent to represent himself, but added that he would be doing so against his advice. (1 RT 97-98.) The court told appellant that self-representation was ill-advised, but then granted his *Faretta* motion. (1 RT 98-99.)

When the court indicated it would appoint "stand-by counsel, sometimes referred to as advisory counsel," without distinguishing between the two, Mr. Carty explained that appellant was not requesting stand-by counsel, who would take over if appellant's pro. per. status were revoked, but advisory counsel, who could assist him in various ways, particularly given that the county jail had no law library. (1 RT 100, 101.) Mr. Carty declined the court's suggestion that he serve as advisory counsel, noting that appellant did not want to perpetuate their "clash of wills" and "was hoping that advisory counsel will find that his wish to plead guilty and admit the special allegations have a tactical basis for the mitigation phase and that there's a good reason not to present mitigating evidence." (1 RT 102.) Mr. Carty suggested Joe Allen to serve as advisory counsel. (1 RT 103.)

The court then secured appellant's waiver of the reading of the indictment and entered a plea of not guilty and a denial of the special circumstances. (1 RT 110.) When appellant objected, the court reiterated that section 1018 precluded entry of a plea of guilty:

THE COURT: . . . . [T]he law is . . . quite clear that on a

> capital case I cannot accept a guilty plea from you. . . . [T]here are other options available to you if you want to expedite this proceeding, but that's going to be your choice, it's going to be a choice that you make after you talk to your advisory counsel. At this point in the proceedings, I cannot accept a guilty plea from you, I cannot allow you to admit the special allegations. As I indicated to you, one way or the other we're going to have a trial.

(1 RT 112.) The court continued the arraignment. (1 RT 114-115.)

On April 26, the court announced it had appointed Adam Pearlman to serve as appellant's advisory counsel. (1 RT 118.) The court relieved Mr. Pearlman two days later, based on a conflict of interest, and announced it had "taken the liberty of contacting Joe Allen," who had agreed to act as advisory counsel. (1 RT 125-126, 139, 143.)

On May 24, the court addressed the issue of appellant's access to discovery. (1 RT 172-190.) The prosecutor expressed concern that if appellant were given access to documents containing witnesses' names he might seek "retribution," yet recognized that appellant needed to review the materials, "especially given that his status is in pro. per." (1 RT 178, 187.)

The court again addressed the question of appellant's self-representation when it took up the issue of section 987.9 funding:

> THE COURT: The only thing that I'm concerned about in utilizing those funds is that the decision to utilize those funds for a specific purpose be made by you, Mr. Miracle, because you're the attorney of record, and not by Mr. Allen. [¶] Mr. Allen is advisory counsel, he can advise you as you see fit, he's not co-counsel, he's not your attorney, he's there to advise you as you need advice in proceeding.

(1 RT 224.)[10] When appellant asked if he could authorize Mr. Allen to use

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[10] Penal Code section 987.9 authorizes funds for expert and (continued...)

the section 987.9 funds as he saw fit, the court reiterated its admonishment: "You're your own attorney, Mr. Allen is advisory counsel and not co-counsel, so I'm going to be looking to you when I have questions about what you want [to] do, how you would like to proceed, and you have to understand your role with respect to Mr. Allen, okay?" (1 RT 225.)

When proceedings resumed on June 14, appellant announced he wanted to plead guilty to all charges and admit the special circumstance allegations. (1 RT 228-229.) The court again told appellant that it could not accept such a plea:

> THE COURT: . . . . Well, I think I explained to you once before that I cannot accept a guilty plea from you on a capital case. [¶] You are entitled to . . . make certain decisions that might expedite the trial in this matter, you can invoke your right to have a trial within sixty days, you can request a court trial as opposed to a jury trial, those are options that are available to you that I'm certain you've discussed with Mr. Allen. [¶] I see Mr. Allen shaking his head yes. But I cannot accept a guilty plea from you on a capital case.

(1 RT 229.) Mr. Allen noted that he had found no case law on whether, for purposes of section 1018, the consent of advisory counsel would be the "equivalent" of the consent of counsel. (*Ibid.*)

After conferring with Mr. Allen off the record, appellant asked whether the court would accept his guilty plea if Mr. Allen consented to it as his advisory counsel. The court said it would not: "No, I'm not prepared to do that. I think, Mr. Miracle, that we spent some time discussing your right to represent yourself, I granted you that right, you're going to continue

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[10] (...continued)
investigative services for capital defendants. (Pen. Code, § 987.9, subd. (a).)

to represent yourself." (1 RT 230.) The court reiterated that appellant had the right to expedite the process and could tell the court or a jury whatever he wished to say. "But having chosen to represent yourself," the court continued, "you have more limited options than perhaps you may have had with appointed counsel . . . ." (*Ibid.*) Appellant asked to "waive [his] right to continue to represent [him]self" and have Mr. Allen appointed, but the court declined:

> THE COURT: Well, you're not going to do that today. [¶] I took your decision to represent yourself seriously. We spent a lot of time discussing this, you indicated the reasons on the record why you wanted to represent yourself. You can't just, you know, flip back and forth between representing yourself and having someone represent you. [¶] You now have advisory counsel and he's there to advise you as you feel it necessary, but you're representing yourself. I'm giving you your options now as an attorney and as a defendant, as an attorney representing yourself and as a defendant. [¶] Your option is you can have a Court trial, you can have a jury trial, which do you prefer?

(1 RT 231.)

After a pause in the proceedings the court made clear it was open to reconsidering appellant's self-representation, but only if he needed assistance in actually trying his case:

> THE COURT: Mr. Miracle . . . when I suggested to you that today I'm not prepared to allow you to withdraw your pro per status and appoint counsel, I'm not suggesting that at no point in the future, if you are sincere about wanting to have counsel appointed to assist you in preparing a defense in this case, that I would deny that request. [¶] But if your intent is to play games with the Court, or to seek some other objective other than to have counsel appointed to assist you in preparing a competent defense, then, you know, we're in a different posture. I may not grant that request.

(1 RT 231-232.) When the court then asked Mr. Allen, "Is it [appellant's] desire in having you appointed for the purpose of having you as appointed counsel now concur in his desire to plead guilty? (*Sic*)" Mr. Allen said, "That's right," and then offered to elaborate in camera. (1 RT 233.)

During the in camera proceedings,[11] Mr. Allen explained that he believed appellant was "correct in two fundamental points that are motivating his desire to enter this set of guilty pleas and admissions." First, based on appellant's review of "most" of the evidence, appellant believed the case against him was very strong; and second, appellant wanted "the record to be extremely clear that he's taking full responsibility for what he decided to do." (1 RT 239-240, 241.) Mr. Allen opined that, "in terms of convincing a jury not to vote for death," appellant's "strategy" was "the best available." (1 RT 241.) Mr. Allen added that, "obviously if that acceptance of responsibility is something less than completely free and unconditional it loses its moral strength as an argument to the jury." (1 RT 242.) Mr. Allen offered that, "there is just no real likelihood of an acquittal[,]" but acknowledged that he had not "attempted to assess Mr. Ibarra's relative guilt . . . ."[12] (1 RT 243, 244.)

Appellant countered that, contrary to Mr. Allen's representation, he

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[11] By Order filed June 25, 2014, this Court granted appellant's motion to unseal the transcript of the June 14, 2005, in camera proceedings, spanning pages 238 to 254 of Volume 1 of the Reporter's Transcript.

[12] The transcript of the grand jury proceedings disclosed that Ibarra's fingerprint was positively identified on the pocket knife recovered at the crime scene. (2 CT 380-383; Grand Jury Exs. 6, 36 and 37.) Although the knife with Ibarra's fingerprint was the only one recovered from the crime scene, it was the prosecutor's theory that Ibarra and appellant had each used a knife in the assault of Silva. (2 CT 484-486.)

wished to plead guilty, and testify at Ibarra's trial, not for strategic reasons pertaining to the penalty phase of his own trial, but because he felt it was the right thing to do: "I feel that I'm the sole individual that is responsible, and that's the only motive that I have is that I want to do the right thing and take responsibility and offer exonerating testimony on behalf of Mr. Ibarra." (1 RT 246.) Thus, appellant did not intend to use the fact of a guilty plea as a factor in mitigation. (*Ibid.*) When the court suggested this might not be appellant's "main" motive and pointed out that his plea "would be used at the penalty phase," appellant responded, "Tell you the truth, I'm not concerned about it at all." (*Ibid.*) Mr. Allen acknowledged that using the guilty plea in mitigation was not one of appellant's motivations, though it was one of his. (1 RT 246-247.) Appellant reiterated that he did not want to put on a case in mitigation, "because it's just against my grain. I just don't believe in doing that, I believe the right thing for me to do is take responsibility." (1 RT 247-248.)

The court then explained to appellant that if Mr. Allen were appointed to represent him, it would be for the entire case, and that as counsel Mr. Allen would present mitigating evidence at the penalty phase:

> THE COURT: [Mr. Miracle], you understand that if you are represented by counsel at the guilt phase I'm not going to allow you to represent yourself at the penalty phase, you're going to be represented by counsel, and counsel is going to conduct your defense and he's going to present mitigating evidence even though you may not want him to do that entirely.

(1 RT 248.) In other words, the court was not prepared to appoint Mr. Allen to represent appellant for purposes of entry of a guilty plea, then relieve him so that appellant, in pro. per., could forego presenting a case in mitigation at the penalty phase.

The court informed appellant that it was "99.9 percent sure" it was not going to allow him to enter a guilty plea with the consent of advisory counsel, again explaining that it read section 1018 as prohibiting acceptance of a guilty plea on that basis:

> [T]he legislature has made it clear, as far as I'm concerned, that the only time you can enter a guilty plea is with the concurrence of your counsel, not concurrence of advisory counsel. And I'm not going to expand on what the legislature has said here and create new law. It may not be an unreasonable construction of existing law what you're asking the Court to do, but I'm not going to do it. [¶] . . . . You don't have concurrence of counsel, obviously, because you're representing yourself.

(1 RT 251-252.) When proceedings resumed in open court the trial court confirmed that appellant was contemplating withdrawing his request to represent himself. (1 RT 256.)

On June 28, Mr. Allen addressed the relationship between section 1018 and *Faretta*. In support of appellant's "first choice" – i.e., to continue to represent himself and enter a guilty plea – he argued that if the right to self representation included the right to plead guilty in a capital case, then *Faretta* and section 1018 were in conflict. (2 RT 260-262.) He noted that appellant's "second choice" was to have him appointed to represent him. (2 RT 262-263.) The court responded that "[its] reading and view of *Faretta* is that it permits a defendant to represent himself at trial when the defendant is of the view that he can provide for himself competent counsel at trial," but that "[w]hen a defendant chooses not to exercise that right to present a defense and to go to trial, but, rather, indicates to the Court that he would like to enter a guilty plea then I think we're outside the parameters of *Faretta*." (2 RT 263.)

Without citing *People v. Chadd, supra*, 28 Cal.3d 739, by name, the court noted there was a California case "that reconciles *Faretta* with Section 1018 and simply indicates that the State has a compelling interest in insuring that a right result is reached in a death penalty case . . . and that interest is furthered by requiring an attorney to consent to a defendant's request to enter a guilty plea in a capital case." (2 RT 263-264.) The court advised appellant that the only way he could plead guilty to capital murder was "with the consent of counsel, and that's counsel that's appointed to represent you." (2 RT 264.) The court indicated that if appellant was "sincere" in wanting Mr. Allen to represent him, it would consider appointing him, but warned appellant that Mr. Allen would then be counsel for the duration, with no "going back and forth." (2 RT 265.) The court agreed to Mr. Allen's request for leave to file a brief on the section 1018/*Faretta* issue, but reiterated that "there are compelling reasons for Penal Code Section 1018 requiring the consent of counsel when a defendant in a capital case seeks to enter a guilty plea." (2 RT 266-267.)

On July 11, Mr. Allen filed his "Memorandum Brief In Support Of Constitutional Right of Self-Represented Defendant To Enter Plea Of Guilty To Capital Charge," in which he argued that either the consent of advisory counsel should be construed as equivalent to the consent of appointed or retained counsel for purposes of section 1018, or section 1018 conflicted with and should "give way" to appellant's constitutional right to self-representation under *Faretta*, which guarantees a criminal defendant the right to personally defend himself. (2 CT 581-591.)

