In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **DANIEL CARL FREDERICKSON,** Defendant and Appellant.	**CAPITAL CASE** Case No. S067392

Orange County Superior Court, Case No. 96CF1713
The Honorable William R. Froeberg, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On February 18, 1997, the Orange County District Attorney charged Daniel Carl Frederickson, with the murder and attempted robbery of Scott Wilson. The information further alleged the special circumstance that Frederickson murdered Wilson during the commission of the attempted robbery, and that he personally used a firearm. (Pen. Code, §§ 187, subd. (a); 1192.7, subd. (c)(1); 664/211.5(b)/213, subd. (a)(2), 1203.06, subd. (a)(1); 12022.5, subd. (a); 190.2, subd. (a)(17)(i).) (1CT 68-69.)

Jury trial began on October 29, 1997. Following six days of testimony, the jury convicted Frederickson of first degree murder, and found the special circumstance and firearm-use enhancement true. (10RT 2058-2061; 3CT 808-810.)

On November 20, 1997, following a three-day sanity phase trial, the jury found Frederickson was sane when he murdered Scott Wilson. (13RT 2542-2543; 3CT 962.)

On December 3, 1997, the jury recommended death as the appropriate penalty. (16RT 3220; 3CT 1084.)

On January 9, 1998, the trial court sentenced Frederickson to death. (16RT 3249-3251.) This automatic appeal followed. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

On June 13, 1996, Scott Wilson was working as the Customer Service Manager at the Home Base store in Santa Ana. (8RT 1313-1314.) Around 11:30 a.m., Maricela Saucedo, a cashier at Home Base, gave Wilson a $50 bill, and asked him to make change for her to give to a customer. (8RT 1313, 1317-1318, 1326.) Saucedo watched Wilson walk towards the customer service area where the store safe was kept. Within a matter of

seconds, Saucedo heard a gunshot. (8RT 1318, 1323.) Saucedo turned and saw Frederickson waiving the gun around, and running out the door. (8RT 1318, 1322, 1323.) Saucedo heard other employees saying "Scott got shot" and saw Wilson, bloody and laying on the floor, holding ten bloody $5 bills in his hand. (8RT 1319-1320; 9RT 1593.) Saucedo later identified Frederickson as the shooter in a photographic line-up. (8RT 1321.)

Susan Bernal was a cashier at Home Base and was working that morning, too. (8RT 1325.) Around 11:30 a.m., as she watched Wilson walk from the customer service area towards the cash register, she saw Frederickson shoot Wilson in the head at close range, point the gun towards the cash register area, and then he ran out the side door of the store. (8RT 1327.) She did not hear Wilson arguing with anyone, call for help, or call out that he was being robbed. (8RT 1325-1329.)

Christopher Rodriguez was a loss prevention agent at Home Base (8RT 1345.) Following the shooting, Rodriquez followed Frederickson out the door and chased him to a white Toyota van parked behind the store. (8RT 1350-1353, 1355.) Rodriguez saw Frederickson get into the van, still holding the gun, and drive away. (8RT 1353, 1356.) He memorized the license plate number of the van (3W18232) and provided the number to Santa Ana Police Officer Mike Callahan. (8RT 1355-1356, 1380, 1382.)

Santa Ana Police Officer Ronald Dryva interviewed witnesses at Home Base following the shooting. (8RT 1370.) While Dryva was at Home Base, Frederickson called the store. (8RT 1371.) A store employee handed the phone to Dryva, and Dryva proceeded to have a conversation with Frederickson, with Frederickson apparently believing he was still talking to the employee. (8RT 1371, 1374.) Frederickson told Dryva "I've never killed or shot anyone before. This is stupid. That is what I do for a living. Do you understand?" (8RT 1374.) Frederickson stated "You need to tell your employees that money is not worth getting killed over."

(8RT 1374.) Dryva asked Frederickson why he "pull[ed] the trigger" and Frederickson responded "Because I was flustrated [sic]. He didn't do what I told him. Do you understand?" (8RT 1374-1375.) Frederickson continued

> I'll tell you. We went to the safe, and I followed. His name was Scott. Both of them were Scotts. One was Scott E. While I pointed the gun at him and told him to put the money in the bag, he just started counting the money. I told him not to count the fucking money. I told him to put the money in the box. He just closed the safe and started walking away. . . . He didn't believe I was serious. I got mad, flustrated [sic], so I shot him.

(8RT 1375.)

The next day, Santa Ana Police Corporal Richard Reese was conducting surveillance outside Frederickson's residence. He saw a white Toyota van matching Rodriguez's description in the driveway. Frederickson began driving away in the van, and Reese pulled him over and arrested him. (8RT 1384-1385.) Following Frederickson's arrest, Reese and other officers searched his residence (a camper in the rear of his grandparents' house), and found a chrome pistol (.32-caliber revolver) containing five live rounds and one empty round, and a makeshift holster on the bed. (8RT 1386-1388, 1398.)

Santa Ana Police Officer Phil Lozano interviewed Frederickson on June 14, 1996, the day after the murder, and Frederickson confessed to the crimes in great detail. (8RT 1406.) A tape of the interview was played for the jury. (8RT 1409.) During the interview Frederickson told the investigators that he planned the robbery two days before actually committing the crimes. (4CT 1230.) He stated that the morning of the murder he entered Home Base "with a game plan." (4CT 1223.) He stated that he "just walked in and you know did my thing and I knew where everybody was and who everybody was and I looked for the people that,

you know, . . . the dicks that look for the shoplifters." (4CT 1223.) Frederickson explained how he looked for a manager, and that "[y]ou can always tell the manager even if they don't wear a different colored apron or a different colored shirt or anything like that." (4CT 1224.) Frederickson told the investigators that he realized Wilson was the manager as Wilson walked towards the safe. While Wilson was opening the safe, Frederickson "kind of like leaned behind the display," because he "didn't want to get [Wilson] suspicious of anything." (4CT 1224.) Frederickson said to Wilson "[c]an you put that money in this box?" Frederickson recalled that Wilson "looked down, picked up a stack of fives and started counting them back into the stack." (4CT 1224.) Frederickson then pulled his gun part way out of the holster so that Wilson would be able to see it. (4CT 1224.) Wilson did not put the money in the box, and he started walking away from Frederickson. Frederickson became "pissed off," placed the gun about two inches from Wilson's head, and shot him in the temple. (4CT 1224-1225, 1238.) After shooting Wilson, Frederickson ran out of the store, got into the van and drove away. (4CT 1225-1226.) Frederickson told investigators that he wanted to kill himself after the murder but that he "couldn't kill [himself]. I can kill somebody else but not myself." (4CT 1229.)

Frederickson further told the investigators that he called Home Base an hour after the shooting and asked to speak to a manager. (4CT 1226-1227.) Frederickson explained how he told a person he believed to be a store manager that "[h]e ought to make his fucking life mission to instruct all of his employees of the proper procedures. Just giving the money up. . . ." (4CT 1227.)

Frederickson further explained that he attempted to rob Home Base because

> I was just tired of. . . being broke all the time. . . . It's just like you know my grandparents been um, you know I've been smoking their cigarettes and shit, eating their food, you know not paying any rent you know. The car I have, the 84 Chrysler. . . was given to me by a friend you know. And. . . it's been sucking money up left and right. The water pump went, this went, that went . . . it's just like you know I just got frustrated with life and shit and said well fuck it man if I get caught you know I'll go back in for about two or three years and you know. . . get out and try it again later.

(4CT 1229.)

Frederickson stated that he was not under the influence of drugs or alcohol when he murdered Wilson, and specifically stated that he "was in [his] right mind." (4CT 1232-1233.)

Marla Jo Fisher, a reporter for the Orange County Register, interviewed Frederickson in jail on June 15, 1996, at the request of her editor. (8RT 1448-1449.) Frederickson told Fisher that he was attempting to rob the Home Base store, and that during the course of the attempted robbery, he shot the manager, Scott Wilson. (8RT 1451-1452.) Frederickson described to Fisher how he entered the store intending to commit the robbery, he waited until he saw Wilson going to the safe before he demanded money from Wilson, and that instead of giving him the money, Wilson slammed the door to the safe shut. As a result, Frederickson shot him. (8RT 1452, 1454.) Frederickson stated that he told Wilson to put the money in a box, but Wilson refused to do so. Frederickson said he shot Wilson out of frustration because he would not give him the money. (8RT 1456.) Frederickson explained how he thought Wilson was "brave, but stupid," and how "he admired his courage," but thought Wilson "should have complied with his request for money." (8RT 1452.) Frederickson also told Fisher that he called the Home Base

store after the shooting, and that he thought he was speaking to a manager, but it turned out he was actually speaking to a police officer. (8RT 1453.) Frederickson told Fisher that during that phone call, he blamed Home Base management for failing to train their managers to immediately hand over money, rather than risking their lives in a robbery attempt. (8RT 1453.)

In August of 1996, Frederickson sent Lozano a letter, asking to speak with Lozano again. (8RT 1418-1419.) Lozano and his partner arranged to meet with Frederickson at the jail on August 12, 1996, where they interviewed him a second time. (8RT 1419.) During the interview Frederickson again admitted responsibility for the murder. (4CT 1246-1248, 1254-1257, 1259-1260.)[1] A tape of that interview was also played for the jury.

Pathologist Richard Fukumoto performed the autopsy on Scott Wilson. (9RT 1583.) Based on the evidence, Frederickson held the gun only 6 to 12 inches from Wilson's head as he shot him. (9RT 1588.)

Defense Evidence

Frederickson represented himself during the guilt phase. During closing argument Frederickson explained his defense to the jury, acknowledging that

> I've never denied to anybody that I pulled that trigger, never denied to anybody that I pulled that trigger. . . when you go back in the jury room and deliberate on that, it's going to make it a lot easier for you, because all you're going to be looking for is whether or not the special circumstance is true or not true.

(10RT 2013-2014.)

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[1] Frederickson also attempted to implicate John McCanns as his accomplice to the crimes, however it is apparent from the facts that Frederickson acted alone in committing these crimes.

Frederickson called Wayne Dasper who testified that he was Frederickson's mentor through Volunteers in Parole. (9RT 1769-1770.) Dasper stated that he never considered Frederickson to be a threat to society, never saw any signs that would suggest Frederickson was using drugs, and observed that Frederickson had "fairly good cognitive abilities" including the ability to "think, plot, strateg[ize]." (9RT 1791-1792.)

Jan Moorehead was Frederickson's parole agent following his release from Atascadero State Hospital.[2] (10RT 1848.) Frederickson was considered a "high control parolee" because of his "high violence potential and mental instability." (10RT 1852.) Moorehead testified that she administered drug tests to Frederickson about twice a month during the nine months following his release, and she recalled Frederickson admitting to using drugs during this time. (10RT 1849.) On one occasion in February of 1996, Moorehead visited Frederickson in his camper. (10RT 1851, 1859.) He told her he was depressed and Moorehead asked him if he wanted to go to a hospital. Frederickson showed Moorehead some writings in which he had described wanting to kill himself. She encouraged him to write positive thoughts instead. (10RT 1851.) Moorehead also informed Frederickson about services that were available to him at that time, including the Salvation Army. (10RT 1859.)

Frederickson called Dr. Martha Rogers, who had interviewed Frederickson at the jail for the purpose of evaluating his sanity. (9RT 1600-1601.) Dr. Rogers spent a total of 12 to 13 hours with Frederickson. (9RT 1602.) Based on her evaluation of him, Dr. Rogers

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[2] Frederickson was certified to be a mentally disordered offender and committed to Atascadero State Hospital in August 1994, while serving a prison term. He was released from Atascadero in July 1995. (11RT 2116-2117, 2164.)

was unaware of any mental disorder from which Frederickson suffered that would have diminished his capacity to form the intent to commit an armed robbery. (9RT 1605.)

Frederickson also called Dr. Roberto Flores de Apodaca, who had been appointed to determine Frederickson's sanity. (10RT 1902.) Dr. Apodaca testified that he had performed a psychological assessment of Frederickson at the court's request. (10RT 1868-1869.) Dr. Apodaca spent about four-and-a-half hours with Frederickson and about ten hours reviewing reports he received from the parties and the court, but did not conduct any clinical testing of his own. (10RT 1874-1875, 1881.) Based on the tests and reports he reviewed, Dr. Apodaca did not find it probable that Frederickson had neuropsychological impairment or brain functioning impairment, and found no evidence that Frederickson's mental capacity was diminished in any way. (10RT 1910, 1923-1924).