When proceedings resumed on July 15, the court began by eliciting appellant's acknowledgment that he had reviewed Mr. Allen's brief and had authorized its filing. (2 RT 273-274.) Appellant confirmed that he still

wished to plead guilty to the capital murder count, but would maintain his not guilty plea as to Count 2, the alleged attempted murder of Jaime Lopez. (2 RT 275-277.)

Turning to the merits of the guilty plea issue, the court elicited Mr. Allen's agreement that he had been playing a relatively active role, and appellant's acknowledgment that this was acceptable. (2 RT 278-279.) The court then secured Mr. Allen's agreement that "at least up until this point in the proceedings" he had been "willing to accept the duties and responsibilities of counsel for Mr. Miracle within the meaning of Penal Code Section 1018." (2 RT 280-281.) Asked by the court whether he would characterize his role as having been "one of counsel and not advisory counsel," Mr. Allen said he had "spent the same time and diligence and explored the same information and issues to the same extent" as if he had been appointed to represent appellant. (2 RT 281-282.) Asked whether that was true "with particular reference to the spirit of Penal Code Section 1018," Mr. Allen answered yes. (2 RT 282.)

The court then asked appellant whether he still wanted to represent himself. (2 RT 282.) Appellant said he did. (*Ibid.*) Asked whether he wanted the court to appoint Mr. Allen as his attorney, appellant said no. (*Ibid.*) When the court asked appellant whether he was willing to accept the "greatly expanded role" Mr. Allen was playing, appellant responded that he both accepted and encouraged it. (2 RT 282-283.) Summing up, the court stated:

> THE COURT: Well, the label that I'm going to continue to use with respect to you, Mr. Allen, will be advisory counsel. But I don't want there to be any ambiguity in the record, and I don't think there is, in terms of the greatly expanded role that you've assumed in discharging responsibilities as the

functional equivalent as of counsel for Mr. Miracle (*sic*).

(2 RT 283.)

The court then confirmed that appellant still wanted to plead guilty to the capital charges and elicited Mr. Allen's representation that he was prepared to consent to the plea, but continued the arraignment again, to allow appellant time to review the waiver of rights form. (2 RT 283, 287, 289-290.) When the prosecutor invited Mr. Allen, on behalf of appellant, to his office to review discovery materials, the court directed that this occur, to insure that "the person who has been the attorney, who has been designated advisory counsel, is one hundred percent comfortable with the giving of consent within the meaning of Penal Code Section 1018." (2 RT 293.)

On July 29, the court began the proceedings by noting that when the parties last appeared "we had a discussion about what we needed to do to enable you, Mr. Miracle, to enter a plea of guilty or no contest to the capital charges . . . ." (2 RT 299.) Mr. Allen indicated he was satisfied that he had all of the discovery, and appellant said he had reviewed it with Mr. Allen. (2 RT 300.) The court then elicited from appellant that, having discussed the matter with Mr. Allen, he wished to plead guilty, and from Mr. Allen his consent to the guilty plea. (2 RT 300-301.) The court then announced, "Well, I'm going to accept the consent to the guilty pleas as is required by Penal Code section 1018." (2 RT 301.) The court added that "at least part of the justification and explanation for Mr. Allen providing consent" would be found in the transcript of the in-camera hearing. (2 RT 303.)

When the prosecutor began going through the written waiver form, the court, addressing Mr. Allen, expressed its understanding that appellant was effectively both representing himself and represented by counsel:

THE COURT: We're not relieving or withdrawing Mr.

> Miracle's pro per status. He's entitled to that and he retains it both now and into future proceedings. [¶] But your role as advisory counsel has been greatly expanded. In effect, you're proceeding as counsel to Mr. Miracle.

(2 RT 304.) Mr. Allen agreed. (2 RT 305.) The prosecutor then went through the waiver of rights form, engaging in a colloquy with appellant, wherein appellant acknowledged that he had reviewed the form with advisory counsel and had no questions about it, had initialed and signed it as appropriate, understood the various rights he was waiving, and was receiving nothing in exchange for his plea. (2 RT 305-308.) Mr. Allen joined in the waiver. (2 RT 308.) The court engaged in a similar colloquy with appellant, asking him, among other things, whether he felt he understood the waiver form, whether advisory counsel had reviewed it with him and whether he (appellant) believed there was factual support for a conviction of murder and the related allegations. (2 RT 308-309.) The court secured Mr. Allen's concurrence in the factual basis for the plea and announced its finding that appellant had "knowingly, intelligently, and understandably waived his rights." (2 RT 309.) The court then reiterated that it "continued to be of the view that [appellant] has the intelligence and capability of representing himself," and observed that there was "nothing . . . that would suggest that there's not a legal basis to go forward today." (2 RT 309-310.) At the court's invitation, the prosecutor then took appellant's guilty plea on the capital murder count (Count 1). (2 RT 310-313.)

On September 8, 2005, appellant changed his plea to guilty with respect to the attempted murder of Jaime Lopez (Count 2). (2 RT 333.)

C. Section 1018 Prohibits the Acceptance Of a Guilty Plea to Capital Murder From a Defendant Who Is Representing Himself

Section 1018 governs the acceptance of guilty pleas in felony cases. As to capital cases the statute currently provides: "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." (Pen. Code, § 1018.) The legislative history of section 1018 and key decisions of this Court make clear that section 1018 prohibits a trial court from accepting a guilty plea in a capital case from a defendant who is representing himself. (See, e.g., *People v. Massie* (1985) 40 Cal.3d 620, 625 ["a defendant who wants to plead guilty in a capital case *must be represented* by counsel (italics added)"].)

As this Court has noted, the Legislature amended section 1018 to impose special conditions on the acceptance of guilty pleas from unrepresented defendants, "drawing a distinction according to the severity of the potential punishment." (*People v. Chadd*, *supra*, 28 Cal.3d at p. 749.) Section 1018 was first amended to prohibit the acceptance of a guilty to capital murder from a defendant "who does not appear with counsel," and to provide that a guilty plea in a noncapital case could be accepted from an unrepresented defendant only if he had "voluntarily, intelligently and openly waived his right to counsel." (*Id.* at p. 750, citing Stats. 1949, ch. 1310, § 1, p. 2298 and Stats. 1951, ch. 858, § 1, p. 2369.) Thus, the more stringent of these amendments, applicable to capital felonies, categorically prohibited the acceptance of a plea by a self-represented defendant, even if he had given a constitutionally adequate waiver of counsel. (*Ibid.*)

In 1973 the Legislature amended section 1018, to add that a defendant wishing to plead guilty to capital murder must again not only *have* counsel, but also the *consent* of their counsel, to close the "statutory gap" revealed in *People v. Vaughn* (1973) 9 Cal.3d 321, in which this Court had construed the prior version of section 1018 as effectively allowing a capital defendant who had counsel to ignore his counsel's professional judgment and advise. (*People v. Chadd*, *supra*, 28 Cal.3d at pp. 749-750, citing Stats. 1973, ch. 719, § 11, p. 1301.) Section 1018 has consistently been construed to require, in the first instance, that defendant who wishes to plead guilty to a capital offense "be represented by counsel." (*People v. Chadd*, *supra*, 28 Cal.3d at p. 749, citing *People v. Vaughn*, *supra*, 9 Cal.3d at p. 327.)

In *People v. Ballentine* (1952) 39 Cal.2d 193, the defendant, charged with capital murder, appeared at the arraignment with counsel, who then withdrew when the defendant made clear he did not wish to be represented by counsel. (*Id.* at p. 194.) When the trial court informed the defendant that he was entitled to counsel and "ought to have one," the defendant stated he did not wish to have an attorney and "waived it." (*Ibid.*) The defendant said he would not object to the court's appointing counsel but also said he "c[ould]n't see the sense of having one" because he intended to plead guilty, knowing the seriousness of the charges against him and the possibility he could be sentenced to death. The court then informed the defendant that it could not "force anything on" him, but again advised him of his right to counsel. (*Id.* at p. 195.) Ultimately, the court accepted the defendant's guilty plea and he was sentenced to death. (*Id.* at pp. 194-195.)

This Court reversed, on the grounds that section 1018 prohibits the acceptance of a guilty plea to a felony punishable by death from a defendant

who "is not represented by counsel." (*People v. Ballentine*, *supra,* 39 Cal.2d at p. 196.) The Court rejected the state's reliance on the defendant's voluntary and knowing waiver of his right to counsel, as well as its argument that section 1018 should not be construed to abrogate a defendant's state constitutional right to represent himself:

> The statute . . . does not prevent a defendant from waiving his right to the aid of counsel and defending himself. It merely prohibits the court from receiving a plea of guilty to a felony for which the maximum punishment is death made by a defendant not represented by counsel. Should a defendant waive his right to counsel and refuse to answer the charge against him by an acceptable pleading, the court must enter a plea of not guilty for him (Pen. Code, § 1024.) The cause would then proceed to trial and the defendant might represent himself, subject to the requirement that his waiver of the right to counsel was made understandingly, competently, and voluntarily in the exercise of a free choice.

(*Id.* at pp. 195-196, citations omitted.) The *Ballentine* court stressed that a criminal defendant does not have the absolute right to plead guilty to capital murder. (*Id.* at pp. 196-197.)

In *People v. Chadd*, *supra*, 28 Cal.3d 739, the defendant, charged with murder with special circumstances, initially entered a plea of not guilty, through his appointed counsel. (*Id.* at p. 744.) When the prosecutor announced his intention to seek the death penalty, defense counsel informed the court that his client wished to plead guilty, against counsel's advice. (*Ibid.*) Defense counsel reiterated he would not consent to entry of a guilty plea. (*Id.* at p. 745.) The trial court concluded that if it found defendant competent to represent himself under the standards set out in *Faretta*, it could accept his guilty plea despite his counsel's refusal to consent. (*Ibid.*) "The court reasoned simply that such a finding would be 'tantamount to'

relieving Mr. Pitkin as counsel and permitting defendant to actually represent himself." (*Ibid.*) The trial court then questioned the defendant, found him competent and allowed him to plead guilty to murder and admit the special circumstance allegations. (*Ibid.*)

This Court reversed the judgment, holding that "the trial court committed prejudicial error in accepting [the] plea without the consent of defendant's counsel as required by Penal Code section 1018." (*People v. Chadd, supra*, 28 Cal.3d at p. 743.) The Court expressly rejected the notion that section 1018 could be construed to permit a capital defendant to first obtain leave to proceed in pro. per. and then plead guilty. Construing section 1018, as amended in 1973, the Court reasoned, first, that as a matter of statutory construction it was "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.'" (*Id.* at p. 746.) The Court also concluded that construing section 1018 to permit a self-represented defendant to plead guilty to capital murder would render the portion of section 1018 governing felonies *not* punishable by death superfluous:

> [The Attorney General] urges in effect that [section 1018] be read to permit a capital defendant to discharge his attorney and plead guilty if he knowingly, voluntarily, and openly waives his right to counsel. But that is precisely what the third sentence of section 1018 expressly authorizes *noncapital* defendants to do. The proposal would thus obliterate the Legislature's careful distinction between capital and noncapital cases, and render largely superfluous its special provision for the former. Such a construction would be manifestly improper.

(*Id.* at p. 747, citation and footnote omitted; see also *People v. Massie* (1985) 40 Cal.3d 620, 624 [Court rejects as "manifestly improper" any

construction that would "obliterate the Legislature's careful distinction between capital and noncapital cases and render largely superfluous its special provision for the former"].)

The Court in *Chadd* explained that while the decision how to plead in a criminal case is "personal to the defendant," the Legislature "has the power to regulate, in the public interest, the manner in which that choice is exercised," because a guilty plea "is the most serious step a defendant can take in a criminal prosecution." (*People v. Chadd, supra*, 28 Cal.3d at p. 748.) First, "[a guilty plea] operates . . . as a waiver of formal defects in the accusatory pleading that could be reached by demurrer." (*Ibid.*, citation omitted.) Second, "because there will be no trial the plea strips the defendant of such fundamental protections as the privilege against self-incrimination, the right to a jury, and the right of confrontation." (*Ibid.*, citing *Boykin v. Alabama* (1969) 395 U.S. 238, 243 and *In re Tahl* (1969) 1 Cal.3d 122, 130-133.) Third, "the plea is deemed to constitute a judicial admission of every element of the offense charged. . . . Indeed, it serves as a stipulation that the People need introduce no proof whatever to support the accusation: the plea ipso facto supplies both evidence and verdict." (*Ibid.*, citations omitted.) Fourth, a guilty plea "severely restricts the defendant's right to appeal from the ensuing judgment." (*Ibid.*, citation omitted.) Section 1018 reflects the Legislature's concern over these "consequences" of pleading guilty. (*Id.* at pp. 748-749.) Here the implications of appellant's plea could not be more serious, as he pled guilty unconditionally to capital murder without the prosecution's agreement that

it would not seek the death penalty.[13]

Finally, the Court in *Chadd* considered the relationship between *Faretta* and section 1018, expressly concluding that *Faretta* "did not strip our Legislature of the authority to condition guilty pleas in capital cases on the consent of defense counsel." (*People v. Chadd*, *supra*, 28 Cal.3d at p. 750.) The Court rejected the argument that the right to self-representation recognized in *Faretta* encompasses the right of a capital defendant to forgo presenting a defense:

> The Attorney General in effect stands *Faretta* on its head: from the defendant's conceded right to "make a defense" in "an adversary criminal trial," the Attorney General attempts to infer a defendant's right to make no such defense and to have no such trial, even when his life is at stake. But in capital cases . . . the state has a strong interest in reducing the risk of mistaken judgments.

(*Id.* at p. 751.)

The Court reiterated that nothing in *Faretta* abrogated the holding in *North Carolina v. Alford* (1970) 400 U.S. 25, 38-39, that a state may constitutionally prohibit all guilty pleas to murder charges, or the holding in *People v. Stanworth* (1969) 71 Cal.2d 820, 833, that a capital defendant has no right to waive his automatic appeal. (*People v. Chadd*, *supra*, 28 Cal.3d at pp. 751-752; see also *People v. Alfaro* (2007) 41 Cal.4th 1277, 1299 [reaffirming reconciliation of section 1018 and *Faretta*]; *People v. Joseph* (1983) 34 Cal.3d 936, 948-949 [reaffirming that *Faretta* does not permit

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[13] The Commentary to Guideline 10.9.2 of the 2003 American Bar Association Guidelines For the Appointment and Performance Of Defense Counsel In Death Penalty Cases, in effect at the time of appellant's plea, cautions, in pertinent part, that: "If no guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be very reluctant to participate in the waiver of a client's rights."

defendant to "defend" himself by discharging counsel and waiving his automatic appeal].)

As repeatedly affirmed by this Court, any uncertainty about the effect of *Faretta* on section 1018 was resolved in *Chadd*, when this Court held "that it was within the Legislature's power to determine, as it has, that a defendant who wants to plead guilty in a capital case must be represented by counsel who exercises his independent judgment in deciding whether to consent to the plea." (*People v. Massie*, *supra*, at p. 625, citing *People v. Chadd*, *supra*, 28 Cal.3d at pp. 747-750; see also *People v. Mai* (2013) 57 Cal.4th 986, 1055 ["even if otherwise competent to exercise the constitutional right to self-representation [citation omitted], a defendant may not discharge his lawyer in order to enter such a plea over counsel's objection"]; *People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1299-1302.) As explained further below, the trial court erred as a matter of law in accepting appellant's guilty plea because appellant was not represented by counsel when he entered his plea.

D. Appellant's Guilty Plea Was Invalid Because He Was Representing Himself When the Court Accepted His Plea

After reviewing the record, appellant's counsel, Mr. Carty, informed the court that he would neither consent to appellant's guilty plea nor serve as his advisory counsel; he suggested that Mr. Allen be appointed as advisory counsel. (1 RT 100-103.) The court eventually did appoint Mr. Allen, but still refused to accept appellant's guilty plea as long as he was in pro. per., and refused to appoint Mr. Allen as "counsel" for the sole purpose of his consenting to the guilty plea (1 RT 230-233, 265). The court also correctly explained that the Legislature had made clear that a capital

defendant could plead guilty only with the concurrence of counsel, not advisory counsel, and recognized that appellant did not have counsel: "You don't have concurrence of counsel, obviously, because you're representing yourself." (1 RT 251-252.)

The trial court was right, in this instance, to stress the bright-line distinction between a defendant who is self-represented and one who is represented by counsel. As this Court has explained, a defendant *either* is proceeding in pro. per. *or* is represented by counsel, but cannot be both:

> [A]t all times the record should be clear that *the accused is either self-represented or represented by counsel; the accused cannot be both at once*. A defendant represented by counsel who wishes to participate in the presentation of the case, but without surrendering the benefits of professional representation, may do so only with counsel's concurrence and under counsel's supervision, and only by leave of the court upon a proper showing. (Citation.) Similarly, a self-represented defendant who wishes to obtain the assistance of an attorney in an advisory or other limited capacity, but without surrendering effective control over presentation of the defense case, may do so only with the court's permission . . . .

(*People v. Bloom* (1989) 48 Cal.3d 1194, 1219, italics added; see also *People v. Stewart* (2004) 33 Cal.4th 425, 517-518.)

Here appellant sought and was granted leave to represent himself when his appointed counsel, Mr. Carty, refused to consent to his pleading guilty. The record confirms that appellant then at all times remained in pro. per., and that Mr. Allen served only as advisory counsel, and never as counsel of record. As noted, for example, during in camera proceedings conducted before entry of the plea the court noted that appellant "d[id]n't have concurrence of counsel, obviously, because [he was] representing [him]self." (2 RT 251-252.) When appellant asked the court whether it

might accept his guilty plea based on Mr. Allen's consent as advisory counsel, the court initially declined, because appellant was representing himself: "You now have advisory counsel and he's there to advise you as you feel it necessary, *but you're representing yourself.* I'm giving you your options now as an attorney and as a defendant, as an attorney representing yourself and as a defendant." (1 RT 231, italics added.) Immediately before it accepted appellant's guilty plea, the trial court asked whether, "Mr. Miracle, you continue to desire *to represent yourself* and direct Mr. Allen to assist you *as you deem appropriate*?" Appellant answered, "Yes." (2 RT 282, italics added.) When the court followed up with, "So you don't want the Court at this point in time *to appoint Mr. Allen as your attorney*?" appellant answered, "No." (*Ibid.*, italics added.) Later, the court noted that "Mr. Miracle *is representing himself.* He requested the assistance of advisory counsel. . . . [W]e've worked out the relationship between Mr. Miracle and Mr. Allen, and whenever Mr. Allen is speaking, *it's with the . . . express authorization of Mr. Miracle.*" (7 RT 1699, italics added.)[14] Because appellant was not represented by counsel when the court accepted his guilty plea, reversal is mandated as a matter of law under section 1018.

The fact that appellant was in pro. per., as the trial court recognized, was dispositive – section 1018 unambiguously prohibits the acceptance of a guilty plea to capital murder by a self-represented defendant. (*People v. Chadd*, *supra*, 28 Cal.3d at p. 747.) The further provision of section 1018,

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[14] The record of the parties' appearances also routinely recites that appellant is appearing in pro. per., with advisory counsel (e.g., 1 RT 133, 154, 169, 199, 228; 2 RT 259, 273, 299, 347, 372, 409, 464; 3 RT 535, 566, 676, 732; 4 RT 789, 1013; 5 RT 1200; 6 RT 1386, 1473, 1560), and the court consistently described appellant, in the jury's presence, as representing himself (e.g., 7 RT 1675; 8 RT 1918, 1953).

allowing acceptance of a guilty plea with "the consent of the defendant's counsel," has no application here, precisely because appellant did not have "counsel." The legislative history of section 1018 and the relevant decisions of this Court, discussed above, make clear that while the categorical prohibition against acceptance of a guilty plea to capital murder from a defendant who does not "appear with counsel" is intended to protect *self-represented* defendants from ill-advised pleas, the prohibition against receiving a guilty plea without "the consent of the defendant's *counsel*" is designed to ensure that capital defendants who *do* have counsel in fact are bound by their counsel's independent professional judgment. (*People v. Chadd, supra*, 28 Cal.3d at pp. 749-750.) Because appellant was in pro. per., the "consent of counsel" provision of section 1018, as stated and construed by the courts, is not implicated. The court erred in allowing appellant to plead guilty based on Mr. Allen's consent because Mr. Allen was never appellant's "counsel."

The distinction between counsel and advisory counsel is well established and legally significant. "When a defendant is represented by counsel, it is counsel who 'is in charge of the case' and the defendant 'surrenders all but a handful of "fundamental" personal rights to counsel's *complete control* of defense strategies and tactics.'" (*In re Barnett* (2000) 31 Cal.4th 466, 472, italics added; accord *People v. Cook* (2007) 40 Cal.4th 1334, 1343 ["counsel, as 'captain of the ship,' maintains complete control of defense tactics and strategies, except that the defendant retains a few 'fundamental' personal rights"]; *New York v. Hill* (2000) 528 U.S. 110, 114-115 [an attorney has full authority to manage the conduct of the trial without obtaining client's approval]; *Taylor v. Illinois* (1988) 484 U.S. 400, 417-418 [same]; *Jones v. Barnes* (1983) 463 U.S. 745, 751-752 [while

client controls certain limited fundamental personal rights, counsel otherwise controls the case, even when contrary to client's wishes].)

By contrast, advisory counsel may be appointed, at the trial court's discretion, to advise and assist a *self-represented* defendant in presenting his defense at trial; not in forgoing it. (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1219; *People v. Blair* (2005) 36 Cal.4th 686, 725, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-920 ["'Advisory counsel' . . . is appointed to assist the self-represented defendant if and when the defendant requests help."].)

Thus the trial court got it right the first time, when it told appellant "the legislature has made it clear . . . that the only time you can enter a guilty plea is with the concurrence of your counsel, not [the] concurrence of advisory counsel." (2 RT 251.) Because appellant was in pro. per., the court then erred in accepting his guilty plea under the plain terms of section 1018.

E. The Acceptance Of Appellant's Guilty Plea In Violation Of Section 1018 Compels Striking the Plea and the Admission of the Special Circumstances and Reversing the Death Sentence

Appellant's guilty plea was invalid as a matter of law because he was not represented by counsel when the plea was accepted. The court's acceptance of appellant's guilty plea in violation of section 1018 compels the striking of the plea as well as the admission of the special circumstance allegations, and requires reversal of the death sentence. (*People v. Chadd*, *supra*, 28 Cal.3d at p. 754.)

The erroneous acceptance of appellant's guilty plea implicates constitutional, as well as state statutory, guarantees. Just as section 1018 furthers the state's interest in reliable, nonarbitrary capital sentencing

determinations (*People v. Chadd, supra*, 28 Cal.3d at p. 750), it is equally well established that appellant himself has an Eighth Amendment right to a reliable, non-arbitrary sentencing determination. (E.g., *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330; *People v. Chadd, supra*, 28 Cal.3d at p. 750.) The court's violation of section 1018 deprived appellant of that right. Moreover, as this Court recognized in *Chadd*, an invalid plea of guilty to capital murder also deprives the defendant of key Fifth and Sixth Amendments rights: "[B]ecause there will be no trial the [guilty] plea strips the defendant of such fundamental protections as the privilege against self-incrimination, the right to a jury, and the right of confrontation." (*People v. Chadd, supra*, 28 Cal.3d at p. 748, citing *Boykin v. Alabama* (1969) 395 U.S. 238, 243, and *In re Tahl* (1969) 1 Cal.3d 122, 130-133.)

Finally, the Supreme Court has also recognized that a criminal defendant has a Fourteenth Amendment due process liberty interest in the enforcement of state statutory rights:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

(*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, citations omitted; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [capital defendant entitled to have aggravating and mitigating sentencing factors weighed in the manner required by state law; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969-971 [giving capital sentencing instruction that is erroneous under state

law deprives defendant of due process life interest].) Here, by prohibiting entry of a guilty plea to a felony punishable by death from a defendant who appears in pro. per., section 1018 afforded appellant a liberty interest in having a jury determine his guilt or innocence of capital murder; the trial court's acceptance of appellant's guilty plea in violation of section 1018 deprived him of that interest, and thus violated his Fourteenth Amendment right to due process.

F. Conclusion

For the foregoing reasons, the trial court's erroneous acceptance of appellant's guilty plea mandates vacating appellant's plea and admission of the special circumstances, reversing the judgment of conviction on Count 1 and reversing the sentence of death.