Marilee Thompson testified that Frederickson worked as a laborer for her in the past, and that he was repairing a fence on her property near the time of the murder. (10RT 1841-1843). Thompson identified her Toyota van as the one used in the murder and robbery, and testified she gave Frederickson permission to use it for transporting building materials. (10RT 1843-1845.)

Nick Peres, Frederickson's cousin, testified that at one time Frederickson asked Peres to kill him, or to find an assassin to do so. (9RT 1801-1803.) However, he testified that around the time of the shooting Frederickson did not seem depressed or suicidal. (9RT 1812.) Further, Frederickson told Peres that Scott Wilson did not do "what he was supposed to do, so Frederickson got mad and shot him." (9RT 1812.)

B. Sanity Phase

Defense[3]

Dr. Roger Wunderlich, staff psychiatrist at Atascadero State Hospital examined Frederickson for 30 minutes in June of 1994, to determine whether he was a mentally disordered offender ("MDO"). (11RT 2133.) He determined that Frederickson was an MDO based "almost exclusively" on Frederickson's statements during the 30 minute interview. (11RT 2129, 2133, 2139, 2144, 2147.) As a result, Frederickson was paroled to Atascadero State Hospital for treatment as an MDO. (11RT 2141.) Frederickson told Dr. Wunderlich that "he was afraid of what he might do if paroled" and that he wanted treatment under the MDO law. (11RT 2141.) Dr. Wunderlich did not ever think Frederickson was "insane," and acknowledged that Frederickson was able to distinguish the difference between right and wrong. (11RT 2149, 2155, 2157.)

Dr. Joseph Chong-Sang Wu, psychiatrist and director of the University of California Irvine Brain Imaging Center, conducted a positron emission tomography ("PET") scan on Frederickson. (12RT 2262.) He testified that Frederickson's results show a significant abnormality in his frontal lobe. (12RT 2266.) Dr. Wu stated that this type of impairment has been reported in Attention Deficit Hyperactivity Disorder. (12RT 2266.) He also stated that Frederickson's scan showed an increased level of aggression. (13RT 2431.)

Steven Clagett, a therapist and case manager for the Health Care Agencies of Orange County, testified that he met with Frederickson in May of 1995, while Frederickson was a patient at Atascadero. (12RT 2283,

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[3] Frederickson's advisory counsel conducted the sanity phase of the trial.

2285-2286.) At that time Clagett was part of a treatment team that determined that Frederickson was not suitable for release into the community. Frederickson had not met certain release criteria, including 12 months of non-aggressive behavior and participation in the groups, programs and activities as part of his treatment plan. (12RT 2287.) Clagett testified that during his May 1995 interview with Frederickson, he did not find any evidence of a thought disorder, hallucinations, suicidal tendencies or homicidal ideations in him. (12RT 2289.) During that same interview, Frederickson acknowledged that he had "played up" psychiatric symptoms in the past to obtain admission to Atascadero and get out of the prison system. (12RT 2289-2290.)

Frederickson testified on his own behalf during the sanity phase. Frederickson testified that he was first institutionalized at age 13, and was in and out of institutions throughout his juvenile and adult life, and that he had been prescribed a variety of psychotropic medications for his aggressive behavior. (11RT 2102-2104.) He testified that he has "always" had violent "fantasies" that told him to act out and destroy things. (11RT 2105.) Frederickson testified that he "continuously requested" counseling during his prison terms, but his requests were denied due to budget constraints. (11RT 2114.)

During cross-examination Frederickson acknowledged that he committed an armed robbery of a market in 1982 because he wanted money. (11RT 2201.) Frederickson also admitted that he pled guilty to assault with a deadly weapon in 1984 arising from a stabbing while in prison, though he testified at trial that he did not actually stab anyone. (11RT 2203.) Frederickson further admitted he pled guilty to assault with a deadly weapon for stabbing a neighbor in 1991, but stated he pled guilty only because "they" paid him to and he "needed an excuse" to go back to prison. (11RT 2206.)

In October of 1997, while his capital case was pending, Frederickson agreed to testify as a gang expert for the defense in an unrelated murder case. (11RT 2207-2208; 14RT 2641.) During this trial, the prosecutor elicited that when questioned during the previous trial about whether he considered himself insane at the time he murdered Wilson, Frederickson responded "no, sir. I presented that as a defense, and it's up to a jury to decide whether I was insane at the time the crime occurred." He admitted he previously testified that he "never felt [he] was insane." (11RT 2209-2210.) During the previous trial, the prosecutor further elicited that Frederickson reported having violent fantasies to a psychologist because he "was trying to get into Atascadero [State Hospital]." (11RT 2210.) When specifically asked by the prosecutor if he lied to the doctor in order to gain admission to Atascadero, Frederickson testified "I made self-serving statements." (11RT 2211.)

Prosecution Evidence

Both Dr. Flores de Apodaca and Dr. Rogers testified during the sanity phase as well. Both doctors opined that Frederickson was sane when he murdered Wilson. (12RT 2294-2296, 2343.)

Dr. Phillip Kelly, staff psychiatrist at Atascadero, testified that Frederickson told him that he "manipulated the examiners" to gain admission to Atascadero. Dr. Kelly testified that Frederickson "repeatedly said he had no mental disease or illness." Dr. Kelly never felt that Frederickson had a mental disease or illness, nor did he ever feel Frederickson was insane. (13RT 2437-2438, 2443.)

C. Penalty Phase[4]

The prosecution called four witnesses who testified about Frederickson's prior criminal history. Jeff Tawasha testified regarding the circumstances of Frederickson's armed robbery conviction. He stated that he owned the Freeway Park Market. On October 25, 1981, Tawasha was working behind the counter. (14RT 2561.) Around 3:00 p.m. that day Frederickson entered the market with a sawed off shotgun and said "[t]his is a robbery. Give me the money or I'll blow your head off." (14RT 2561-2562.) A female customer entered the store during the robbery. Frederickson ordered her behind the counter at gunpoint too. He demanded Tawasha open the cash register and "put the money in a bag." Tawasha complied. Frederickson instructed them not to move and then he ran from the store. (14RT 2562-2563.)

Correctional Officer Grant Henry testified about the circumstances of Frederickson's conviction for possession of a shank in prison in 1983. He testified that during a search of Frederickson's cell, he found a roller paint brush that had been broken off and sharpened into a stabbing instrument. (14RT 2627-2634.)

Lieutenant Rick Martinez testified about the circumstances of Frederickson's conviction for a 1984 prison stabbing. Martinez stated that he was talking with an inmate in the sally port area of a housing unit when Frederickson began stabbing the inmate. Frederickson stabbed the inmate three to seven times before the two were separated. (14RT 2658-2661.)

Officer Bradford Blakely testified regarding Frederickson's 1990 conviction for possession of a stabbing instrument in jail. Blakely stated

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[4] Frederickson conducted the majority of his defense during the penalty phase, however, his advisory counsel argued the mitigating factors and mental health aspect of the case during the closing argument.

that on November 15, 1990 he was working at the Central Men's Jail in Santa Ana. During his shift he was searching Frederickson's cell and located a five-inch stabbing instrument made from a mop bucket. (14RT 2657-2649.)

Frederickson's admission, made while testifying as a gang expert in the unrelated trial, that he returned to prison in 1991 for stabbing James Reid six times, was also presented to the jury. (14RT 2642-2643.)

Marla Jo Fisher testified in the penalty phase also. She stated that while interviewing Frederickson, he told her that one of the reasons he robbed Home Base was because he wanted to return to prison. Fisher testified that Frederickson did seem sorry that he killed Wilson, but believed the killing was the fault of the Home Base management for not teaching their employees to hand over money during a robbery. (14RT 2573-2575.)

Dr. Flores Apodaca testified as an expert witness regarding Frederickson's mental health. He testified that while Frederickson's history is consistent with personality disorder, he did not have a condition that impacted his "free will." (14RT 2672-2673, 2689.)

Dr. Helen Mayberg, a neurologist specializing in functional imaging research testified regarding Dr. Wu's PET scan results. (15RT 2741-2749, 2809.) Dr. Mayberg took issue with much of Dr. Wu's methods and findings, and opined that Frederickson's PET scan showed only trivial abnormalities in the frontal lobes, and normal temporal lobes. (15RT 2784-2790, 2800-2802, 28006-2807, 2846-2847.)

Three witnesses provided victim-impact testimony. Maricela Saucedo testified that she worked with Wilson five days a week, eight hours a day. She described Wilson as friendly, very outgoing, very understanding, and a very active and hard worker. Saucedo testified that she felt guilty about Wilson's death because if she would not have asked him for change, he

would not have been killed. Saucedo further testified that while Wilson was lying on the floor, she tried to use her apron to stop the bleeding from his head. Saucedo and others were trying to talk to him, but he was unconscious and unable to respond. (14RT 2568-2570.)

Scott Wilson's aunt, Joyce Fyock, testified that she helped Wilson's mother take care of Wilson as a child after his father died. She described how much she loved him, and how as a child, Wilson liked to go to the circus, to go to the movies, and to go to sporting events. As Wilson got older he became a good friend. He was always there for his mom, who was older and not in good health. Wilson was outgoing, and cared about people, particularly his mother and family. Fyock visited Wilson as he lay dying in the hospital. Fyock then delivered the news of Wilson's death to his mother. Fyock described taking Wilson's mother to see him at the mortuary. Fyock testified that she and Wilson's mother discussed how she

> Just can't imagine looking at your child dead. Had he been in a car accident or if he had died of a dreadful disease, I think his mother could have accepted it a little more, but to think that a man would shoot him dead when he was not doing anything wrong was just almost more than she could stand. But we talked about the justice system, and she believes in justice, and she thinks justice will be carried out here in this Court.

(14RT 2704- 2710.)

Kirk Wilson was Scott Wilson's older brother. He described how due to a 10-year age difference, and the death of their father, he and Scott had a father/son relationship for much of their lives. He described how happy Scott was to have been promoted to manager at Home Base. Kirk Wilson described walking into the I.C.U. room and seeing his brother laying on a bed

> His head is swollen up like a pumpkin, and his eyes are bulging so badly that his eyelids couldn't close over them. He had a big knot on the left-hand side of his head, and there was - there were staples in his skin on the right-hand side right by his temple. He had a bandage on his head, and there was blood coming out underneath the bandage. Evidently when he fell, he hit his head on the cement and split his head open. And there was blood coming out his ears, and there was blood coming out his nose. He was laying there, and the towel behind his head kept getting redder and redder and redder.

Kirk testified that he sat with Scott for several hours before he was pronounced dead and talked to him. Kirk told Scott how much he loved him and how much he would miss him when he was gone.

Kirk also testified how Scott was going to school with hopes of becoming a sports broadcaster, and that Scott had been hired by a television station in San Diego to produce sports promotions. Scott only had time to produce one promotion before his death, and it was played for the jury.

Kirk described how Scott turned 30 just two weeks before he was killed, and how the two of them celebrated by going to Catalina Island together. He said that he had two impressions of Scott in his mind, one is of Scott in the hospital with blood pouring out of his head and his eyes, and the other is of Scott as they returned home from Catalina Island, where Scott gives him the "thumbs-up" and says "Everything's going to be okay." (14RT 2711-2717.

Mitigating Evidence

Dr. Wu testified during the penalty phase also. In sum, he testified that he disagreed with Dr. Mayberg's interpretation of Frederickson's PET scan as being normal. Dr. Wu reiterated his opinion that Frederickson's scan was "quite abnormal" and that it showed a "significant decrease in frontal lobe abnormality. . . ." (15RT 2889.)

Wayne Dasper testified during the penalty phase as well. Dasper testified that Frederickson was one of the most intelligent men he has ever known. (16RT 3020.) He also testified that Frederickson had a "childhood from hell," and "he has had a number of problems that very few of us can even comprehend, let alone understand. . ." (16RT 3020.) Dasper stated that Frederickson reported having given clothes to local homeless people, and that he had a desire to help other people. (16RT 3021-3022.) Dasper told the jury that he did not think Frederickson entered Home Base intending to kill Wilson, and that he did not believe Frederickson deserved the death penalty for his crimes. (16RT 3025-3026.)