II. APPELLANT WAS EXCESSIVELY AND VISIBLY SHACKLED IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO PARTICIPATE IN HIS OWN DEFENSE AND TO A FAIR AND RELIABLE PENALTY DETERMINATION

A. Introduction

Appellant was visibly restrained in the courtroom throughout his trial. Initially, his legs were shackled and both of his wrists were confined in a lock box attached to a waist chain. Then the lock box was replaced with three sets of handcuffs, attached in two places to a waist chain, while the leg shackles remained. Additionally, a sheriff's deputy was stationed nearby appellant. The court not only prohibited appellant from having one hand free, but also forbade him from using any writing instrument, even the two-and-a-half-inch golf pencil the sheriff's department had proposed. Although appellant had engaged in no misconduct in the courtroom, the trial court cited appellant's prior criminal record and other assaultive conduct, and his hostile and threatening behavior toward correctional staff at the jail and in the holding cell in reaction to the shackling, as a basis for insisting that he be shackled in the courtroom to the greatest possible extent.

Appellant was prepared to wear ankle schackles or other restraints not visible to the jurors. But the multiple restraints appellant was forced to wear throughout his trial were visible and excessive, leaving the jury with the indelible impression that appellant was to be feared. The restraints exceeded what the sheriff's department found necessary to ensure courtroom security; inhibited appellant's ability to participate in his own defense; caused prolonged pain, stress and discomfort; and prejudicially bolstered the prosecutor's argument that, if not sentenced to death, appellant would pose a danger to others in the future. Appellant's restraints thus

denied him his Fifth and Fourteenth Amendment rights to due process and a fair trial, his Sixth Amendment right to participate in his own defense, his Eighth and Fourteenth Amendment right to a reliable sentencing determination, and his correlate state constitutional rights. Reversal of appellant's death sentence is therefore required.

B. Appellant Was Visibly Restrained In the Courtroom In the Jurors' Presence

On October 18, 2005, after the court had accepted appellant's guilty plea but before the start of jury selection, Mr. Allen, appellant's advisory counsel, noted that appellant had been coming to court under tight security conditions. (2 RT 401.) He stated that visible shackling of appellant's hands at counsel table was articularly problematic. (2 RT 402.) Appellant needed to have his hands free to take notes. (*Ibid.*) The court indicated it was familiar with United States Supreme Court authority, and the presumption against shackling, particularly when the defendant is proceeding in pro. per. and needs to make notes to his advisory counsel. (2 RT 401-402.) The court stated, "So if we're going to do something other than what the U.S. Supreme Court has said then we need a report from the sheriff's department why shackles are necessary." (2 RT 401.)

On October 28, 2005, the Santa Barbara Sheriff's Department filed a motion seeking to have appellant "physically restrained in Court by having both his hands handcuffed within a lockbox, and to a waist chain, and having both of his legs attached to leg shackles." (3 CT 850-863, at p. 850.)[15] The motion described incidents when appellant, in custody, had "slipped" a handcuff and assaulted another inmate, attempted to assault

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[15] The motion identifies the sheriff's department as the petitioner and appellant as the respondent. (3 CT 850.)

other inmates, threatened and charged at jail personnel, pulled a razor blade from his waistband and lashed out with it, and blocked the view into his cell, resulting in his forcible "extraction" by a team using a taser gun and pepper spray. (3 CT 851-854.) The motion also cited appellant's prior convictions for offenses involving violence or the threat of violence, including incidents involving custodial and emergency personnel, with supporting documentation. (3 CT 853, 863-878.)

On November 3, 2005, County Counsel Michael Ghizzoni, who was appearing on behalf of the sheriff's department, handed appellant a copy of the motion; the court suggested it recess briefly to allow appellant time to read it. Mr. Allen explained that it would be very difficult for appellant to read anything in the holding cell, given that his hands were shackled. (2 RT 467.) When the court asked appellant to raise his hands, Mr. Ghizzoni confirmed appellant's hands were restrained in a lock box. (2 RT 468.) The court noted that it could "see by observing Mr. Miracle, who has the lock box on his wrists, that he would not be able to write with the lock box." (4 RT 468.) Appellant was also wearing a waist chain and leg shackles. (2 RT 467.)

Mr. Ghizzoni then informed the court that the sheriff's department had agreed to modify their original request for restraints: "[A]fter working with Mr. Allen and the sheriff's department, we believe that with the combination of legs shackled together and Mr. Miracle's non writing hand restrained to a waist belt, his writing hand could be free so long as there were additional deputies nearby." (2 RT 469, see also 487-489.) That arrangement "would provide adequate courtroom security while still providing him with his writing hand free." (2 RT 469.) Mr. Ghizzoni proposed appellant use a short golf pencil. (*Ibid.*) The court again stated it

would "take a break. I want Mr. Miracle, just as a matter of procedure, to read the motion . . . ." (2 RT 469-470.) The court indicated it might be willing to allow appellant to have one hand free if Mr. Ghizzoni felt courtroom security could still be maintained, but was inclined not to, and instead to take more frequent breaks. (*Ibid.*)

When proceedings resumed Sergeant Timothy Morgan, head of the jail's Special Operations Response Team, testified that the "cell extraction" cited in the shackling motion was necessary because appellant had blocked the view into his cell, preventing staff from conducting mandatory security checks, and had then refused to leave his cell voluntarily. (2 RT 491-495.) Appellant was taken to a "safety cell" and strip searched. (2 RT 496-497.) At that point appellant verbally threatened jail personnel. (2 RT 497-498.) A video of the incident was played for the court, showing jail personnel firing a pepper ball gun and a 50,000-volt taser at appellant to forcibly remove him from his cell. (2 RT 495-496, People's Ex. 35.)

Mr. Ghizzoni then summarized the sheriff's department's position: appellant would wear leg shackles, and at least his "non writing hand" would be handcuffed to his waist chain. (2 RT 499-500, see also 487-489.) Mr. Ghizzoni noted that attempts to conceal these restraints from the jury would not likely succeed, given the "relative positions of the jury box and defendant's chair" and the fact that appellant had elected to wear jail clothing. (2 RT 499-500.) Mr. Ghizzoni also suggested the court give a cautionary jury instruction regarding appellant's shackles. (2 RT 500.) Mr. Allen pointed out that the agreement to allow appellant to have his writing hand free amounted to a concession that there was no "manifest necessity" for both of appellant's hands to be shackled. (*Ibid.*) He added that the cell extraction had occurred months earlier, that appellant had been

uncooperative but had not hurt anyone, and that he had been a gentleman in court. (2 RT 500-501.)

The court prefaced its ruling on the shackling motion by citing *People v. Duran* (1976) 16 Cal.3d 282 and *Deck v. Missouri* (2005) 544 U.S. 622, noting the requirement of "manifest need" and the courts' concern about the visibility of shackles to the jury. (2 RT 502.) The court found restraints were needed, based on appellant's prior misconduct in jail. (2 RT 504.) The court observed that all of the restraints would be visible to the jurors, and acknowledged appellant was asking to have one hand free because he was proceeding in pro. per. and wanted to be able to communicate with advisory counsel. (2 RT 502-503.)

The court nonetheless denied appellant's request to have one hand free and ordered appellant shackled in the manner originally requested in the sheriff department's written motion. (2 RT 504, 511.) The court described the courtroom, noting how close appellant was to others, and expressed its concern about putting a pencil, no matter how small, in appellant's hands: "So, I'm not going to permit you to use any sort of writing instrument." (2 RT 504.) The court suggested appellant could communicate with Mr. Allen by whispering. (*Ibid.*) The court offered to take more frequent breaks and arrange for appellant to be brought to court 10 minutes early and for proceedings to adjourn 10 minutes early. (*Ibid.*) The court also indicated it might revisit the issue. (*Ibid.*)

When Mr. Ghizzoni sought clarification, the court confirmed that "the original request was that both hands would be handcuffed within the lock box" and reiterated "[t]hat's what I want in this courtroom." (2 RT 505.) The court added, "And I want the waist chain and I want the leg shackles." (2 RT 506.)

Appellant's suggestion that he wear a stun belt instead, so he could take notes, was rejected, in part because the sheriff's department did not have one. (2 RT 507-510.) The court reiterated its refusal to allow appellant to write: "So, for security purposes I am not going to permit the defendant's use of his hands for the purpose of writing. I'm just not going to do it. I just don't see any justification for it. And I think we can address his need to communicate to [Mr. Allen] in other ways." (2 RT 510.)

Jury selection began November 14, 2005. Appellant, Mr. Allen and the prosecutor were introduced to the first panel of prospective jurors, who were then sworn. (3 RT 583-587.) The court gave no admonition or instruction to this panel, or to any other, regarding appellant's visible shackles.

On November 21, 2005, the court again took up the subject of restraints (outside the presence of the prospective jurors). (3 RT 746.) Mr. Allen expressed concern that appellant, in pro. per., should be able to "take notes of things that happen, either events in the case or particular things said by witnesses." (3 RT 747.) He asked appellant to stand, so the court could see "that the way Mr. Miracle has been coming to court so far his hands point in opposite directions." (3 RT 747.) He conveyed appellant's suggestion that if the lock box were placed on his wrists so that his hands pointed in the same direction, with a bit more slack in the waist chain, he could put both hands on the table and take notes, holding the paper down with one hand and writing with the other. (3 RT 747-748.) Mr. Allen stressed that, given appellant was representing himself, his ability to take notes was particularly important. (3 RT 748.) He said he had found some felt-tip pens appellant might use, in the courtroom. (*Ibid.*) He also conveyed appellant's suggestion that his leg shackles could be fastened to

the table, and added that appellant's waist chain could also be secured that way. (3 RT 749.)

The court directed appellant to place his hands on the table and then asked: "Does anyone have a key to the lock box? [¶] I'd like to see what you're proposing in terms of his hands together." (3 RT 749.) Before anyone could respond Mr. Ghizzoni suggested "just taking a note pad and having it double-back taped to the table." (3 RT 750.) Mr. Allen said, "That's fine. As long as he can comfortably lean forward and take notes." (*Ibid.*) When Mr. Ghizzoni explained that the sheriff's department was concerned that felt-tip pens were too long, Mr. Allen responded, "I'm happy with golf pencils, that's fine." (*Ibid.*) The court, however, was not: "Well, I'm not particularly happy with a golf pencil, because they are very sharp. They maybe short, but I think they can be gripped enough to cause fairly significant damage or injury." (3 RT 751.) The court proposed that appellant confer with defense investigator Lynn McLaren, seated at counsel table, and that she take notes. (*Ibid.*) The court again denied appellant's request to have any writing instrument, whether a golf pencil or a felt-tip pen. (*Ibid.*)

Mr. Allen next explained that the lock box was causing appellant to suffer muscle cramps and expressed concern "about trying to make that bearable for him in terms of the passage of time." (3 RT 752.) Appellant added that it was a "very stiff position" for him to be in for any length of time. (*Ibid.*) The court proposed appellant's hands might be repositioned periodically, perhaps with appellant's "right arm on top" in the morning and his "left arm on top" in the afternoon; and when Mr. Ghizzoni suggested that appellant could have the lock box "potentially" removed altogether during breaks outside the courtroom, the court agreed. (3 RT 753.) The

court then continued, however: "And it may be uncomfortable, but it's not of a nature that I think warrants, you know, taking the lock box off or – I mean, if it can be, if it can be maneuvered in a slightly different way, or, you know, changed from the afternoon to the morning session then that's fine. (*Sic.*)" (*Ibid.*)

Appellant then suggested that securing a chain to an eye bolt on the table, with his hands still in the lock box, would give him a range of motion of one-and-a-half to two feet, which would allow him to place his hands on the table to write notes and read documents, and would be more comfortable. (3 RT 753-754.) Appellant reminded the court of the discomfort he was suffering: "Because after one or two hours in the courtroom I start cramping up, and by the time I go back to the jail my whole body is really stiff. Especially my neck." (3 RT 754.) Appellant explained that his neck got stiff because the lock box forced him to lean forward. (*Ibid.*) When appellant acknowledged that standing up helped alleviate the discomfort, the court suggested it might take more frequent breaks, but added that, based on its observations, what appellant was experiencing was not "the type of discomfort or pain that rises to the level of a violation of due process or a violation of [appellant's] legal rights." (3 RT 754.) The court reiterated that its primary concern was with security and that "the lock box ensures security." (3 RT 755.)

Mr. Ghizzoni then described the table and opined that it was not structurally sound enough for an eye bolt arrangement. (3 RT 755.) The court told appellant it was concerned that it would be worse for the jurors to see appellant chained to a table, which is "what we do with rabid dogs," than to see him with "handcuffs on [his] hands and a chain around [his]

legs. (3 RT 755-756.)[16] The court describe appellant as being able to "raise both arms at once," "move [his] feet back together," "put [his] knees together and separate them," and thus have "a little bit of freedom of movement." (3 RT 756.)

On November 28, 2005, outside the presence of the prospective jurors, Mr. Allen asked that appellant be permitted to have the lock box removed while he was in the courthouse holding cell during breaks and recesses. (4 RT 903.) The court said no. (*Ibid.*) Mr. Allen reminded the court it "had previously indicated that it would accommodate having the lock box off when [appellant] [was] in breaks, because, otherwise, if it's on for hours and hours and hours it causes muscle cramps." (4 RT 904.) The court responded that it was not necessary to do so "in terms of the representation of himself" and that "in terms of the security risk" it would leave the matter to the sheriff's department to decide. (*Ibid.*) The bailiff then explained that "the biggest reason" why the lock box could not be removed during beaks was that he did not always have a key for it. (*Ibid.*) A sheriff's sergeant explained they needed three bailiffs to "unlock him and lock him back up again," which would "hold up proceedings." (*Ibid.*) The court concluded the discussion by saying, "I think that's your answer, Mr. Allen, Mr. Miracle," and recessed for lunch. (*Ibid.*)

On November 30, 2005, appellant was not present in court when proceedings began. (4 RT 1007.) Deputy Sheriff Jesse Ybarra had informed the court that when jail personnel had attempted to put restraints on appellant in order to transport him to the courtroom, appellant had gotten

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[16] At this point appellant was in fact still wearing the lock box, not the triple handcuffs, which he would not begin wearing until December 5, 2005. (See pp. 59-60, *post.*)

"out of control, . . . was threatening corrections officers, . . . was acting violently [and] . . . was not in a condition to bring into the courtroom." (*Ibid.*) Appellant had been returned to the jail. (4 RT 1007-1008.) When the panel of prospective jurors scheduled for voir dire entered the courtroom, they were informed that because of "court emergency" they were to return the following Monday, December 5, 2005. (4 RT 1010.)

On Thursday, December 1, 2005, the court began the proceedings by warning appellant it had contemplated revoking his pro. per. status and appointing Mr. Allen to represent him, and would do so if appellant engaged in any further misconduct. (4 RT 1014.) The court then proceeded with voir dire (of a different panel of prospective jurors). Later the same day the court returned to the subject of appellant's disciplinary incident. (5 RT 1188.) The court reiterated that it was inclined to revoke appellant's pro. per. status. (5 RT 1188-1189.) The court noted Mr. Allen would then "dictate how the case would proceed" if he were appointed to represent appellant. (5 RT 1189.)

Mr. Allen explained that appellant did not wish to disrupt the proceedings and understood the court's admonitions. (5 RT 1191.) Because of the "conditions" previously discussed, appellant had asked to waive his presence for further voir dire, and have Ms. McLaren take notes for use during the peremptory challenges. (5 RT 1191-1192.) When the court asked appellant, "And the reason why you don't want to be present is because of the restraints on your arms?" appellant replied, "Yes." (5 RT 1193.) When the court specified that this was "[b]ecause there's some discomfort associated with those restraints," appellant again said, "Yes." The court expressed concern that allowing a pro. per. defendant to waive his presence because of restraints deemed necessary "create[d] a legal

issue," which it decided to defer. (5 RT 1192-1193.)

On December 5, 2005, Deputy Ybarra testified about the incident of November 30, 2005, resulting in appellant's failure to appear in court. Deputy Ybarra and another officer were putting restraints on appellant in the courthouse holding facility when appellant became agitated, aggressive and belligerent and insisted the lock box was too tight. (5 RT 1202.) He demanded to be taken back to the jail. (*Ibid.*) When instead he was placed in his holding cell, and discovered the lock box was not going to be removed, he again became hostile and aggressive. (5 RT 1202-1203.) He was then transported back to the jail. (5 RT 1203.) Deputy Ybarra also read Correctional Officer Morales's report into the record, to the effect that appellant had complained that the waist chain was too tight and had become belligerent and hostile when Officer Morales refused to loosen it by more than one link. (5 RT 1204-1205.) At Mr. Ghizzoni's request, a report of another cell extraction, conducted November 26, 2005, with a taser gun, was also made part of the record. (5 RT 1206.)

The court then returned to the issue of appellant's hand restraints, noting it had ordered that appellant be allowed to wear long-sleeved shirts and/or wrist bands, subject to any objection by the sheriff's department. (5 RT 1207-1208.) Mr. Ghizzoni said that the "padding" the court had ordered increased the chances that appellant might slip out of the lock box restraint system. (5 RT 1208.) Mr. Ghizzoni offered that, if the court were persuaded that the lock box was "not appropriate," based on appellant's complaints that it was painful, the sheriff's department was prepared to adopt an alternative system of restraints, which appellant was then wearing. (5 RT 1209.) Mr. Ghizzoni described this system as consisting of three sets of handcuffs – each of appellant's hands was cuffed to his waist chain and

his two hands were cuffed together – with the same leg shackles and an additional sheriff's deputy stationed "near" appellant. (5 RT 1209-1211.)[17] The court agreed to this system based on Mr. Ghizzoni's representation that the arrangement was adequate, and with the understanding that they would resume use of the lock box if necessary. (5 RT 1212.) The court also agreed to allow appellant to wear thicker socks, again based on the sheriff's department's acquiescence. (5 RT 1212-1213.) Jury selection then resumed. (E.g., 5 RT 1225-1228.)

The jury was sworn December 6, 2005. (6 RT 1426.) All but one of the twelve jurors (4 RT 1247-1250, 6 RT 1408 [Juror No. 6]) had been voir dired in open court when appellant was still visibly restrained and distressed in the lock box arrangement, prior to the switch on December 5, 2005, to the triple handcuffs and additional sheriff's deputy (4 RT 837-839, 6 RT 1409 [Juror No. 1]; 4 RT 868-869, 6 RT 1417 [Juror No. 2]; 4 RT 966-967, 6 RT 1406 [Juror No. 3]; 4 RT 906, 6 RT 1405 [Juror No. 4]; 4 RT 1099-1101, 6 RT 1409 [Juror No. 5]; 4 RT 1153, 6 RT 1410 [Juror No. 7]; 4 RT 874-875, 6 RT 1409 [Juror No. 8]; 4 RT 1163-1164, 6 RT 1404 [Juror No. 9]; 4 RT 875-876, 6 RT 1410 [Juror No. 10]; 4 RT 1164-1165, 6 RT 1411 [Juror No. 11] and 4 RT 838-839, 6 RT 1417 [Juror No. 12]). Alternate Juror No. 1, who later replaced a sitting juror, had also been voir dired while appellant was wearing the lock box. (4 RT 1013.)

Appellant was visibly shackled with the triple handcuffs, waist chain and leg chains throughout the penalty phase. The jury was instructed to disregard appellant's restraints: "The fact that physical restraints have been

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[17] Mr. Ghizzoni also stated that "Mr. Miracle, if he . . . inhales, can raise the waist chain up some inches and have some arc with each hand." (5 RT 1210.)

placed on defendant, Joshua Miracle, must not be considered by you for any purpose. You must not speculate as to why restraints have been used in determining the issues in this case. Disregard this matter entirely." (4 CT 1080; 8 RT 1958.)

C. Restraints Visible To the Jury Must Be Justified By a State Interest Particular To the Defendant's Trial, Be Based On a Showing Of Manifest Need and Be the Least Obtrusive Means, Imposed As a Last Resort

In *Deck v. Missouri* the defendant, convicted of murder and sentenced to death, had – like appellant – been shackled in leg irons, handcuffs and a waist chain, at the retrial of the penalty phase of his trial. (*Deck v. Missouri, supra*, 544 U.S. at p. 625.) The Supreme Court found these shackles had not been shown to be justified and reversed the death sentence, holding that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." (*Id.* at p. 629.) The Court identified three "fundamental legal principles" implicated by the unjustified shackling of a criminal defendant at the guilt phase of a capital trial: the presumption that the defendant is innocent; the defendant's right to counsel and to participate in one's own defense without pain, embarrassment or confusion; and the dignity and decorum of the judicial process itself. (*Id.* at pp. 630-632; see also *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 747-748 ["in the absence of a compelling need to shackle the defendant during his sentencing hearing, such a practice is inherently prejudicial"].)

The Court in *Deck* next concluded that these considerations "apply with like force to penalty proceedings in capital cases." (*Deck v. Missouri*,

supra, 544 U.S. at p. 632.) The court reasoned that while application of the second and third considerations was obvious – the accused's ability to defend and the dignity of the judicial process – the first consideration applied as well because the jury's decision between life and death is "no less important" than its decision between guilt and innocence. (*Ibid.*) "That decision, given the 'severity' and 'finality' of the sanction, is no less important than the decision about guilt. *Monge v. California*, 524 U.S. 721, 732, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) (quoting *Gardner v. Florida*, 430 U.S. 349, 357, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977))." (*Ibid.*) The Court observed that "[t]he appearance of the offender during the penalty phase in shackles . . . almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community – often a statutory aggravator and nearly always a relevant factor in jury decisionmaking . . . ." (*Id.* at p. 633.) Because the practice "almost inevitably affects adversely the jury's perception of the character of the defendant . . . . it inevitably undermines the jury's ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive – when it determines whether a defendant deserves death." (*Ibid.*) At the penalty phase of a capital trial, where "the Court has stressed the 'acute need' for reliable decisionmaking," visible restraints "inevitably undermine the jury's ability to weigh accurately all relevant considerations" and "can be a 'thumb [on] death's side of the scale.'" (*Id.* at pp. 632-633, quoting *Monge v. California*, *supra*, 524 U.S. at p. 732 and *Sochor v. Florida* (1992) 504 U.S. 527, 532.) Therefore, a trial judge may only order that a capital defendant be shackled to take into account "special circumstances, including security concerns," and then only based on a "case specific" determination that "reflect[s] particular concerns,

say, special security needs or escape risks, related to the defendant on trial." (*Ibid.*)

Even before the Supreme Court clarified the law, in *Deck*, the Ninth Circuit had acknowledged the inherently prejudicial effect of shackling a criminal defendant at the sentencing phase of a capital trial. In *Duckett v. Godinez*, *supra*, 67 F.3d 734, the court noted that shackling conveyed future dangerousness:

> In the penalty phase of a capital trial, the jury knows the defendant is a convicted felon. But the extent to which he continues to be dangerous is a central issue the jury must decide in determining his sentence. "[N]ot all convicted felons are so dangerous and violent that they must be brought to court and kept in handcuffs and leg irons." *Lemons v. Skidmore* [7th Cir. 1993] 985 F.2d [354], 357. Unlike prison clothes, physical restraints may create the impression in the minds of the jury that the court believes the defendant is a particularly dangerous and violent person.

(*Id.* at p. 748.) The court noted that due process requires a trial court to engage in a two step process before shackling a defendant at trial. First, the court must be persuaded by "compelling circumstances" that some measure of shackling is needed to maintain courtroom security; and, second, the court must pursue "the least restrictive alternative" before resorting to shackles. (*Ibid.*, citing *Jones v. Meyer* (9th Cir. 1990) 899 F.2d 883, 885, and quoting *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 720-721.)

This Court has also long recognized the inherently prejudicial effect of requiring a criminal defendant to wear handcuffs, shackles, leg irons or other physical restraints at trial. In *People v. Harrington* (1871) 42 Cal. 165 the Court reasoned that "any order or action of the Court which, without evident necessity, imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and

embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense . . . ." (*Id.* at p. 168.)

More recently, in *People v. Duran*, *supra*, 16 Cal.3d 282, this Court reaffirmed that the "possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon a defendant's decision to take the stand, all support our continued adherence to the *Harrington* rule." (*Id.* at p. 290.) This Court also noted that the Supreme Court "ha[d] acknowledged that physical restraints should be used as a last resort not only because of the prejudice created in the jurors' minds, but also because 'the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" (*Ibid.*, quoting *Illinois* v. *Allen* (1970) 397 U.S. 337, 344.) Accordingly, this Court has held that the imposition of restraints must be based on a showing of manifest need, supported by evidence of "violence or a threat of violence or other nonconforming conduct" (*People v. Duran*, *supra*, 16 Cal.3d at pp. 290-291, citing *Kennedy v. Cardwell* (6th Cir. 1973) 487 F.2d 101, 102); and that "where physical restraints are used those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances" (*Id.* at p. 291). The imposition of visible physical restraints otherwise constitutes an abuse of discretion. (*Ibid.*)

D. The Restraints Imposed On Appellant Were Unduly Restrictive, Painful and Excessive

The restraints appellant was made to wear – first the lock box confining both wrists, attached to a waist chain, coupled with the leg shackles, and later the triple handcuffs, waist chain and leg shackles – were

visible and excessive. Although appellant had acted out in custody outside the courtroom, he had never engaged in any threatening, emotional or disrespectful misconduct or outbursts in the courtroom, where he appeared in pro. per. (See 5 RT 1190-1191.) Nor was there any evidence appellant posed a flight or escape risk.