Frederickson testified on his own behalf during the penalty phase. He testified that he had endured a troubled childhood, that his parents separated when he was very young, and that he had difficulty integrating into peer groups and his family because of his "mixture" of Scandinavian and Hispanic ethnicity. (15RT 2916-2917.) Frederickson testified that he was first hospitalized for mental health issues when he was 12 years old, and spent 15 years of his life living in group homes, juvenile halls, and state institutions. (15RT 2918-2919.) He also testified that he served five months in the U.S. Navy before receiving an honorable discharge. (15RT 2919.)

Frederickson testified that the he wanted the jury to recommend he receive the death penalty. (16RT 3065.) Frederickson also stated that he would "like to apologize," and that he has never denied his guilt, and had attempted to plead guilty and "acknowledge full responsibility to all of the charges, including the special circumstances, even though I don't believe in my mind that they are true." (16RT 3069.)

ARGUMENT

Penal Code Section 1018 Constitutionally Prohibited Frederickson From Pleading Guilty Without Consent Of Consent

I. PENAL CODE SECTION 1018 CONSTITUTIONALLY PROHIBITED FREDERICKSON FROM PLEADING GUILTY WITHOUT CONSENT OF COUNSEL

Frederickson contends that he was denied the fundamental right to control his defense because he was not permitted to plead guilty in the municipal court. (AOB 61-96.)

A. Procedural and Factual Background

Frederickson appeared in municipal court on June 18, 1006, for the first time following his arrest. (Municipal Court Reporter's Transcript "MRT" 2.) At his request, the court appointed the Public Defender to represent him. (MRT 4-5.)

On July 16, 1996, Frederickson filed a motion seeking to proceed in propria persona. (Supplemental Clerk's Transcript "Supp. CT" 1.) The court heard his motion August 22, 1996, and it explained to Frederickson in great detail that if he indeed were to proceed without counsel, that he would be not granted any special privileges, that he would be opposing very experienced trial attorneys, and that he was facing a penalty of death by lethal injection. When asked if he was "willing to roll the dice. . . without any skills of an experienced attorney?," Frederickson replied that "[a]t the present time I can't trust the Public Defender's Office." The court then further questioned Frederickson about his level of schooling, and his mental status. Frederickson stated that he had significant experience with the legal system, and that he had acted as his own counsel in three previous cases. Following this exchange, Frederickson's counsel asked the court to defer

ruling on Frederickson's motion to proceed in propria persona "in light of the conversation we had in chambers."[5] The court agreed, and without objection from Frederickson, took his request under submission. (MRT 9-15.)

On October 30, 1996, Frederickson appeared in court for arraignment and for a ruling on his motion to proceed in propria persona. When asked if he still wanted to represent himself, Frederickson stated that he did not. However, he "reserve[] . . . [his] right to defend [himself] later." Additionally, Frederickson requested a *Marsden*[6] hearing. (MRT 19.)

The court conducted the *Marsden* hearing in chambers. During the hearing Frederickson explained

> The reason I wanted to have this Marsden hearing is so I can go on the record to explain that I have zero confidence in my attorneys. I understand that the potentiality for this to be a capital case is great, and therefore my life is in jeopardy. I mean, any decision that these people make, they are going to be making towards my life or my death. I'm not happy with their idea of what they want to do tactical-wise.
>
> I've been reading in *People v. Deere*. . . The majority opinion feels that if an attorney is appointed to represent a capital defendant, that attorney has to do – you know, based on their ethics and everything, they have to present the best, you know, defense that they can present, over the objection of the defendant. If the defendant doesn't want certain witnesses to be called, they could still call, you know, the witnesses over the defendant's objection. I don't want my defense that vigorous.

(MRT 21-27.)

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[5] The record is not clear as to what conversation in chambers he is referring.

[6] *People v. Marsden* (1970) 2 Cal.3d 118.

The court asked Frederickson, "[y]ou don't want them working as hard as they are working; is that what you're saying?" and he responded:

> Yes, sir. I don't want that vigorous of a defense. I want them to let me – allow me to steer them away from certain witnesses that I don't want called onto the stand because of – you know, I just – I just don't want certain information coming out. -

(MRT 22-23.)

Frederickson clarified that he was "discussing the penalty phase" at that point. The court then explained then that "you're here now facing just a preliminary hearing, where the People put on some of their evidence and the defense puts on nothing. So you're talking about way down the line at trial and then sentencing rights." (MRT 23.) Frederickson replied that he wanted to waive a preliminary hearing, and that he was "pleading guilty." (MRT 23.) Frederickson complained that:

> They want time to investigate and to check out all avenues and all that, and I don't want them to do that, right? But I'm also afraid of losing all of my protections and rights by going pro per and allow Mr. Tanazaki, the prosecutor, to just walk all over me, you know, that's tantamount to just executing me.
>
> So I'm going to keep these counsel. I'm not saying they are ineffective. I'm just saying if the court would look at the dissenting opinion in . . . *Deere*, right, and understand what the jurist is saying there, then possibly we could come to some type of a conclusion where I could be happy and whatever verdict is returned I'll be happy with, and I'll be able to live with that decision.

(MRT 23.)

The court clarified "you're saying [your attorneys] are working too hard?" to which Frederickson replied "[y]es." (MRT 24.)

The court explained to Frederickson:

> I sure can't remove one or both of them because they are working too hard. There is no guarantee that you're going to be happy with them. You're just entitled to competent, reasonable efforts on behalf of your counsel, and it sounds like you're a little unhappy because they're working too hard. . . . I can't remove them because they are fighting too hard for you. I could remove them if they aren't doing enough for you that you can articulate, so they are not in that category. So your request under Marsden is denied.

(MRT 24-25.)

The court opined that Frederickson's concern regarding his counsel "sounds like just a personality thing," and that Frederickson was "talking about way down the line strategies. All we're talking about here is prelim, just coming up to prelim, and we haven't even got to that yet," but that "we'll cross those bridges as we come to them." (MRT 25.) The court then denied Frederickson's Marsden request without prejudice, telling him:

> Good luck to you, sir. You're in the hands of two outstanding lawyers, and we just may be jumping the gun with some concerns here, but they are your concerns, they are legitimate concerns, and you let the court know if there is any other future problems under the law other than personalities, okay?

(MRT 26.)

The court then arraigned Frederickson. Defense counsel acknowledged receipt of a copy of the complaint, waived reading and advisement, and entered a plea of not guilty. Frederickson stated "[o]ver my objection," which defense counsel clarified "what he means is he would like to have the complaint read." Frederickson did not clarify that he was objecting on any other grounds. The court responded "Okay. His objection is noted for the record, Mr. Goss. It's on the record, Mr. Frederickson, that you object, okay?" (MRT 19-28.)

On November 7, 1996, Frederickson made another oral motion to proceed in pro per. Defense counsel represented that he had supplied Frederickson with a *Faretta*[7] form. The court then engaged Frederickson in a discussion about his motion and *Faretta* waiver. (MRT 32-34.) The court asked Frederickson, "[a]nd you basically want to [represent yourself] because you know you have a right to do it and you want to do it?" to which he responded "yes, sir." (MRT 34.) The court granted Frederickson's *Faretta* motion, ruling:

> That's what the Constitution says, you have a right to represent yourself or the assistance of counsel. Having talked to you previously, Mr. Frederickson, you strike me as a very bright person, mentally alert. You differ with your approach towards the case from your attorney's [sic] from what little I heard from you folks last time.
>
> I didn't get into that but other than to detect that you folks had a difference of opinion as to where the case was going, how to get there. But that's the only thing I noted that was inconsistent with what a law school, trained attorney would think. . . .
>
> Under the Constitution he can represent himself even on a death penalty case. And he's filled out a *Faretta* waiver form. No problems there. Nothing inconsistent. He's a normal, bright, average person, I've seen. So I'll let him represent himself.

(MRT 34-35.)

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[7] *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].

Frederickson then accepted the court's offer to appoint advisory counsel. [8] (MRT 35.)

On January 27, 1997, Frederickson appeared in court and explained that:

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

(MRT 159.)

The prosecutor requested to speak with Frederickson off the record. Following that conversation, the prosecutor represented to the court that Frederickson:

> [W]ants to plead guilty to the charges. I told him by law he cannot plead guilty to a special circumstances allegation case. He understands that, but I told him no judge can accept [his] plea.
>
> Furthermore, I told him that it was my opinion Mr. Freeman would offer him the best possible representation and suggested that he follow Mr. Freeman's advice on the matter.

(MRT 160.)

The prosecutor also represented that Frederickson wanted to waive preliminary hearing. The court did not rule on either of Frederickson's motions, telling him:

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[8] Bob Goss and Debra Barnum were initially representing Frederickson. They declined to act as his advisory counsel, and the court appointed Ed Freeman to the role. (MRT 38.)

> You will have another nine days to think about this and decide whether or not you truly want to waive preliminary hearing or not. So at this point that is what I am going to do is terminate these proceedings for today and bring you back on the 5th and we'll see where the case goes on that date. Okay?

(MRT 160-162.)

Frederickson agreed to continue the matter. (MRT 162.) The record contains no indication that Frederickson subsequently made any further attempt to change his plea to guilty, or to waive the preliminary hearing.

On February 24, 1997, Frederickson appeared in superior court with advisory counsel, and personally entered pleas of not guilty and not guilty by reason of insanity to the charges. (1RT 4, 14-15.) The following day he was back in court with advisory counsel, and when asked by the court about his status, Frederickson reiterated that he was representing himself. He did not make any indication that he wished to relinquish his pro per status and accept representation. (1RT 17.)

On March 14, 1997, the prosecutor requested the court take a second *Faretta* waiver from Frederickson, because the first waiver was in municipal court, prior to the time when the prosecution sought the death penalty. (1RT 86.) As the court was advising him of his rights, Frederickson interjected:

> Yeah, I'm fully aware of my rights. I'm making a knowing and intelligent waiver of my rights. I understand that this is a death penalty case and that the maximum term is death by lethal injection, and the minimum term, mandatory minimum is life without the possibility of parole. I also am aware that by pleading not guilty and not guilty by reason of insanity, I could spend the rest of my life in a mental institution if a jury so finds, but I'm willing to fill out your petition here. . .

(1RT 88-89.)

The court responded

> As long as this has all been gone over with you by [Municipal Court] Judge Millard, I'm satisfied. If you don't mind filling out the paper, signing it, then we'll have a written record, so there is no question. I'll let you have a copy of that also. I think that ought to take care of it.

(1RT 89.) The court asked both Frederickson and his advisory counsel whether they needed anything else, and both responded no. (1RT 89.)

On Friday, July 25, 1997, while in one of many courtroom appearances dealing with pretrial matters, Frederickson stated "[a]nd I'm contemplating withdrawing my right to – our request to plead in propria persona and ask for counsel to start representing me." (1RT 175.) The court asked him if he was "making that request at this time?" and Frederickson responded "[n]o, sir. I need to find out if [Freeman] wants to represent me or if I need to find other counsel."[9] (1RT 175.) The court ended the hearing by continuing all pending motions so that Frederickson could consult with Freeman as to whether Frederickson wanted to "continue to represent [himself]" or whether he wanted Freeman to "take over as lead counsel." (1RT 181.) Frederickson then stated

> Once again, I know it's not the jurisdiction of this Court, but one of the reasons why I would even be considering giving up my pro per status would be I feel if counsel represents me, the court will give counsel the funds to do it, whereas they won't give it to me.

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[9] While discussing pretrial matters, the court asked Frederickson what Freeman's role would be during trial. Frederickson responded that he wanted Freeman to conduct the entire sanity phase, and the closing argument for the entire trial, but with regard to the remaining arguments and questioning of witnesses, Frederickson stated that he would be doing those himself. The court expressed concern that Freeman could be advisory counsel, but that there is no provision for "co-chair" counsel when a defendant is proceeding in pro per. (3RT 387-391.)

(1RT 181-182.) Frederickson made no mention of a desire to plead guilty.

B. The Consent of Counsel Provision in Penal Code Section 1018 Is Constitutional

Frederickson contends that the consent of counsel provision in Penal Code section 1018 (section 1018) is unconstitutional on its face, and alternatively, that it is unconstitutional as applied to him. (AOB 61-74.) This Court has consistently upheld the constitutionality of section 1018, thus, his argument is without merit.

1. The consent of counsel provision in section 1018 is constitutional on its face

Section 1018 governs guilty pleas by capital defendants, specifying, in pertinent part, that:

> 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.)

A capital defendant does not have a constitutional right to plead guilty.

> Although a defendant has the right to defend himself in person in a criminal prosecution, he is not guaranteed the right to plead guilty to a charge of a felony punishable with death. In that situation, 'such proceedings shall be had as are . . . prescribed by law.' The Legislature has deprived the court of the power to accept a guilty plea from a defendant charged with a felony punishable with death when he is not represented by counsel.

(*People v. Ballentine* (1952) 39 Cal.2d 193, 196, internal citations omitted.)

This Court has repeatedly affirmed the constitutionality of section 1018. In *People v. Chadd* (1981) 28 Cal.3d 739 (*Chadd*), this Court rejected the State's claim that section 1018 is unconstitutional because it "allows counsel to "veto" a capital defendant's decision to plead guilty."

(*Chadd*, *supra*, at p. 747.) This Court held that "the Legislature has the power to regulate, in the public interest, the manner in which that choice is exercised. Thus it is the legislative prerogative to specify which pleas the defendant may elect to enter (Pen. Code, § 1016), when he may do so (*Id.*, § 1003), where and how he must plead (*Id.*, § 1017), and what the effects are of making or not making certain pleas." (*Chadd*, *supra*, at p. 748.)

This Court explained that the "consent of counsel" provision was adopted as "an integral part of the Legislature's extensive revision of the death penalty laws. . . . [in] an effort to eliminate the arbitrariness" the United States Supreme Court found inherent in the operation of prior death penalty legislation. "The fact that the requirement of counsel's consent to guilty pleas in capital cases was enacted as part of that statutory scheme demonstrates that the Legislature intended it to serve as a further independent safeguard against erroneous imposition of a death sentence." (*Id.*, at p. 750.) This Court further explained that "in capital cases . . . the state has a strong interest in reducing the risk of mistaken judgments. Nothing in *Faretta*, either expressly or impliedly, deprives the state of the right to conclude that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plead guilty in capital cases is subjected to the requirement of his counsel's consent." (*Chadd*, *supra*, 28 Cal.3d at p. 751.)

Recently, in *People v. Alfaro* (2007) 41 Cal.4th 1277 (*Alfaro*), this Court confirmed the constitutionality of section 1018, recognizing, as it did in *Chadd*, that section 1018 was:

> intended to serve as a 'further independent safeguard against erroneous imposition of a death sentence.' . . . The consent requirement of section 1018 has its roots in the state's strong interest in reducing the risk of mistaken judgments in capital

> cases and thereby maintaining the accuracy and fairness of criminal proceedings. . . . The statute constitutes legislative recognition of the severe consequences of a guilty plea in a capital case, and provides protection against an ill-advised guilty plea and the erroneous imposition of a death sentence.

(*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1300.)

Thus, Frederickson's claim that section 1018 is unconstitutional must be rejected.

2. Section 1018 is not unconstitutional as applied to Frederickson

Frederickson next argues that even if section 1018 is constitutional on its face, it is unconstitutional as applied to him. (AOB 71-74.) Because this is the type of case for which the safeguards of section 1018 were intended to apply, his argument fails.

In this appeal Frederickson contends that he "sought to plead guilty to accept responsibility and make a case for life at penalty." (AOB 74.) However, the record is devoid of facts supporting this claim. Instead, the record supports the inference that Frederickson sought to plead guilty because he was unhappy with the office supplies he was furnished, the restrictions on his telephone use, and because he did not want "certain information coming out" during trial. (Jan. 23, 1997, pp. 22-23; MRT 22-23.)

The only reference Frederickson made to remorse with regard to pleading guilty was during a hearing in January 1997, prior to the preliminary hearing, when he stated:

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

(MRT 159.)

At no time did Frederickson state that he desired to plead guilty in order to take responsibility for his crimes and spare his life at the penalty phase. When questioned by the court regarding his desire to plead guilty on January 23, 1997, he indicated that he wanted to do so because he was unhappy with the computer he requested to conduct his trial, stating:

> This is not on the advice of anyone, sir. This is a decision that I have made based on the fact that there is absolutely zero potential for me receiving any type of justice whatsoever. The games – the games – you know, the computer is a joke. I'm still laughing about it. . . .
>
> I would like to enter a plea. . . . I do not care – I do not care to allow the State of California, the government, to run over me. I want to just go ahead, plead guilty, go and put my life in front of a jury and let the jury decide whether or not I should get this death penalty or whether I should get life imprisonment. But as to the matter of death, I don't even want to play these games anymore. I want to just go ahead, I want to enter a plea or guilty. I have a right to do so, and I wish to do so at this time.

(Jan. 23, 1997, pp. 22-23.)

Frederickson continued, complaining about his perceived lack of access to resources to conduct the trial in the manner in which he wanted, including complaining about the amount of telephone calls he was authorized to make each day. (*Id.* at p. 23.) Frederickson said absolutely nothing about wanting to plead guilty because he felt remorse or wanted to save his own life. The only inference supported by the record is that Frederickson was angry because he did not have access to the materials and support to which he believed he was entitled, and as a result he wanted to "quit," as his attorney and instead plead guilty. This is exactly the type of situation the safeguard of section 1018 is intended to prevent.

Frederickson contends this case is unlike other cases upholding the consent of counsel requirement in section 1018 (AOB 73-74), but he is mistaken. This case is strikingly similar to *People v. Massie* (1985) 40 Cal.3d 620, in which this Court reversed the judgment because the defendant was allowed to plead guilty without the consent of his counsel. In *Massie*, the defendant sought to plead guilty "apparently in reaction" to a trial court ruling on the circumstances of his confession. (*Id,* at p. 622.) In explaining his decision to change his plea to guilty, the defendant stated:

> I happened to have been telling the truth when I told you that I asked for attorneys when I come in here. However, both officers have gotten on the stand and said the contrary. Okay. Fine. That's the way it is. At this point, I see no reason to pursue this, what is to me, a farce and a sham. I will just as soon go ahead, let the preliminary transcripts stand as they are, and as to the guilt–or if the prosecution desires, they can put on more witnesses. By I just like the guilty plea to stand. I'd like a penalty trial period. And let it go at that.

(*Massie, supra*, 40 Cal.3d at p. 622.)

Frederickson's reasons for wanting to plead guilty are indistinguishable from *Massie*. If, in fact, the trial court had allowed Frederickson to plead guilty without the consent of counsel, there is no doubt that Frederickson would be arguing the court erred in doing so, and pointing to *Massie* as the case directly on point.

In addition, Frederickson attempts to distinguish this case from *Alfaro*. There, this Court rejected a challenge to section 1018 because while the defendant claimed she "sought to plead guilty in order to help establish a foundation for a "remorse" defense at the penalty phase," the record did not support that claim. Instead, the record supported "the inference defendant desired to plead guilty in order to avoid testifying against" a third party "whom her counsel sought to implicate as an accomplice in the murder. . ." (*Alfaro, supra*, 41 Cal.4th at pp. 1299-1300.) While Frederickson contends

that his case is "completely distinguishable" from *Alfaro*, because he "did not seek to avoid the presentation of a defense for reasons unrelated to the merits of that defense," the record shows that it is not. (AOB 73-74.)

Instead, the record supports an inference that Frederickson sought to plead guilty, at least in part, to avoid the introduction of specific evidence unrelated to the merits of any defense. When asked if he wanted to discharge his attorneys because they were "working too hard," Frederickson replied "[y]es, sir. I don't want that vigorous of a defense. I want them to let me – allow me to steer them away from certain witnesses that I don't want called onto the stand because of – you know, I just – I just don't want certain information coming out." (MRT 22-23.) As in *Alfaro*, there is simply nothing in the record to indicate Frederickson sought to plead guilty as part of a strategy to accept responsibility and make a case for a life sentence at the penalty phase.

Frederickson's attempts to plead guilty were made prior to the preliminary hearing, in Municipal Court. The record does not reflect that Frederickson attempted to plead guilty in Superior Court, or that he made any attempt to obtain the consent of counsel, either from his appointed counsel, or from his advisory counsel, to plead guilty. Frederickson did not ask to have counsel appointed to gain his or her consent to a guilty plea, although he was aware of his right to do so. On July 25, 1997, Frederickson informed the court that he was "contemplating withdrawing" his in propria persona status, "and ask for counsel to start representing [him]." Frederickson stated that "one of the reasons why I would even be considering giving up my pro per status would be I feel if counsel represents me, the court will give counsel the funds to do it, whereas they won't give it to me." (1RT 175,181-182.) Frederickson made no mention of seeking representation in order to plead guilty, or any desire to take responsibility for his crimes and demonstrate remorse.

In any event, the consent of counsel requirement did not affect Frederickson's stated desire to accept responsibility due to his remorse. Frederickson represented himself throughout the guilt and penalty phases. Had he really desired to accept responsibility for his crimes, he easily could have done so. Instead he cross-examined the prosecution's witnesses with regard to their recollection of the attempted robbery and murder, their identification of him as the shooter, and their interactions with law enforcement investigating the murder. (8RT 1322-1324,1329-1333, 1339-1341, 1342-1345, 1359-1363, 1364-1365.) Frederickson even cross-examined the victim-impact witnesses. During cross-examination of Maricela Saucedo, a Home Base employee who blamed herself for Wilson's death, he intimated that Saucedo was being untruthful about how long she actually knew Wilson before he was killed. (14RT 2571-2573.) This is certainly not a trial strategy of someone who wished to take responsibility for his crimes.

Moreover, while he contends that he wanted the jury to spare his life, during the penalty phase, Frederickson asked the jury to recommend he receive the death penalty. (16RT 3065.) Frederickson also told the jury that he would "like to apologize," that he has never denied his guilt, and that he had attempted to plead guilty and "acknowledge full responsibility to all of the charges, including the special circumstances," however, he added "*even though I don't believe in my mind that they are true.*" (16RT 3069, emphasis added.) Frederickson's claim that he wished to accept responsibility for his crimes and plead for his life at penalty phase is in stark contrast with his request that the jury recommend he receive death, and his statement that he accepts full responsibility for the charges "even though I don't believe in my mind that they are true." (16RT 3065, 3069.)

The record provides no indicia of evidence that Frederickson sought to plead guilty to accept responsibility for his crimes and to demonstrate

remorse. Section 1018 was not unconstitutional as applied to him and his argument should be rejected.

3. Frederickson entered his own plea in open court

Frederickson contends that he was denied the right to enter his own plea in open court, in violation of section 1018. (AOB 74-75.) However, section 1018 makes no reference to the manner in which a capital defendant's plea of not guilty may be entered. "It is only in instances where pleas of guilty are entered that such pleas must be entered by the defendant himself." (*People v. Miller* (1934) 140 Cal.App. 241, 244.) Thus, this argument is without merit.

In any event, Frederickson did enter his pleas in open court. On February 24, 1997, Frederickson appeared in Superior Court with advisory counsel, and personally entered pleas of not guilty and not guilty by reason of insanity to the charges. (1RT 4, 14-15.)

Frederickson nevertheless contends that he was denied his right to enter his plea in municipal court. (AOB 74; MRT 28.) Frederickson was represented by counsel during his Municipal Court arraignment. At that time counsel acknowledged receipt of a copy of the complaint, waived reading and advisement, and entered a plea of not guilty on Frederickson's behalf. Frederickson stated "Over my objection," which defense counsel clarified "what he means is he would like to have the complaint read." The court responded "Okay. His objection is noted for the record, Mr. Goss. It's on the record, Mr. Frederickson, that you object, okay?" (MRT 19-28.) On appeal, Frederickson argues that he was actually objecting to entry of the guilty plea, not to the waiver of the reading of the complaint. (AOB 75.) However, the record clearly refutes this contention. In any event, Frederickson's personal entry of plea in superior court effectively renders this argument moot.

4. The Municipal Court properly refused to accept Frederickson's guilty plea

Frederickson next contends that the Municipal Court erred by not accepting his guilty plea. (AOB 75-76.) As explained above, section 1018 prohibits a capital defendant from entering a guilty plea without the consent of counsel. Thus California law prohibited the Municipal Court from accepting Frederickson's guilty plea, and his argument must be rejected.