The restraints the court imposed were also excessive in that they were more restrictive and onerous than what the sheriff's department deemed sufficient to address all security concerns. (See *Deck v. Missouri*, *supra*, 544 U.S. at p. 633.) Although in its written motion the sheriff's department requested that, in addition to leg shackles, appellant be restrained with a lock box and waist chain, Mr. Ghizzoni later informed the court that allowing appellant to have his writing hand free would be acceptable, and suggested appellant could use a golf pencil to write on a pad of paper affixed to counsel table. (2 RT 469-470, 3 RT 750.) Yet the court refused to accept even this reasonable accommodation; both of appellant's hands remained restrained throughout the trial, initially in the lock box, then in the triple handcuffs, and at all times with a waist chain attached. While some physical restraints might have been appropriate, there was no "manifest need" to restrain appellant to such an extreme extent. The court thus failed to use the least restrictive means necessary in order to ensure courtroom security. (*People v. Duran*, *supra*, 16 Cal.3d at p. 290, quoting *Illinois v. Allen*, *supra*, 397 U.S. at p. 344.)

Restraining appellant's hands and wrists in the courtroom to the extent the court did also interfered with appellant's ability to participate in his own defense. (*Deck v. Missouri*, *supra*, 544 U.S. pp. 630-632.) Particularly because he was proceeding in pro. per., his need to be sufficiently free of restraints was paramount and is one of the factors

required to be taken into account in the case-specific assessment of the need for restraints. (See *People v. Burnett* (1980) 111 Cal.App.3d 661, 669 [whether or not visible to the jury, shackles impermissibly prevented pro. per. defendant from leaving his chair]; *Deck v. Missouri*, *supra*, 544 U.S. at p. 629.) The trial court repeatedly informed the jury that appellant was representing himself; yet visibly restrained him in a manner that prevented him from taking notes or communicating silently in writing with his advisory counsel – the court having denied his request to have one hand free to use a short golf pencil – and from grasping documents so he could read them. (2 RT 468 [court acknowledges that appellant cannot write when wearing lock box], 3 RT 750-751 [court declines to allow appellant to use golf pencil]; 2 RT 467 [appellant unable to read documents in holding cell because of wrist restraints].)

The importance of appellant's ability to communicate silently with Mr. Allen is underscored by the trial court's own description of the "small, relatively small courtroom," with appellant seated "in very close proximity" to a number of courtroom personnel. (2 RT 504.) Appellant thus had reason to believe his privileged, oral communications with Mr. Allen or Ms. McLaren would be overheard.

With respect to keeping appellant shackled even in the courthouse holding cell, the court erred not merely in keeping appellant excessively restrained where courtroom security was not at issue, but in allowing law enforcement staffing and logistical constraints to dictate the nature and extent of appellant's restraints. (*People v. Stevens* (2009) 47 Cal.4th 625, 642 [trial court may not defer decisionmaking authority as to the need for particular restraints to law enforcement officers, but must "come to its own conclusion" about the need for particular restraints rather than "abdicate

control to law enforcement"].) When Mr. Allen reminded the court that it had said it might allow appellant to be free of restraints during breaks, the court replied, "I'm going to leave that up to the Sheriff's Department." (4 RT 904.) When a deputy explained that they did not always have a key for the lock box, and that they needed three deputies to take appellant's restraints off and put them back on again, the court dismissed the matter without further inquiry, saying, as noted, "I think that's your answer, Mr. Allen, Mr. Miracle." (*Ibid.*) The court took no steps to direct law enforcement personnel to obtain a key for use during appellant's trial, for example; or to assess whether three officers in fact were needed to remove and reattach appellant's restraints in a holding cell; or to determine whether additional personnel could be brought in on an as needed basis to assist with that task; or to inquire whether appellant might be released from wrist restraints in the holding cell at least once or twice a day, if not at every break. The court thus erred in allowed appellant's right to participate effectively in his own defense – by reviewing documents in the holding cell, and by getting temporary relief from the pain, stress and discomfort the court knew the restraints caused – to give way to unexamined logistical and staffing concerns.

That the restraints the court insisted appellant wear all day every day caused appellant pain and discomfort is itself a factor rendering the restraints excessive.[18] Appellant was in the most severe pain during the

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[18] Appellant appeared in court wearing the lock box, waist chain and ankle shackles for five days of voir dire. (3 RT 586 [November 14, 2005]; 3 RT 676 [November 16, 2005]; 3 RT 732 [November 21, 2005]; 4 RT 789 [November 28, 2005]; 4 RT 1013 [December 1, 2005].) He appeared in the triple handcuffs, affixed to a waist chain, and leg shackles, with the

(continued...)

critical stage of voir dire. Early on Mr. Allen advised the court that the lock box "leads to muscle cramps after a couple of hours" and expressed his concern about "trying to make that bearable," given appellant would be shackled for a number of hours. (3 RT 752.) Appellant himself explained that the lock box forced him to remain in "a very stiff position," because it caused him to lean forward continuously, and that by the end of the day his whole body was stiff, especially his neck. (3 RT 752-754.) Although the court suggested they could take more frequent breaks so the lock box could be removed periodically (2 RT 469), in fact, as noted, that did not occur. (4 RT 904 [appellant remains shackled when in the holding cell]; 2 RT 467 [appellant cannot read documents in the holding cell because his hands are shackled]; 5 RT 1191 [Mr. Allen's reference to "the length of the day and the conditions that [appellant]'s in].) The pain from the lock box was such that appellant even contemplated waiving his presence during jury selection. (5 RT 1191-1192.)

Although near the end of jury selection the court agreed to allow appellant to wear the triple handcuffs, affixed to a waist chain, in lieu of the lock box, the alternate arrangement did little to alter the impression of appellant as incorrigibly dangerous and afforded him only marginally more freedom of movement. (5 RT 1210.) Further, appellant was still not able to write, having categorically been denied access to even a two-and-one-half

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[18] (...continued)
additional deputy stationed near him, for eight days, commencing December 5, 2005, the last day of voir dire and for the duration of the penalty trial. (5 RT 1200 [December 5, 2005]; 6 RT 1386 [December 6, 2005]; 6 RT 1473 [December 7, 2005]; 6 RT 1560 [December 8, 2005]; 7 RT 1675 [December 9, 2005]; 8 RT 1818 [December 15, 2005]; 8 RT 1918 [December 16, 2005], 8 RT 1963 [December 19, 2005].)

inch golf pencil.

Finally, the "dignity and decorum of the judicial process" necessarily are diminished when a self-represented capital defendant is forced to appear shackled to the extreme extent appellant was before the jury that would decide whether he should be sentenced to death. (*Deck v. Missouri*, *supra*, 544 U.S. at p. 632.)

E. The Court's Excessive Shackling Of Appellant Was Prejudicial

Visible shackling is "'inherently prejudicial.'" (*Deck v. Missouri*, *supra*, 544 U.S. at p. 635, citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 568; see also *People v. Hernandez* (2011) 51 Cal.4th 733, 745-746 ["the high court has held that shackling is an inherently prejudicial practice"].) "Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" (*Deck v.* Missouri, *supra*, 544 U.S. at p. 635, quoting *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Hernandez*, *supra*, 51 Cal.4th at p. 745 [acknowledging that *Deck* holds that criminal defendants have a due process right to be free from inherently prejudicial security measures such as shackling, and that the unjustified imposition of such measures is an error of constitutional dimension]; *People v. Miller* (2009) 175 Cal.App.4th 1109, 1115, citing *People v. McDaniel* (2008) 159 Cal.App.4th 736, 742 [applying *Chapman* where shackles presumed to be visible to the jury].) Here the state cannot meet it's burden to show that appellant's visible and excessive shackling did not contribute to his sentence of death.

First, as noted, the lock box was visible during the voir dire of 11 of the original 12 jurors and one of the alternate jurors who ultimately were sworn to try the case, and the triple handcuffs, which replaced the lock box, and the additional deputy sheriff stationed near appellant for the duration of the trial, were visible to the 12 sitting jurors who ultimately voted to sentence appellant to death. The excessive visible shackling alone establishes prejudice. (See, e.g., *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 637 [prejudice established in part by the fact that unjustified shackles were visible to the jurors]; *Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439, 1450-1452 [the appearance in shackles of a defendant who has already been convicted of a terrible crime may be so inherently prejudicial as to deny him a fair capital sentencing proceeding].)

Second, the various restraints appellant was made to wear caused him pain, stress and discomfort. (3 RT 752-753; 5 RT 1191-1192; 7 RT 1769.) The Ninth Circuit has held that "evidence of physical and emotional pain" may demonstrate "a strong likelihood of prejudice." (*Rhoden v. Rowland, supra*, 172 F.3d at p. 637, citing *Holbrook v. Flynn, supra*, 475 U.S. at p. 568.)

Third, although appellant had pled guilty and admitted the special circumstances, the case against him at the penalty phase, presented to the jury as the "circumstances of the crime" (Pen. Code, § 190.3, factor (a)), left ample room to question his individual, as well as relative, culpability of capital murder. Notably, the prosecutor repeatedly told the jury that co-defendant Ibarra was equally culpable. Thus, for example, in his opening statement the prosecutor told the jury that appellant "*and a man named Robert Ibarra* . . . murdered Eli Silva;" that it was Ibarra who knew Silva and that they "didn't particularly care for one another;" that appellant *and*

Ibarra were talking about dealing with "rats" in Santa Barbara; that "*Mr. Ibarra and* Mr. Miracle wanted more crystal meth;" that Ibarra and Silva had had "a falling out"; that Ibarra pulled Silva into the room when he came to the door; and that "Miracle *and Ibarra* stabbed Eli Silva 48 times." (6 RT 1582, 1582-1583, 1584, 1585, 1587, 1588, italics added.) In his closing argument the prosecutor then reiterated that appellant *and Ibarra* "wanted" to kill Silva and "planned it out." (8 RT 1976.)

Robert Galindo, the prosecution's principal witness, confirmed that it was Ibarra who knew Silva, and harbored animosity toward him (7 RT 1627); that it was Ibarra who left the apartment and returned with the duffle bag containing plastic sheeting, duct tape and a tool resembling a hatchet (7 RT 1641-1642; 1750-1751); that Ibarra was "wired," "antsy" and "hyper" (7 RT 1644); that "Ibarra wanted to get some drugs because he just got his check" (7 RT 1647); that Ibarra was getting "pushy" and repeatedly urged him to call Silva to ask him to bring drugs to the apartment (7 RT 1653, 1650-1652, 1654, 1656, 1657); that Ibarra pulled Silva into the room (7 RT 1660, 1671, 1677); that Ibarra then threatened to kill whoever might next come to the door, including Phillip (Galindo's brother's partner) (7 RT 1670, 1689); and that one of the two knives ostensibly used in the homicide was never recovered (7 RT 1682). Galindo did not witness the homicide, and the prosecution did not call anyone who did.

That one or more jurors harbored doubt as to the extent of appellant's legal and moral responsibility for first degree capital murder is further evidenced by the note the jury sent to the court during deliberations. Among the questions the jurors asked were: "1. Is there a doc signed by Mr. Miracle that says he was the one who used the knife to kill Mr. Silva?" and "6. What happens when you use crystal meth? How long does it

impact a person? Does it agitate someone? Would a person know what they're doing while under its influence?" (4 CT 1114.)[19] Although the jury's verdict was received before the court could respond to the note, the jurors' questions underscore that a death sentence was not a forgone conclusion. (Cf. *People v. Burnett*, *supra*, 111 Cal.App.3d at p. 669 [visible

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[19] The jurors' note, in full, reads as follows:

Questions:

1. Is there a doc signed by Mr. Miracle that says he was the one who used the knife to kill Mr. Silva?
2. What day was Mr. Miracle apprehended and where (city)?
3. Can you give us Mr. Miracle's age and the year he first started disobeying the laws? What was the offense?
4. Can you give us some personal background on Mr. Miracle (family life, schooling, his children and wife, if any, family support system)?
5. Where does Mr. [Galindo] . . . work? What type of work does he do? Was he employed at the time of the murder?
6. What happens when you use crystal meth? How long does it impact a person? Does it agitate someone Would a person know what they're doing while under its influence?
7. You showed video of Mr. Ibarra in a grocery (?) store picking up various things. Were the items important to this case? Other than Gil stating it was Mr. Ibarra was there any other importance to this video?
8. What holds more weight– what a witness states under oath or what a witness signs as to what happened to be the truth?

(4 CT 1113-1115.)

physical restraints not harmless even where evidence of guilt was strong].)

Most important, appellant's appearance in shackles, which "almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community," credited the prosecutor's argument that appellant should be sentenced to death because he would pose be a danger to others if allowed to live. (*Deck v. Missouri*, *supra*, 544 U.S. at p. 633; *Rhoden v. Rowland*, *supra*, 172 F.3d at p. 637 [shackling "essentially branded Rhoden as having a violent nature in a case where his propensity for violence was the crucial issue"].) "[T]he extent to which [the defendant] continues to be dangerous is a central issue the jury must decide in determining his sentence." (*Duckett v. Godinez*, *supra*, 67 F.3d at p. 748.)

Here, after alluding to the incident when appellant threatened the officers who were reattaching the restraints that appellant found so painful, the prosecutor asked, "Who is next?" (8 RT 1990.) The prosecutor then argued explicitly that appellant would pose a threat to anyone he came in contact with in prison – professionals, correctional staff and inmates – if allowed to live:

> . . . . And there's just no evidence at all of Mr. Miracle ceasing to be dangerous when he's locked up.
>
> . . .
>
> When we talk about who's next, it's not speculating about literally who's next, but just consider the people that Mr. Miracle will be in contact with for the rest of his life if his life is spent in prison, the entirety of it, every doctor that has to examine him, every dentist, every nurse, every corrections officer that has to transport him to the shower and back, out to the yard for exercise, every one of those people is in, I would argue, *grave danger at any time*, no matter how careful they are or used to the institution they are. And that's

> forgetting entirely other inmates, who you may or may not have sympathy for.

(8 RT 1997-1998, italics added.)

In his concluding remarks the prosecutor reiterated his theme of future dangerousness: "Who's next? That's the question that just keeps coming back to me, who's next? [¶] Ladies and gentlemen, you have the power to say no one else." (8 RT 200-2001.) Appellant's presence in shackles graphically brought home the prosecutor's message that appellant would pose a continuing threat of violence, in the prison "community." Appellant's visible shackles, conveying future dangerousness, also lessened the mitigating weight appellant's unconditional guilty plea had, in and of itself, regardless of appellant's election not to argue the point, as an expression of appellant's acceptance of responsibility.

The fact that appellant chose to appear in his prison clothes did not diminish the prejudicial effect of his shackles. The jurors knew he had been convicted, by plea, of first degree murder and therefore would minimally be sentenced to life imprisonment without possibility of parole; thus they would have expected him to be in custody. In any event, it is not the fact that appellant was in custody that made his shackles prejudicial. The court's observation in *People v. McDaniel* is analogous and instructive:

> It is not the fact that the defendant is a prison inmate that makes shackling prejudicial; rather, it is the jurors' visual, psychological, and emotional response to seeing a defendant so physically restrained and differentiated from everyone else and the natural tendency to wonder whether the defendant is a violent and dangerous person, and worry about safety.

(*People v. McDaniel*, *supra*, 159 Cal.App.4th at p. 746 [prejudicial abuse of discretion to allow defendant, a prison inmate, to be shackled with only one hand free, absent prior determination of necessity or justification]; see also

People v. Miller, *supra*, 175 Cal.App.4th at pp. 1116-1117.)

Finally, that the jurors were instructed to disregard appellant's restraints does not render his excessive shackling harmless. (See *People v. Soukomlane* (2008) 162 Cal.App.4th 214, 231 [court rejects argument that because the trial court gave a shackling instruction any inferences the jurors may have drawn about defendant on learning he was restrained presumptively had no bearing on their decision to convict].) Here, given the high visibility and extent of appellant's restraints, and the vigor of the prosecutor's future dangerousness argument, the jurors cannot reasonably be expected to have ignored appellant's shackles or the message they conveyed.

F. Conclusion

Appellant was visibly and excessively shackled to an extent that exceeded even the sheriff department's assessment of what was required to ensure courtroom security. Though proceeding in pro. per., he was denied the means to take notes for himself or to communicate in writing to his advisory counsel, or to review documents. The shackles, which appellant was forced to wear even in the courthouse holding cell, caused pain, stress and discomfort. Appellant's shackling made him look the part of the dangerous criminal who, the prosecutor argued, should be sentenced to death lest he harm others in the future. Because under these circumstances it cannot be said beyond a reasonable doubt that the appellant's excessive shackling did not contribute to the verdict, his death sentence must be reversed. (*Deck v. Missouri*, *supra*, 544 U.S. at p. 635; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Hernandez*, *supra*, 51 Cal.4th at p. 735.)

III. CALIFORNIA'S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. However, this Court has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme would be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges to California's sentencing scheme in order to urge reconsideration of these claims and to preserve them for federal review. Should the Court decide to reconsider any of these claims, appellant requests leave to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To pass constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few murder cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting this criterion requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S.

862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 listed 21 special circumstances which in total made 32 factually distinct murders eligible for the death penalty.

Given this large number of special circumstances, California's statutory scheme failed to identify the few cases in which the death penalty might have been appropriate, and instead made almost everyone convicted of first degree murder eligible for the death penalty. This Court has routinely rejected these challenges to the statute's lack of meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme because they are so over-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Penal Code Section 190.3(a) Violated Appellant's Constitutional Rights

Penal Code section 190.3, factor (a), directed appellant's jurors to consider in aggravation the "circumstances of the crime." (4 CT 1067, 6 RT 1577; CALJIC No. 8.85.) In capital cases throughout California prosecutors have urged juries to weigh in aggravation almost every conceivable circumstance of a crime, even those that, from case to case, are starkly opposite. In addition, prosecutors use factor (a) to embrace the entire spectrum of factual circumstances inevitably present in any homicide; facts such as the age of the victim or the defendant, the method of killing, the alleged motive for the killing, the location of the killing, and the impact of the crime on the victim's surviving relatives.

Here, the prosecutor, in his closing argument, reminded the jurors that Silva had been stabbed, multiple times (8 RT 1968, 1975, 1980, 1995, 1999); that appellant was a street gang member (8 RT, 1974, 1978, 1981, 1988, 1996); that appellant committed the crime with a co-defendant, who drove the car when they left the scene (8 RT 1973, 1977, 1992); that appellant would be dangerous in the future (8 RT 1998-1999, 2000-2001); and that Silva had three children (8 RT 2000).

This Court has never applied any limiting construction to factor (a). (*People v. Blair*, *supra*, 36 Cal.4th at p. 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factor" has been applied in such a random and arbitrary manner that almost every feature of every murder can be and has been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jurors to assess death upon no basis other than that the particular set of circumstances surrounding the murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware this Court has repeatedly rejected the claim that permitting the jurors to consider the "circumstances of the crime" within the meaning of Penal Code section 190.3, factor (a), results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Brown* (2004) 33 Cal.4th 382, 401.)

Appellant urges the Court to reconsider this holding.

C. California's Death Penalty Statute and the CALJIC Instructions Given In This Case Failed To Set Forth the Appropriate Burden Of Proof and the Requirement Of Unanimity

1. Appellant's Death Sentence Is Unconstitutional Because It Was Not Premised On Findings Made Beyond a Reasonable Doubt

California law does not require, and at the time of the offense charged against appellant did not require, that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86 and 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, the jurors in this case were not told they had to find beyond a reasonable doubt either the existence of any aggravating circumstances or that the aggravating circumstances outweighed the mitigating circumstances, before determining whether or not to impose a death sentence. (4 CT 1072-1073; 6 RT 1580-1581 [CALJIC No. 8.88].)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604 and *Cunningham v. California* (2007) 549 U.S. 270, now require that any fact used to support an increased sentence (other than a prior conviction) be submitted to the jurors and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jurors had to first make several factual findings: (1) that aggravating circumstances were present; (2) that the aggravating circumstances

outweighed the mitigating circumstances; and (3) that the aggravating circumstances were so substantial as to make death an appropriate punishment. (4 CT 1072-1073; 6 RT 1580-1581 [CALJIC No. 8.88].) Because these additional findings were required before the jurors could impose the death sentence, *Apprendi*, *Blakely*, *Ring*, and *Cunningham* require that each of these facts be found, by the jury, to have been established beyond a reasonable doubt. The court failed to so instruct the jurors in this case and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground by *People v. Breverman* (1998) 19 Cal.4th 142, 149; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is aware this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 819-821). The Court has rejected the argument that *Apprendi* and *Ring* impose a reasonable doubt standard on California's penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant also contends due process and the prohibition against cruel and unusual punishment mandate that the jurors in a capital case be convinced beyond a reasonable doubt not only

that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Fourteenth Amendment or the Eighth Amendment requires the jurors be instructed that to return a death sentence it must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests the Court reconsider this holding.

2. Some Burden Of Proof Should Have Been Required, Or the Jurors Should Have Been Instructed That There Was No Burden Of Proof

Evidence Code section 520, which provides that the prosecution always bears the burden of proof in a criminal case, creates a legitimate expectation as to the way a criminal prosecution will be decided under state law, and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jurors should have been instructed, but were not, that the state had the burden of persuasion regarding the existence of any and all circumstances in aggravation, the determination whether aggravating circumstances outweighed mitigating circumstances, and the appropriateness of the death penalty, and that it was presumed life without parole was the appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given in this case (4 CT 1067-1077, 1072-1073; 6 RT 1576-1578, 1580-1581) failed to provide the jurors with the guidance legally necessary for the imposition of the death

penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal constitution and therefore urges the Court to reconsider its decisions in *Lenart* and *Arias*.

3. Appellant's Death Verdict Was Not Premised On Unanimous Jury Findings Regarding Aggravating Circumstances

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jurors, ever found a single set of aggravating circumstances that rendered death the appropriate penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided and that application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate

decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require appellant's jurors to unanimously find any and all aggravating circumstances were established also violated the equal protection clause of the Fourteenth Amendment. In California, when a criminal defendant has been charged with certain special allegations that may increase the severity of his sentence, the jurors must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Because capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than to a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), by its inequity violates the equal protection clause of the Fourteenth Amendment and by its irrationality violates both the Fourteenth Amendment due process clause and Eighth Amendment cruel and unusual punishment clause, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal constitution.

D. California's Death Penalty Statute and the CALJIC Instructions Given In This Case On Mitigating and Aggravating Circumstances Violated Appellant's Constitutional Rights

1. The Instructions Given Failed To Inform the Jurors That the Central Sentencing Determination Is Whether Death Is the Appropriate Penalty

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 did not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same. (4 CT 1072-1073; 6 RT 1580-1581.)

The Court has previously rejected this challenge to CALJIC No. 8.88. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) If this Court rejects the argument set forth in Argument III.B., above, appellant urges this Court to reconsider that ruling.

2. The Use Of Adjectives In the List Of Potential Mitigating Circumstances Is Impermissibly Restrictive

The inclusion in the list of potential mitigating circumstances of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, subd. (g); 4 CT 1067-1068) impeded the jurors' consideration of mitigation, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Locket v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware the Court has rejected this very argument (*People v. Alveoli* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

3. The Instructions Caused the Penalty Determination To Turn On An Impermissibly Vague and Ambiguous Standard

The question whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances [were] so substantial in comparison with the mitigating circumstances that it warranted] death instead of life without parole." (4 CT 1072-1073; 6 RT 1580-1581 [CALJIC No. 8.88].) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentence's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violated the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

This Court has found the use of this phrase does not render the instruction constitutionally deficient. (*People v. Beaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant requests this Court reconsider that opinion.

4. The Jurors Should Not Have Been Instructed On Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case because no evidence was presented to support them – specifically, factor (d) ("Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"), factor (e) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"), and factor (h) ("Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or

to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication"). (4 CT1067-1068; 6 RT 1577-1578.) The trial court failed to omit those factors from the jury instructions (*Ibid.*), likely confusing the jurors and preventing them from making a reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook* (2006) 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury instructions.