C. Frederickson was not entitled to plead guilty without the consent of counsel, despite his representation status

Frederickson argues that his attempts to plead guilty in the Municipal Court, prior to the preliminary hearing, while representing himself, were improperly denied, in violation of his right to self-representation. (AOB 77-81.) Frederickson frames the issue in terms of "whether a capital defendant may discharge his or her attorney, represent himself or herself, and have a guilty plea accepted as part of a strategy to obtain a life sentence at the penalty phase." (AOB 77.) Frederickson's attempts to plead guilty were not part of a strategy to obtain a life sentence at the penalty phase. As explained above, the record does not support Frederickson's claim that his desire to plead guilty was anything more than a fleeting emotional reaction to what he perceived as unfair treatment by the court and the jail. As such, the issue, which this Court declined to decide in *Alfaro, supra*, 41 Cal.4th at pp. 1299-1300, is not properly presented here.

In any event, this Court noted in *Chadd* that construing section 1018 "to permit a capital defendant to discharge his attorney and plead guilty if he knowingly, voluntarily and openly waives his right to counsel" would "make a major portion of the statute redundant." This Court pointed out that "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." (*Chadd, supra*, 28 Cal.3d at p. 747; see also *Massie, supra*, 40 Cal.3d at p. 624.)

In addition, Frederickson's claim that section 1018 represents an unconstitutional infringement on the constitutional right of self-representation recognized in *Faretta*, is without merit. (AOB 81.) "'[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.'" (*Edwards v. Indiana* (2008) 554 U.S. 2379, 2387 [171 L.Ed.2d 345].) This Court has also rejected this argument, noting that "*Faretta* does not purport to guarantee a defendant acting in propria persona the right to do any and all things his attorney could have done." (*Chadd, supra*, 28 Cal.3d at p. 750; *Massie, supra,* 40 Cal.3d at p. 620.) (AOB 81.) Recognizing that *Faretta* does not "purport to abrogate the rule that a state could constitutionally prohibit all guilty pleas to murder charges (*North Carolina v. Alford* (1970) 400 U.S. 25, 38-39 [91 S.Ct. 160, 27 L.Ed.2d 162, 171-172,]) or the rule that a capital defendant has no right to waive his automatic appeal (*People v. Stanworth* (1969) 71 Cal.2d 820, 833)," this Court has determined that *Faretta* does not affect the state's power to limit a capital defendant's right to plead guilty. (*Chadd, supra*, 28 Cal.3d at p. 747; *Massie, supra*, 40 Cal.3d at p. 620.)

Frederickson also contends that section 1018's consent of counsel requirement violated his right to equal protection and to substantive due process, under the federal and state constitutions, because he had a right to self-representation and a fundamental interest in pleading guilty as part of a strategy to obtain a life sentence. (AOB 81-85.) However, the right to plead guilty is a statutorily created right, and a capital defendant does not

have a constitutional right to plead guilty. "Although a defendant has the right to defend himself in person in a criminal prosecution, he is not guaranteed the right to plead guilty to a charge of a felony punishable with death. . . . " (*People v. Ballentine* (1952) 39 Cal.2d 193, 196, internal citations omitted.) As explained above, this Court has rejected the argument that the consent of counsel provision in section 1018 infringes on his right to self-representation. (*Chadd, supra*, 28 Cal.3d at p. 747; *Massie, supra*, 40 Cal.3d at p. 620.) Furthermore, this Court has concluded that capital defendants and noncapital defendants are not similarly situated, consistently holding that the death penalty law does not violate equal protection by denying capital defendants various procedural rights given to noncapital defendants. (*People v. Martinez* (2010) 47 Cal.4th 911, 968); *People v. Riggs* (2008) 44 Cal.4th 248, 330.)

The record here simply does not reflect that Frederickson sought to plead guilty as part of a strategy to obtain a life sentence. California's strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of criminal proceedings outweighs Frederickson's interest in pleading guilty under the circumstances. (*People v. Alfaro, supra*, 41 Cal.4th at p. 1300.)

D. Frederickson was not induced to discharge counsel

Frederickson next contends he was denied the right to counsel because the consent of counsel requirement "induced [him] to discharge counsel." (AOB 86-87.) There is no support in the record for this assertion. Frederickson first requested to represent himself in July of 1996, stating that he did not "trust the Public Defender's office." The court discussed the perils of self-representation with Frederickson, and delayed ruling on the motion so that Frederickson could have more time to consider whether or not that was what he really wanted to do. (Supp. CT 1; MRT 9-15.) On October 30, 1996, Frederickson told the court that he no longer desired to

represent himself, but that he disagreed with appointed counsels' tactics, and was unhappy with the "vigorous" defense his lawyers were preparing. (MRT 21-27.) However, on November 7, 1996, Frederickson made another oral motion to proceed in pro per. After some discussion and a *Faretta* waiver, the court clarified to Frederickson "[a]nd you basically want to [represent yourself] because you know you have a right to do it and you want to do it?" to which he responded "yes, sir." (MRT 32-34.) Frederickson did not mention one word about a desire to plead guilty, that his counsel would not consent to such a plea, or that he was discharging counsel for this reason. It was not until January 27, 1997, almost three months later, that Frederickson actually attempted to enter a guilty plea. (MRT 159.)

After being advised that the court could not accept a guilty plea without the consent of counsel, Frederickson did not ever request the re-appointment of counsel, make another attempt to plead guilty, or complain that he was unable to obtain the consent of counsel as required by section 1018. He surely could have done all of these things. The record shows that he was aware of his right to do so, and even told the court that he was "contemplating" relinquishing his pro per status and requesting counsel at one point prior to trial. (1RT 181-182.) Thus, contrary to Frederickson's argument, there is no evidence that he discharged counsel because they disagreed with his desire to plead guilty, and as a result was denied the right to counsel. This argument must be rejected.

E. The consent of counsel provision did not prejudice Frederickson during the penalty phase

Finally, Frederickson contends that the effect of section 1018's consent of counsel requirement violated his right to have the jurors consider and give meaningful effect to his acceptance of responsibility and case for life. (AOB 87-96.) First of all, Frederickson testified during the penalty phase. During his testimony he told the jury about his "acceptance of responsibility," saying:

> I'd like to apologize. From the day that this has happened, I have never tried to deny to anybody, and I have thought it was a joke for anybody – the Public Defender's Office or anybody to stand up on my behalf and answer not guilty to the charges that I'm accused of.
>
> I've attempted to plead guilty. I've attempted to acknowledge full responsibility to all of the charges, including the special circumstances, even though I don't believe in my mind that they're true.

(16RT 3069.)

Moreover, both advisory counsel and Frederickson presented closing arguments to the jury at the conclusion of the penalty phase. He could have argued to the jury about the import of his attempts to plead guilty and/or accept responsibility – but he did not.

Finally, there is no evidence that he attempted to plead guilty as part of a strategy to demonstrate responsibility and make a case for life. Instead, his attempts to plead guilty stemmed from his dissatisfaction with the amount and condition of office supplies and restrictions on phone use and money. The record simply does not show that Frederickson sought to take responsibility for his crimes, or wanted the jury to believe he did. In his closing argument during the penalty phase, he devoted only one sentence to his so-called "strategy," telling the jury that he has not blamed anyone else

for the crime, that he has taken responsibility for it, and that the jury can consider those factors in making its determination. (16RT 3205.) As such, his argument must be rejected.

II. FREDERICKSON KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL AND DID NOT EVER RELINQUISH HIS RIGHT TO SELF-REPRESENTATION

Frederickson contends that he was denied the right to counsel because his waiver of counsel in Municipal Court was invalid; he made subsequent requests to have counsel reappointed which were improperly denied, and because his subsequent waiver of counsel in Superior Court was invalid. (AOB 97-115.) Because Frederickson validly waived counsel in Municipal and Superior Court, and never requested reappointment of counsel, his arguments are without merit.

A. Frederickson validly waived counsel in Municipal Court

Frederickson first contends that his waiver of counsel in Municipal Court was invalid. He argues that his waiver was "induced" by the court's failure to address and resolve a conflict between Frederickson and his counsel; that the court failed to advise him with regard to section 1018; and that the court's inquiry was insufficient to support a waiver in a capital case. (AOB 100-105.) The court adequately addressed Frederickson's concerns regarding his attorney, and adequately advised him on the disadvantages of self-representation. Thus he validly waived his right to counsel. His arguments are without merit and must be rejected.

1. Procedural and factual background

On July 16, 1996, Frederickson filed a motion seeking to proceed in propria persona. (Supp. CT. 1.) The court heard his motion on August 22, 1996, and it explained to Frederickson in great detail that if he were to proceed without counsel, he would be not be granted any special privileges,

that he would be opposing very experienced trial attorneys, and that he was facing a penalty of death by lethal injection. The court further questioned Frederickson about his level of schooling, and his mental status. Frederickson stated that he had significant experience with the legal system, and that he had acted as his own counsel in three previous cases. Following this exchange, Frederickson's counsel asked the court to defer ruling on Frederickson's motion to proceed in propria persona "in light of the conversation we had in chambers."[10] The court agreed, and without objection from Frederickson, took his request under submission. (MRT 9-15.)

On October 30, 1996, Frederickson appeared in court for arraignment and for a ruling on his motion to proceed in propria persona.[11] When asked by the court if he still wanted to represent himself, Frederickson stated that he did not. However, he "reserve[] . . . [his] right to defend [himself] later." Frederickson then requested a *Marsden* hearing. (MRT 19.)

During the *Marsden* hearing Frederickson explained

> [t]he reason I wanted to have this *Marsden* hearing is so I can go on the record to explain that I have zero confidence in my attorneys. I understand that the potentiality for this to be a capital case is great, and therefore my life is in jeopardy. I mean, any decision that these people make, they are going to be making towards my life or my death. I'm not happy with their idea of what they want to do tactical-wise."

Frederickson explained that he was concerned that even if he did not want his attorneys to present "certain witnesses" that "they could still call, you

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[10] The record is not clear with regard to the conversation to which he is referring.

[11] Frederickson's motion to proceed in propria persona was set to be heard on September, 20, 1996, but this hearing and his arraignment were continued until October 30, 1996, at his request. (MRT 17-18.)

know, the witnesses over the defendant's objection. I don't want my defense that vigorous." (MRT 21-27.)

The court asked Frederickson "[y]ou don't want them working as hard as they are working; is that what you're saying?" and he responded:

> Yes, sir. I don't want that vigorous of a defense. I want them to let me – allow me to steer them away from certain witnesses that I don't want called onto the stand because of – you know, I just – I just don't want certain information coming out.

(MRT 22-23.)

Frederickson complained that:

> They want time to investigate and to check out all avenues and all that, and I don't want them to do that, right? But I'm also afraid of losing all of my protections and rights by going pro per and allow Mr. Tanazaki, the prosecutor, to just walk all over me, you know, that's tantamount to just executing me.
>
> So I'm going to keep these counsel. I'm not saying they are ineffective. I'm just saying if the court would look at the dissenting opinion in . . . *Deere*, right, and understand what the jurist is saying there, then possibly we could come to some type of a conclusion where I could be happy and whatever verdict is returned I'll be happy with, and I'll be able to live with that decision.

(MRT 23.)

The court clarified again, "you're saying [your attorneys] are working too hard?" to which Frederickson replied "[y]es." (MRT 24.)

In denying the motion, the court explained to Frederickson:

> I sure can't remove one or both of both of them because they are working too hard. There is no guarantee that you're going to be happy with them. You're just entitled to competent, reasonable efforts on behalf of your counsel, and it sounds like you're a little unhappy because they're working too hard. . . . I can't remove them because they are fighting too hard for you. I could remove them if they aren't doing enough for you that you can articulate, so they are not in that category. So your request under *Marsden* is denied.

(MRT 24-26.)