5. The Jurors Should Have Been Instructed That Statutory Mitigating Circumstances Were Relevant Solely As Potential Mitigation

In accordance with customary state court practice, nothing in the instructions given in appellant's case advised the jurors which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jurors' appraisal of the evidence. (4 CT 1067-1068; 6 RT 1577-1579.) This Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigating circumstances. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) Appellant's jurors were not instructed that a "not" answer as to any of these "whether or not" sentencing factors did not establish an aggravating circumstance. Consequently, the jurors were free to aggravate appellant's sentence based on non-existent or irrational aggravating circumstances, precluding the reliable, individualized, capital sentencing

determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as potential mitigation.

6. The Instructions Given Failed To Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return a Sentence Of Life Without Possibility Of Parole

Penal Code section 190.3 directs the jury in a capital case to impose a sentence of life imprisonment without possibility of parole if the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required by the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Here, the trial court gave CALJIC No. 8.88, which did not address this proposition, but only informed the jurors of the circumstances that permitted the rendering of a death verdict. (4 CT 1072-1073; 6 RT 1580-1581 [CALJIC No. 8.88].) Because it fails to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that because CALJIC No. 8.88 tells the jurors that death can be imposed only if they find aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v.*

Kelley (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be appropriate, but failing to explain when a life without possibility of parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Jurors Should Have Been Instructed On the Presumption That Life Without Possibility Of Parole Was the Appropriate Sentence

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) At the penalty phase of a capital case, the presumption that life without possibility of parole is the appropriate penalty is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption that life without possibility of parole is the appropriate sentence. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.)

The trial court's failure to instruct the jurors that the law favors life and presumes the sentence of life imprisonment without possibility of parole to be the appropriate sentence violated appellant's Eighth Amendment right to be free from cruel and unusual punishment and to have his sentence determined in a reliable and non-arbitrary manner, and his Fourteenth Amendment right to due process and the equal protection of the

laws.

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other subsections of this argument demonstrate, this state's death penalty law is fundamentally deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

E. Failing To Require the Jurors To Make Written Findings Violated Appellant's Right To Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), the jurors in this case were not required to make any written findings at the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments, as well as his right to meaningful appellate review to ensure the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook*, *supra*, 39 Cal.4th at p. 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Imposition Of the Death Penalty

California's capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between appellant's and

other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (*People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or in violation of the defendant's right to equal protection or to due process. For this reason, appellant urges the Court to reconsider its failure to require intercase proportionality review in capital cases.

G. California's Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, in violation of the equal protection clause. To the extent there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating circumstances must be established by a preponderance of the evidence, and the sentence must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) At the penalty phase of a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but asks the Court to reconsider them.

H. California's Imposition Of the Death Penalty As a Regular Form Of Punishment Falls Short Of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty, violates international law, the Eighth and Fourteenth Amendments and "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

IV. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINE THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Even if this Court were to conclude that none of the errors in this case was sufficiently prejudicial, by itself, to require reversal of appellant's conviction or death sentence, the cumulative effect of the errors that occurred below nevertheless requires reversal of appellant's conviction and sentence. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may "so infect[] the trial with unfairness" as to violate due process and require reversal. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927-928 [principle that cumulative errors may violate due process is "clearly established" by Supreme Court precedent]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty judgments in capital case for cumulative prosecutorial misconduct].)

The death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [cumulative effect of penalty phase errors prejudicial under state or federal constitutional standards]; *People v. Brown* (1988) 46 Cal.3d 432, 463 [applying reasonable possibility standard for reversal based on cumulative error].)

In this case the trial court erred at the guilt phase by accepting

appellant's plea of guilty because appellant was representing himself and thus did not have the consent of counsel, as required by Penal Code section 1018. (Argument I, *ante*.) By virtue of this invalid plea, at the penalty phase the prosecutor was free to present evidence of appellant's participation in the crime in the most aggravated terms, as the circumstances of the crime, despite the existence of evidence that would have mitigated appellant's actual and relative culpability of capital murder. The court compounded the prejudicial effect of the invalid plea by ordering appellant to appear before the jurors – who, by virtue of the plea, accepted that he was guilty of capital murder – visibly and excessively shackled. (Argument II, *ante*.) Together these errors unfairly and prejudicially magnified the aggravating factors and led the jury to believe appellant was not only guilty, but also was and would continued to be dangerous if not executed. These errors were in turn exacerbated by other defects in California's capital sentencing scheme. (Argument III, *ante*.)

In this way, the errors at the guilt (i.e., plea) phase and at the penalty phase – even if individually not prejudicial – together preclude the possibility that the jury reached an appropriate verdict in accordance with the state death penalty statute or the federal constitutional requirements of a fundamentally fair, reliable, non-arbitrary and individualized sentencing determination. Reversal of the death judgment is mandated because it cannot be shown that the errors, individually, or collectively, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341. The cumulative effect of all of the errors set out herein requires that appellant's guilty plea be vacated and that his conviction and sentence of death be reversed.

V. THE TRIAL COURT ERRED IN IMPOSING RESTITUTION FINES WITHOUT CONSIDERING APPELLANT'S INABILITY TO PAY MORE THAN THE STATUTORY MINIMUM

A. Introduction and Procedural Background

When the trial court sentenced appellant to death it also ordered him to pay restitution to several victim restitution funds, totaling approximately $3,400, and imposed restitution fines in the amount of $10,000 each pursuant to Penal Code sections 1202.4 (restitution fines in felony cases) and 1202.45 (additional parole revocation restitution fine). (8 RT 2041-2043.)[20] The Court stayed the fine imposed pursuant to Section 1202.45, only, "pending successful completion of parole if the execution of Count 1 [the death sentence] is not carried out." (8 RT 2041.) In a companion case (No. 1202051), in which appellant was convicted by plea of certain felonies arising out of his conduct while in jail, the Court sentenced appellant to a consecutive prison sentence, stayed pending the execution of the death sentence in the capital case, and imposed restitution fines in the amount of $2,400, each, under Penal Code sections 1202.4 and 1202.45. As in the capital case, the Court stayed only the restitution fine imposed pursuant to Section 1202.45, "pending execution of the sentence on Count 1 in the companion case, namely, the death penalty." (8 RT 2043.) The Court then remanded appellant to the custody of the sheriff for transportation to San Quentin State Prison. (8 RT 2044.)

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[20] The Court ordered appellant to pay "restitution of $107.77 to State Victim Account 848222; $107.11 to Account Number 848223; $107.77 to Account Number 848223 (*sic* - same account number); $3,078.47 to Account 851144, plus additional restitution in amounts to be determined on those accounts, and also on Accounts 848221 and 825526." (8 RT 2041.) It does not appear that any "additional restitution" was ever ordered.

Thus, in total appellant has been ordered to pay $3,400 in victim restitution and $24,800 in restitution fines, of which only $12,400 has been stayed pending the execution of his death sentence. This means that appellant, who is incarcerated on Death Row while he pursues this automatic appeal and other post-conviction remedies, is currently obligated to pay $12,400 in restitution fines, as well as $3,400 in victim restitution, despite his continued indigency and the statutory limitations on his ability to earn the means to pay these fines.[21]

If appellant does not prevail on this appeal, the restitution fines should each be reduced to $200, because the trial court erred in failing to consider appellant's inability to pay, and he in fact remains indigent and unable to pay a restitution fine greater than the applicable $200 statutory minimum. Any sums in excess of $200 that have already been deducted from his inmate trust account should be restored to his account. In the alternative, the matter of restitution should be remanded to the trial court for reconsideration of the amount of the restitution fines in light of appellant's inability to pay.

B. The Restitution Fines Are Excessive and Should Be Modified Or Reconsidered In Light Of Appellant's Inability To Pay a Fine Greater Than the Statutory Minimum

The version of Section 1202.4 in effect at the time of appellant's offense provided in pertinent part:

(b) In every case where a person is convicted of a crime, the

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[21] As a practical matter, this means that whenever a friend or relative of appellant's deposits so much as $25 to appellant's trust account for him to use to buy toiletries, stamps or food items at the prison "Canteen," up to half of the amount is deducted from the trust account toward payment of the $10,000 restitution fine.

> court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.
>
> (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200) starting January 1, 2012 . . . and not more than ten thousand dollars ($10,000), if the person is convicted of a felony . . . .
>
> . . . .
>
> (c) The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only *in increasing the amount of the restitution fine in excess of the two hundred- dollars ($200) . . . minimum* [for a felony conviction] . . . .
>
> (d) In setting the amount of the fine pursuant to subdivision (b) in excess of the . . . minimum, the court *shall* consider any relevant factors, *including, but not limited to, the defendant's inability to pay* . . . .

(Pen. Code, § 1202.4; italics added.)

Thus, Penal Code section 1202.4 by its terms mandated consideration of the defendant's inability to pay a restitution fine greater than the then applicable $200 minimum. The trial court failed to do. The court made no inquiry of appellant as to his ability to pay a restitution fine greater than $200, much less a fine of $10,000 (still less two such fines), and made no findings on the issue. (8 RT 2041-2043.) Had the Court conducted the inquiry mandated by Section 1202.4 it would have been apparent that appellant did not and would not have the ability to pay any fine greater than $200, for several reasons.

First, appellant was determined to have been indigent at the commencement of the proceedings, and thus was afforded the assistance

first of appointed counsel (Michael Carty), then of appointed advisory counsel (Joseph Allen). (See 2 CT 559-560 [appointment of advisory counsel]; 1 RT 101 [reference to "[Penal Code] section 987.9 funds," which are provided to indigent capital defendants to retain and compensate expert witnesses and investigators].)

Second, as a matter of law appellant, as a condemned prisoner on Death Row at San Quentin, has virtually no post-incarceration earning potential. (See Pen. Code, § 2933.2 ["any person convicted of murder, as defined in Section 187, shall not accrue any [worktime] credit"]; *In re Barnes* (1985) 176 Cal.App.3d 235, 239 [discussing the Department of Corrections and Rehabilitation's prioritization, with condemned prisoners and prisoners in security housing units at the lowest priority for work assignments]; see also Pen. Code, § 2933, subd. (b) [a prisoner's "reasonable opportunity to participate" in work programs "must be consistent with institutional security and available resources"].) Thus appellant was indigent at the outset, and, having been sentenced to death, would inevitably remain so.

People v. Gamache (2010) 48 Cal.4th 347, in which this Court rejected on appeal a capital defendant's challenge to a restitution order, does not foreclose relief here. First, while the Court in *Gamache* did find the claim forfeited for want of an objection, it went on to decide the merits of the claim. (*Id.* at p. 409.) Moreover, in this case appellant was proceeding in pro. per., and in any event could not have known that he would not be allowed to work in prison because of his status as a condemned inmate, and thus could not have known to object on this ground. Second, where in *Gamache* the Court faulted the appellant for pointing to no evidence of his inability to pay, beyond his impending incarceration

(*Ibid.*), and made no finding as to his indigency, here appellant has established he was indigent and points to the statutory limitations on his future earning capacity on Death Row. (Pen. Code, § 2933.2.)

C. Conclusion

The trial court imposed excessive restitution fines without taking into account appellant's pay, as required by statute. If appellant does not prevail on this appeal, the fines should be modified to the applicable $200 statutory minimum and any sums in excess of that amount that have already been deducted from appellant's inmate trust account should be funded. In the alternative, the matter of restitution fines should be remanded to the trial court for reconsideration in light of appellant's inability to pay.

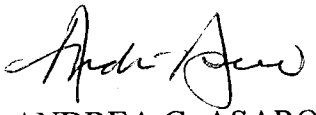
CONCLUSION

For all of the reasons stated above, the entire judgment – the conviction, the special circumstance findings, the sentence of death and the restitution orders and fines – must be reversed.

Dated: September 17, 2014

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender



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

I, Andrea G. Asaro, am the Senior Deputy State Public Defender assigned to represent appellant Joshua Martin Miracle in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 28,672 words in length.

Dated: September 17, 2014

ANDREA G. ASARO
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Joshua Martin Miracle* Cal. Supreme Ct. No. S140894
(Santa Barbara Co. Sup. Ct. No. 1200303)

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, California 94607. On this day, I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;

/ X / **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 **September 19, 2014**, as follows:

Peggy Huang, Esq.
Deputy Attorney General
Department of Justice
300 South Spring Street
Los Angeles, CA 90013

Honorable Brian E. Hill
Santa Barbara Co. Superior Ct.
1100 Anacapa Street
Santa Barbara, CA 93101

Pursuant to Policy 4 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, the above-described documents will be hand delivered to appellant, Joshua Martin Miracle, at San Quentin State Prison within 30 days.

I declare under penalty of perjury that the foregoing is true and correct. Signed on **September 19, 2014**, at Oakland, California.

DECLARANT