On November 7, 1996, Frederickson made another oral motion to proceed in pro per. Defense counsel represented that he had supplied Frederickson with a *Faretta* waiver form. (Municipal Court Clerk's Transcript 51 "MCT".) The court then engaged Frederickson in a discussion about his motion and *Faretta* waiver. (MRT 32-34.) In his written *Faretta* waiver Frederickson answered the question as to why he wished to represent himself as follows: "Because it is my right to do so." (MCT 51.) The court asked Frederickson "[a]nd you basically want to [represent yourself] because you know you have a right to do it and you want to do it?" to which he responded "yes, sir." (MRT 34.) The court granted Frederickson's *Faretta* motion, ruling:

> That's what the Constitution says, you have a right to represent yourself or the assistance of counsel. Having talked to you previously, Mr. Frederickson, you strike me as a very bright person, mentally alert. You differ with your approach towards the case from your attorney's from what little I heard from you folks last time.
>
> I didn't get into that but other than to detect that you folks had a difference of opinion as to where the case was going, how to get there. But that's the only thing I noted that was inconsistent with what a law school, trained attorney would think. . . .
>
> Under the Constitution he can represent himself even on a death penalty case. And he's filled out a *Faretta* waiver form. No problems there. Nothing inconsistent. He's a normal, bright, average person, I've seen. So I'll let him represent himself.

(MRT 34-35.)

Frederickson then accepted the court's offer to appoint advisory counsel. (MRT 35.)

2. Frederickson's waiver of counsel was knowing and voluntary

Frederickson contends that the court should have asked him whether he was seeking to waive counsel due to a conflict over his desire to plead guilty, and if so, the court should have attempted to resolve that conflict. He asserts that the court's failure to do so negated the voluntary and intelligent showing required for a valid waiver of counsel. (AOB 101.)

A criminal defendant has a constitutional right to conduct his own defense, provided that he knowingly and intelligently waives his Sixth Amendment right to the assistance of counsel. (*Faretta, supra*, 422 U.S. at pp. 835–836; *People v. Bradford* (1997) 15 Cal.4th 1229, 1363.) A "defendant seeking self-representation 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."'" (*People v. Bloom* (1989) 48 Cal.3d 1194, 1224–1225, quoting *Faretta, supra,* 422 U.S. at p. 835. "The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*People v. Riggs, supra,* 44 Cal.4th 248, 276.) Thus, "[a]s long as the record as a whole shows that the defendant understood the dangers of self-representation, no particular form of warning is required." (*People v. Pinholster* (1992) 1 Cal.4th 865, 928–929; accord, *U.S. v. Lopez-Osuna* (9th Cir. 2001) 242 F.3d 1191, 1199 ["the focus should be on what the defendant understood, rather than on what the court said or understood"].)

First of all, Frederickson's claim that the court "made no inquiry into the conflict with counsel" is belied by the record. (AOB 100.) The court conducted a *Marsden* hearing at Frederickson's request, during which

Frederickson and the court discussed the conflict at length. Frederickson explained that he did not want his attorneys to pursue a "vigorous defense," that he wanted to "steer them away from calling certain witnesses," and that he did not want "certain information coming out." (MRT 21-27.) Frederickson did not once state that his attorneys would not consent to his desire to plead guilty. The court denied the *Marsden* motion, ruling that it could not "remove [counsel] because they are fighting too hard for you." (MRT 9-15.)

Four months later Frederickson moved to proceed in pro per once again. Frederickson represented that he was aware of his right to represent himself, and he wanted to exercise that right. The court granted his motion. (MCT 51; MRT 34-35.) Frederickson made no mention of a desire to plead guilty, or a conflict with his attorneys over that desire, at any time during this hearing.

The record reflects that Frederickson wanted to exercise his right to self-representation because he wanted to control his defense, and because it was his right to so do. (MCT 51; MRT 34-35.) He was advised, among other things, that it is almost always unwise to represent yourself, that he would not be entitled to any special privileges and would be required to follow all the technical procedural and evidentiary rules; that the prosecutor would be an experienced and professional attorney with far superior skills; and that if convicted, he would not be able to complain of not having an attorney represent him. (MCT 51.) Frederickson had a constitutional right to waive counsel and to represent himself, and he exercised that right. The court cautioned Frederickson at length regarding the disadvantages of self-representation, and the record demonstrates that Frederickson understood the perils of such an undertaking. Frederickson's waiver of counsel was knowing, intelligent and voluntary. That is all that was required under the circumstances. As such, his argument must be rejected.

3. The court adequately advised Frederickson prior to accepting his waiver of counsel

Frederickson next contends that the court was required to inform him that he could not plead guilty without the consent of counsel pursuant to section 1018, prior to accepting his waiver of counsel. (AOB 101-102.)

The trial court is

> not required to ensure that the defendant is aware of legal concepts such as the various burdens of proof, the rules of evidence, or the fact that the pursuit of one avenue of defense might foreclose another before the trial court can determine that a defendant has been made aware of the pitfalls of self-representation, such that he or she can make a knowing and intelligent decision whether to waive the right to counsel.

(*People v. Riggs, supra*, 44 Cal.4th at pp. 277-278.) Frederickson's "technical legal knowledge" was irrelevant to the court's assessment of his "knowing exercise of the right to defend himself." (*Faretta, supra*, 422 U.S. at p. 836].)

Frederickson indicated both orally and in writing that he wished to represent himself simply because it was his right to do so. He made no mention of representing himself as a means of entering a guilty plea that counsel would not otherwise consent to. (MCT 51; MRT 32-35.) The advisements given in this case warned Frederickson that defending against capital charges is a complex process involving extremely high stakes and technical rules he would be expected to follow despite his likely unfamiliarity with them. Further, he was warned that his ability to defend himself might be limited by his incarceration and lack of training. (MRT 9-15.) Moreover, the record shows Frederickson understood the possibility of a penalty phase of the trial that might result in a sentence of death. (1RT 88-89.) Accordingly, the court properly advised Frederickson, and he knowingly exercised the right to defend himself. (See *People v. Riggs*, *supra*, 44 Cal.4th at p. 275.)

4. The municipal court's inquiry was sufficient to support a valid waiver of counsel in a capital case

Frederickson further contends that the Municipal Court's inquiry was insufficient to support a valid waiver of counsel in a capital case. (AOB 102-105.) He acknowledges that the advisements he received were similar to advisements consistently upheld in recent decisions by this Court. (AOB 105.) (See *People v. Riggs, supra*, 44 Cal.4th at p. 275; *People v. Blair* (2005) 36 Cal.4th 686, 709-710; *People v. Lawley* (2002) 27 Cal.4th 102, 140-141.) Frederickson requests this Court to reconsider those decisions, but offers no persuasive reason to do so. As such, his argument must be rejected.

B. Frederickson did not make an unequivocal request to revoke his in propria persona status

Frederickson next contends that the lower courts erred by failing to address and grant his request to reappoint counsel. (AOB 106-109.) Frederickson did not make an unequivocal request to have counsel reappointed, thus his argument is without merit.

On January 23, 1997, Frederickson appeared, pro per, in Municipal Court for purposes of his Penal Code 987.9 motion.[12] During the hearing he stated:

> I would like to ask the court to go public and allow me to enter a change of plea. After I enter a change of plea and make my plea, I would like to request a waiver of – well, by pleading guilty, I will be waiving my preliminary examination. I'd like the court to take my waiver of rights and schedule me on calendar for Department 5 Superior Court arraignment for schedule for trial for the penalty phase for February 5th and appoint the Public Defender's Office.

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[12] Penal Code section 987.9 governs indigent defendants' rights to funds to prepare their defense in a capital case.

> I've already talked to Bob Goss. Bob Goss, Debra Barnum[13] is willing to take the case on as soon as I plead guilty to the criminal aspect and set for Superior Court arraignment to set for trial the penalty phase.

After explaining that he did not "even want to play these games anymore," and complaining about his computer and perceived lack of telephone access, Frederickson continued: "I've spoken with counsel. And like I said, I would drop my pro per status and accept the Public Defender's Office to represent me as far as the penalty phase is concerned. And if the court would take my waiver, I'm making a knowing and [] intelligent waiver." The court explained that whether or not Frederickson was going to plead guilty or waive preliminary hearing was not before it that day. Frederickson nevertheless reiterated his desire that the court permit him to plead guilty and allow "the Public Defender's Office to retake the case." (Jan. 23, 1997 RT 21-24, 34-35.)

The court did not rule on Frederickson's requests, and instead made arrangements for them to be "expedited" in the appropriate courtroom. (987.9 July 14 Supp. CT 49.) That same afternoon Frederickson appeared back in court, along with advisory counsel. When asked by the court to explain the reason for his appearance, Frederickson stated that he "would like to offer a change of plea and enter a plea of guilty to murder. . . and waive all appellate rights at this time." (MRT 159.) The prosecutor then asked to speak with Frederickson off the record.

Following their discussion the prosecutor explained to the court that Frederickson wanted to waive preliminary hearing, and plead guilty to the charges. The prosecutor told the court that he explained to Frederickson that he could not plead guilty without the consent of counsel, that he should

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[13] Bob Goss and Debra Barnum were the two Public Defenders initially appointed to represent Frederickson in this matter.

"seriously reconsider his thoughts about what he was planning on doing," and "suggested that he follow [advisory counsel's] advice on the matter." He further suggested to him "not to do anything today," but to "come back on February 5 and have of a chance to think about it." At that point, the prosecutor noted, "if Mr. Frederickson after being fully advised of his rights wants to waive [preliminary hearing], we will seriously consider it at that time. . . " (MRT 160-161.)

The court explained to Frederickson that the People have a right to a preliminary hearing, and that he could not unilaterally waive the hearing. It terminated the proceedings, and told Frederickson "[y]ou will have another nine days to think about this and decide whether or not you truly want to waive preliminary hearing or not." (MRT 162.)

After having the additional time to consider his options, Frederickson never made another request to plead guilty or to have counsel reappointed subsequent to doing so.[14] As is clear from the record, Frederickson did not make an unequivocal request for counsel that the court should or could have granted or denied. Frederickson's request for counsel was a product

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[14] The record does not contain any indication that Frederickson desired representation throughout trial, but instead, that he was enjoying representing himself. At one point, after advisory counsel received transcripts to review that Frederickson apparently wanted to review himself, he sent Judge Millard a handwritten note stating

> You are an unprincipled man! After calming down from reading your order of 7-14-97 I am wanting you to recuse yourself from my entire case. BAD! BAD! Judge! I-AM-LEAD-COUNSEL IN-PROPRIA-PERSONA Do you understand? Are you ignorant of what that means? . . . BAD Judge! I can't believe you continue this even after I have made it clear in hearing after hearing that I AM LEAD COUNSEL! And you must deal with me and not my advisor. GOD you are recalcitrant!

(1CT 293.)

of his frustration with the way his case was proceeding, and such request was wholly contingent on his being permitted to plead guilty, and only for the penalty phase. "*Faretta* motions must be both timely and unequivocal. Otherwise, defendants could plant reversible error in the record. Equivocation of the right of self-representation may occur where the defendant tries to manipulate the proceedings by switching between requests for counsel and for self-representation, or where such actions are the product of whim or frustration." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1002, internal citations omitted.) If Frederickson "did not want to proceed without counsel, [he] should have made an express request to revoke his waiver and pressed for a final ruling. . ." (*People v. Lawrence* (2009) 46 Cal.4th 186, 194.) Thus, the record does not show that Frederickson made a request to revoke his in propria persona status, that the trial court denied it, or that the circumstances rendered any denial an abuse of discretion. (*Ibid.*)

C. Frederickson Waived in His Right to Counsel In Superior Court

Next, Frederickson contends that he did not validly waive counsel in the Superior Court, because the court did not readvise him of his right to counsel upon arraignment. (AOB 109-111.) Frederickson executed a valid waiver of counsel in Superior Court and this argument is without merit.

Penal Code section 987 requires the court to advise a defendant of his or her right to counsel in Superior Court whenever the defendant appears without counsel at the arraignment, even when the defendant previously has been advised of the right to counsel and has expressed an intention to waive counsel throughout the proceedings. (*People v. Crayton* (2002) 28 Cal.4th 346, 361.)

On February 24, 1997, in Frederickson's initial Superior Court appearance, Ed Freeman introduced himself as Frederickson's "co-counsel"

and stated "Mr. Frederickson would like to waive reading and waive advisement" and enter pleas. (1RT 4.) The court replied "[i]s that correct, Mr. Frederickson," to which Frederickson replied "yes, sir" and subsequently entered pleas of not guilty and not guilty by reason of insanity. (1RT 4.) Thus, Frederickson waived readvisement of his right to counsel in Superior Court, and his argument should be rejected.

In any event, the next day Frederickson was back in court where he was admonished that by entering a plea of not guilty by reason of insanity, he could be committed to a state hospital for the remainder of his life. Frederickson cut the court's comments short, interjecting "I was fully aware of that." (1RT 14.) Then, on March 14, 1997, during a pretrial conference, the prosecutor stated "as the court is aware, Mr. Frederickson represents himself in pro per, although Mr. Freeman acts as his co-counsel. We took a *Faretta* waiver back in muni court at a very early stage. . . . I'm going to request the court take another *Faretta* waiver of Mr. Frederickson, given that now he knows and is aware that the death penalty is being sought, and the disadvantages to representing himself in that circumstance." (1RT 86.) The court then presented Frederickson with a "Petition to Proceed in Propria Persona" form explaining all the rights to which he was entitled. (1CT 110-113.) Frederickson stated:

> I'm fully aware of my rights. I'm making a knowing and intelligent waiver of my rights. I understand that this is a death penalty case and that the maximum term is death by lethal injection, and the [] mandatory minimum is life without the possibility of parole. I am also aware that by pleading not guilty and not guilty by reason of insanity, I could spend the rest of my life in a mental institution if a jury so finds, but I'm willing to fill out your petition here.

(1RT 88-89.)

Frederickson completed the "Petition to Proceed in Propria Persona." The petition explained to Frederickson that he had the right to a speedy and public trial; to subpoena records and witnesses; to confront and cross-

examine witnesses; to testify or not testify at trial; and "the right to be represented by a lawyer at all states of the proceedings." Further, that petition advised him "the advice and recommendation of this court" was that he "not represent [himself], and accept counsel appointed by the court." (1CT 110-113.) Frederickson signed the petition, signifying that he understood he was "giving up the right to be represented by a lawyer appointed by the Court." (1CT 110.) Thus, the record reflects that Frederickson was properly advised of his right to counsel in both the municipal and superior courts.

Even if the Superior Court's advisement was inadequate, because there is no reasonable probability that the Superior Court's error in failing to readvise defendant of his right to counsel at the arraignment affected defendant's decision to represent himself throughout the course of the proceedings, any error was harmless. (*People v. Crayton* (2002) 28 Cal.4th 346, 365-366.)

III. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO INTRODUCE FREDERICKSON'S STATEMENTS FROM THE JUNE 14, 1996 AND AUGUST 12, 1996 INTERVIEWS

Frederickson contends the trial court erred by not suppressing Frederickson's June 14, 1996 and August 12, 1996 statements to the police, resulting in reversible error. (AOB 116-140.) Because Frederickson validly waived his rights before speaking to investigators, and initiated the August interview himself, his arguments are without merit.

A. Factual and Procedural Background

June 14, 1996 interview:

Investigators Mark Steen and Phillip Lozano interviewed Frederickson on June 14, 1996. Prior to beginning the interview, Steen explained to Frederickson that he was under arrest for Wilson's murder, and that the investigators wanted to interview him regarding the incident.

(1CT 295, 302.) Steen read Frederickson his *Miranda*[15] rights, explaining that Frederickson had the right to remain silent; that anything he said could be used against him in court; that he had the right to an attorney before and during any questioning; and that if he could not afford an attorney, one would be appointed for him. (1CT 300; 8RT 1406-1407.) After reading each right, Steen asked Frederickson if he understood, to which Frederickson replied "yes sir." (1CT 300; 8RT 1407.) Steen then asked him "Daniel, can we talk about what happened? And I'm referring to the uh, to the shooting at the Home Base which is what we're investigating at this time." (1CT 301.) Frederickson replied "I'll talk about as much as I understand about it." (1CT 301.)

The investigators first confronted Frederickson with the gun found in his camper, and he admitted it was his, but stated that he found it two days earlier. (1CT 308-309.) Shortly thereafter the following exchange between Frederickson and Steen took place:

Frederickson: Hey, when am I going to get a chance to call my lawyer. It's getting late and he's probably going to go to bed pretty soon. (1CT 315.)

Steen: Your lawyer? Well you can call your lawyer after we're done in our facility.

Frederickson: Oh, okay. So what do we got to do in our facility here?

Steen: Well we're conducting this interview.

Frederickson: Oh okay. Can we finish tomorrow?

Steen: Um, we can continue talking tomorrow however we're not going to continue the interview.

Frederickson: Oh okay.

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[15] (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694,] (*Miranda*).)

Steen: I mean, we can talk again.

Frederickson: Okay.

(1CT 315-316.)

Steen then began asking Frederickson about the murder. (1CT 316.) Frederickson stated that he was at Home Base for about 40 minutes prior to the murder, and that he had been to that store many times so he knew how the store operated. He admitted going in "with a game plan." (1CT 319, 322.) Frederickson explained to the investigators his plan, the robbery, the murder, and his getaway in intricate detail. (1CT 322-341.)

On July 25, 1996, Frederickson sent Lozano a letter requesting to speak with him again. (4CT 1243.) After receiving Frederickson's letter, Lozano and Steen went to the jail to interview him. (4CT 1243.) Prior to beginning the interview, Lozano advised Frederickson as follows:

> Daniel Frederickson, we're here because you asked us to be here. We are not making any promises, nor are there any guarantees. You are being represented, at this point that we know of, by a Public Defender, okay . . . who has invoked your right to remain silent with the court. He's filed papers to that effect . . . that you are just . . . remain silent, okay? You have the right to have your attorney . . . present while we talk to you, okay? Uh . . . do you wish to waive that right to have that attorney . . . uh . . . here at this time . . . uh . . . Daniel?

(4CT 1244; 8RT 1419-1423.)

Frederickson responded "I waive that, and I have since fired him," apparently referring to his appointed counsel. (4CT 1244.) Lozano then advised Frederickson with a standard *Miranda* admonition as well, and Frederickson signed both admonitions, indicating that he understood his rights and that he waived them. (2CT 485, 487; 4CT 1245-1246.) Lozano began the interview by asking Frederickson to read the letter he wrote to him, initiating the interview, out loud for the record. Frederickson agreed and read the following letter:

Hey, Phil,

Shit, I didn't recognize you from that day.[16] It wasn't until the following week that my grandmother told me who you were. Well, anyway, we need to talk I already gave you 100 percent cooperation, right? Well, I held back some info like accomplices . . . before and after. And . . . here's the cream. I don't want no deal, I just . . . I just . . . give you the info now. What's the reason?

I'm pissed, the person who gave me the murder weapon is the confidential informant who gave me up. Fuck that. He ain't getting no immunity on this. He's scum, he's my dealer. He is a dealer of guns, drugs, and weed. He's dirty, and some cop is probably going to look the other way for information from him.

Oh, hey, guy . . . for old times sake, when you come down, bring some cigarettes. I remember your telling me I couldn't smoke because we were in the building.

Hey, the arrest went good, huh? Shit, I wasn't scared at all. I'd been hoping it'd come soon.

Thanks, Phil. Say hi to Joe and Karen for me.[17]

Sincerely, Daniel Frederickson.

(4CT 1246; copy of original letter at 2CT 439.)

After reading his letter, Frederickson told the investigator an elaborate story about a person named John McCanns allegedly acting as an accomplice to the robbery and murder. (4CT 1248-1283.)

On June 23, 1997, Frederickson moved to dismiss the information. He argued that his June 14, 1996 confession was obtained in violation of *Miranda*, and without the allegedly illegally obtained confession, there was

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[16] Frederickson appears to be referencing the day of June 14, 1996, the day of the first interview.

[17] "Joe and Karen" appear to be a reference to Officer Lozano's brother and sister-in-law. (8RT 1423.)

not sufficient evidence to hold him to answer the murder charge. (1CT 195-199.) The same day Frederickson moved to suppress his June 14, 1996 confession on the same grounds. (1CT 212-216.)

The prosecution submitted a written opposition to Frederickson's motion to dismiss the information, arguing that Frederickson's statement during the interview was not a clear request for counsel, and that in any event, ample evidence supported him being bound over for trial. (1CT 276-284.) The prosecution also submitted a written response to Frederickson's motion to suppress his June 14, 1996 confession, arguing his statements during the interview did not amount to an invocation of the right to counsel. (1CT 288-289.)

On September 8, 1997, Frederickson filed another written motion to suppress both his June 14, 1996 confession, and the interview he initiated with Lozano on August 12, 1996, arguing that the August statements were the "fruit" of the June statements, and that the investigators engaged in misconduct by not notifying Frederickson's counsel of Frederickson's request to speak with them. (1CT 385-396.)

On September 26, 1997, Frederickson, along with his advisory council Freeman again moved to suppress appellant's June 14, 1996 confession, and his August 12, 1996 statements. (2RT 274.) The prosecution submitted a written response to Frederickson's motion to suppress both interviews. (2CT 425-435.) The same day the court denied both motions, ruling that appellant did not make an unequivocal request for an attorney. (2RT 307, 3RT 365.) The court specifically found that Frederickson's statement "when am I going to get a chance to call my lawyer. It's getting late and he's probably going to go to bed pretty soon," indicated that "defendant is desirous of speeding up the interview so he can call his lawyer when the interview was over," and held that the statement "is certainly nothing close to a clear request for an attorney." (2CT 491.)

B. The Trial Court Properly Admitted Frederickson's June 14, 1996 Statements

Frederickson contends he did not validly waive his right to counsel before speaking with investigators on June 14, 1996 and that even if he did initially waive the right, he subsequently invoked his right to counsel before making incriminating statements. (AOB 125-127.) His argument is without merit, as the court properly found that Frederickson "had been advised of and specifically waived his right to have an attorney present before and during questioning" and that he did not subsequently make an unequivocal request for counsel. (2CT 491.)

> In considering a claim on appeal that a statement or confession is inadmissible because it was obtained in violation of a defendant's *Miranda* rights, we 'review independently the trial court's legal determinations . . . . We evaluate the trial court's factual findings regarding the circumstances surrounding the defendant's statements and waivers, and "'accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.'"'

(*People v. Dykes* (2009) 46 Cal.4th 731, 751, internal citations omitted.)

1. Frederickson waived his *Miranda* rights prior to the interview

Prior to beginning the interview, Steen explained to Frederickson that he was under arrest for Wilson's murder, and that the investigators wanted to interview him regarding the incident. (1CT 295, 302.) Steen read Frederickson his *Miranda* rights, explaining that Frederickson had the right to remain silent; that anything he said could be used against him in court; that he had the right to an attorney before and during any questioning; and that if he could not afford an attorney, one would be appointed for him. (1CT 300; 8RT 1406-1407.) After reading each right, Steen asked Frederickson if he understood, to which Frederickson replied "yes sir." (1CT 300; 8RT 1407.) Steen then asked Frederickson "Daniel, can we talk

about what happened? And I'm referring to the uh, to the shooting at the Home Base which is what we're investigating at this time." (1CT 301.) Frederickson replied "I'll talk about as much as I understand about it." (1CT 301.)

Frederickson does not claim that the *Miranda* advisement was incomplete. Rather, he argues that the advisement of rights, combined with his agreement to "talk about what happened" was not an "express" waiver, and therefore not a knowing, intelligent and voluntary waiver of his right to counsel. (AOB 125-127.)

In *Miranda v. Arizona, supra*, 384 U.S. at p. 436, the United States Supreme Court held a criminal defendant

> must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed prior to custodial interrogation. Questioning may then occur if the defendant voluntarily, knowingly and intelligently waives those rights.

(*Miranda v. Arizona, supra*, 384 U.S. at p. 444)

However, law enforcement is not required to obtain an express written or oral waiver of constitutional rights prior to interviewing a defendant. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373 [99 S.Ct. 1755, 60 L.Ed.2d 286,].) Waiver can be inferred from a defendant's words and actions. (*People v. Whitson* (1998)17 Cal.4th 229, 246.) Implied waivers of *Miranda* rights are acceptable under California and federal case law. (*Id.* at p. 247.)

Where a defendant's actions demonstrate that he or she intended to waive *Miranda* rights, there has been a valid waiver. (*People v. Whitson, supra*, 17 Cal.4th at p. 250.) In *People v. Sully* (1991) 53 Cal.3d 1195, 1233, and *People v. Davis* (1981) 29 Cal.3d 814, 823-826, this Court found implied waivers where defendants gave statements, but no express waivers,

after they had been admonished of and had indicated they understood their *Miranda* rights.

As in *Sully* and *Davis*, Frederickson elected to discuss the robbery and murder immediately after he was admonished of and had indicated he understood his *Miranda* rights. By his actions, Frederickson made it clear that he wanted to waive his constitutional rights and discuss the incident with the investigators. The trial court specifically found that this constituted a valid waiver. Since the trial court's finding of waiver is supported by substantial evidence, its ruling should be upheld. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 814; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 56; *People v. Mayfield* (1997) 14 Cal.4th 668, 733.)

2. Frederickson did not unequivocally invoke his right to counsel during the interview.

Frederickson contends that even if he is deemed to have waived his right to counsel by responding to questioning, he subsequently invoked his right to counsel before making any inculpatory statement. (AOB 127-135.)

For a statement to qualify as an invocation of the right to an attorney for purposes of *Miranda*, the defendant "must unambiguously request counsel." (*Davis v. United States* (1994) 512 U.S. 452, 459 [114 S.Ct. 2350, 129 L.Ed.2d 362].) He "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Ibid.*) Where the defendant invokes the right to counsel, the officers must cease interrogation unless the defendant's counsel is present or the defendant initiates further exchanges, communications, or conversations. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880, 68 L.Ed.2d 378].)

The standard in *Davis* "is an objective inquiry." (*Davis v. United States, supra*, 512 U.S. at p. 459.) Thus,

> a reviewing court -- like the trial court in the first instance -- must ask whether, in light of the circumstances, a reasonable officer would have understood a defendant's reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant. (*People v. Gonzalez, supra*, 34 Cal.4th at p. 1125, citing *Davis v. United States, supra,* 512 U.S. at pp. 460-462.)

Frederickson's comment "Hey, when am I going to get a chance to call my lawyer. It's getting late and he's probably going to bed soon" was not an unequivocal invocation of the right to counsel. (1CT 315.) Frederickson's question was, as the trial court pointed out, an indication that he was "desirous of speeding up the interview so he [could] call his lawyer when the interview was over." (2CT 491.) Frederickson gave no indication he desired representation at any point during the interview. Frederickson's lone statement about when he would have a chance to call his lawyer was far from an invocation of his rights, and far more ambiguous and equivocal than statements deemed ambiguous and equivocal in other cases. (*People v. Stitely* (2005) 35 Cal.4th 514, 534 ["I think it's about time for me to stop talking"]; *People v. Clark* (1993) 5 Cal.4th 950, 989 [defendant's statement, "what can an attorney do for me," was not necessarily a request for one]; *People v. Thompson* (1990) 50 Cal.3d 134, 165-166 [context of interview showed that defendant's references to counsel during interrogation were not an invocation of his right to counsel]; *People v. Jennings* (1988) 46 Cal.3d 963, 977 [frustrated suspect's statement, "that's it, I shut up," not invocation of right to remain silent]; *People v. Silva* (1988) 45 Cal.3d 604, 629-630 [suspect's statement that he did not "want to talk about that," was not an invocation of the right to

silence, but merely indicated unwillingness to discuss a certain subject]; *People v. Ashmus* (1991) 54 Cal.3d 93, 968 [the defendant's continued conversation with the police after statement, "I ain't saying no more," demonstrated that he was not invoking Fifth Amendment rights]; *People v. Roquemore* (2005) 131 Cal.App.4th 11, 23-24 [the defendant's question whether "he could call a lawyer or his mom," not an unequivocal request for counsel]; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 153 ["There wouldn't be [an attorney] running around here now, would there? . . . I just don't know what to do," not an unambiguous request for counsel]); (*People v. Crittenden, supra,* 9 Cal.4th at pp. 129-131 ["Did you say I could have a lawyer?" was clarification of rights rather than unambiguous invocation of right to counsel]; *People v. Johnson* (1993) 6 Cal.4th 1, 27-30, disapproved on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826, 879 ["Maybe I ought to talk to my lawyer, you might be bluffing, you might have not enough to charge murder" and mother would secure "a high priced lawyer" not invocation].)

As in the above cases, Frederickson's ambiguous and equivocal reference to an attorney did not require cessation of the interview. (See *United States v. Davis, supra,* 512 U.S. at p. 459 ["If a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning."].) Since the trial court's finding that Frederickson did not invoke his right to counsel is supported by substantial evidence, its ruling should be upheld. (*See People v. Jablonski, supra,* 37 Cal.4th at p. 814; *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 56; *People v. Mayfield, supra,* 14 Cal.4th at p. 733.)

C. The Trial Court Properly Admitted Frederickson's August 12, 1996 Statements

Frederickson further contends that the court erred by denying his motion to suppress statements made during the August 12, 1996 interview with Steen and Lozano because the August 12 statements resulted from the "taint" of the June 12 statements; the investigators interviewed him without appointed counsel present; and that he had a mental illness that prevented him from waiving his right to counsel. (AOB 135-140.) These arguments are without merit.

On July 16, 1996, Frederickson filed a motion to proceed in propria persona. (Supp. CT 1.) On July 25, 1996, Frederickson sent Lozano a letter requesting to speak with him. (2CT 439; 4CT 1243.) After receiving Frederickson's letter, Lozano and Steen went the jail to interview him again. (4CT 1243.) Prior to beginning the interview, Lozano advised Frederickson as follows:

> Daniel Frederickson, we're here because you asked us to be here. We are not making any promises, nor are there any guarantees to you. You are being represented, at this point that we know of, by a Public Defender, okay . . . who has invoked your right to remain silent with the court. He's filed papers to that effect . . . that you are just . . . remain silent, okay? You have the right to have your attorney . . . present while we talk to you, okay? Uh . . . do you wish to waive that right to have that attorney . . . uh . . . here at this time . . . uh . . . Daniel?

(4CT 1244; 8RT 1419-1423.)

Frederickson responded "I waive that, and I have since fired him." (4CT 1244.) Lozano then advised Frederickson with a standard *Miranda* admonition as well, and Frederickson signed both admonitions that he understood his rights and waived them. (2CT 485, 487; 4CT 1245-1246.)

1. The August 12 statements did not carry any taint from the June 12 statements

As discussed above, Frederickson's June 12, 1996 statements were properly obtained and introduced, thus, Frederickson's subsequent statements were not tainted by that interview. Even assuming that his June statements were improperly obtained, his August 12 statements were obtained by means sufficiently attenuated so as to be free of any taint of that alleged impropriety.

> A subsequent confession is not the tainted product of the first merely because, 'but for' the improper police conduct, the subsequent confession would not have been obtained. (*Johnson, supra*, 70 Cal.2d at p. 549.) As the United States Supreme Court has explained: '[N]ot . . . all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."' (*Wong Sun v. United States* (1963) 371 U.S. 471, 487-488 [83 S.Ct. 407, 9 L.Ed.2d 441, 455-456]; *Johnson, supra*, 70 Cal.2d at p. 548.) The degree of attenuation that suffices to dissipate the taint 'requires at least an intervening independent act by the defendant or a third party' to break the causal chain in such a way that the second confession is not in fact obtained by exploitation of the illegality. (*People v. Sesslin* (1968) 68 Cal.2d 418, 428; see *People v. Rich* (1988) 45 Cal.3d 1036, 1081.)

(*People v. Sims* (1993) 5 Cal.4th 405, 445.)

Here, about six weeks following Frederickson's June 12 interview with Steen and Lozano, and after moving to proceed in pro per, Frederickson, on his own accord, wrote a letter to Lozano asking to meet with him to discuss the case. (2CT 439; 4CT 1243.) In addition, the investigators advised him of his rights again prior to the August interview. Frederickson's intervening act of requesting to speak with investigators, the nearly two-month period in between interviews, and the fact that

Frederickson was properly and thoroughly re-advised of his *Miranda* rights, broke any causal chain between the June and August interviews. Thus, the August interview was not the tainted product of the June interview and Frederickson's argument fails.

2. Frederickson waived his right to counsel prior to the August 12, 1996 interview

Frederickson next contends that despite the fact that he initiated the August interview, his Sixth Amendment rights were violated when the investigators spoke with him without first consulting his attorney. (AOB 137-138.)

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State. . . [T]his guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. . . . Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

(*Maine v. Moulton* (1985) 474 U.S. 159, 176 [106 S.Ct. 477; 88 L.Ed.2d 481].)

Here, Frederickson filed a motion to proceed in pro per on July 16, 1996. (Supp. CT 1.) Frederickson then initiated an interview with investigators by writing a letter to Lozano requesting to speak with him regarding the case. Prior to speaking with Frederickson, Lozano carefully and thoroughly advised him of his rights. While Frederickson had the right to rely on counsel as a "medium" between himself and investigators, he knowingly and intelligently waived this right – first by requesting to represent himself, and second, by acknowledging that he understood and

waived his rights prior to questioning. In no way did the State knowingly circumvent Frederickson's right to have counsel present in violation of the Sixth Amendment.

3. Frederickson's waiver was valid despite his claim of mental illness

Frederickson next argues that the court failed to consider the effect of Frederickson's alleged mental illness on the validity of his waiver of counsel. (AOB 138-139.) Frederickson submitted a declaration from Dr. Fisher in support of his motion to suppress his statements, in which the doctor declared that he had examined Frederickson's health history, administered a "series of psychological tests to him," and discussed the condition of Frederickson's mental health during July and August of 1996 with him. (2CT 410.) Based on the information obtained, Fisher declared "Mr. Frederickson was mentally ill . . . his condition had deteriorated significantly during July/August of 1996. His letter to the police of 7/25/96 was a product of this deteriorated mental state." (2CT 410.) The court sustained the prosecution's objection to Dr. Fisher's declaration, ruling that Dr. Fisher's opinion that Frederickson had a deteriorated mental state was "a legal conclusion that would not be admissible as it is without foundation." (2RT 294-295.) In denying Frederickson's motion to suppress, the court ruled in a written order that Frederickson had "failed in his attempt to present evidence of any mental defect that would prohibit him from understanding and or waiving his *Miranda* rights." (2CT 491.)

The thrust of Frederickson's argument appears to be that his mental condition was such as to preclude a knowledgeable and voluntary decision to make incriminating statements. However, exclusion of evidence on this ground was conclusively rejected by the United States Supreme Court in *Colorado v. Connelly* (1986) 479 U.S. 157, 164-167 [107 S.Ct. 515, 93 L.Ed.2d 473, 482-485]) and Frederickson does not cite to any authority

stating otherwise. "[C]oercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment." (*Colorado v. Connelly*, *supra*, 479 U.S. at p. 167.) Frederickson cannot demonstrate any coercive police activity and his argument is without merit.

D. Any Error Was Harmless

Even assuming that Frederickson's statements were improperly obtained, under the circumstances their admission was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [111 S.Ct. 1246, 1265, 113 L.Ed.2d 302]; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705]; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.)

Undisputed and overwhelming evidence showed that Frederickson murdered Wilson during an attempted robbery. First of all, several Home Base employees identified Frederickson as the shooter. (8RT 1321, 1333, 1336-1342, 1344, 1358-1359.) In addition, Christopher Rodriquez provided police with the license plate and description of the van Frederickson used as his getaway car, and Frederickson was arrested the following day in the same van. (8RT 1338-1339; 1355-1356, 1380, 1382, 1384-1385.)

Moreover, right after the murder, Frederickson called Home Base and spoke to Officer Dryva. (8RT 1371.) Frederickson explained the details of the robbery and murder to Dryva, blaming Home Base management for Wilson's death. Frederickson explained that he followed Wilson to the safe and demanded money, and that when Wilson did not comply, he became frustrated and shot him. (8RT 1371-1375.)

The day following his arrest, Marla Jo Fisher, a reporter for the Orange County Register, interviewed Frederickson at the Santa Ana Detention Center. (8RT 1448-1449.) Frederickson told Fisher that he

called the Home Base store after the shooting, and that he thought he was speaking to a manager, but it turned out he was actually speaking to a police officer. (8RT 1453.) Wilson told Fisher that during that phone call, he blamed Home Base management for failing to train their managers to immediately hand over money, rather than risking their lives in a robbery attempt. (8RT 1453.) Frederickson also told Fisher that he was attempting to rob the Home Base store, and that during the course of the attempted robbery, he shot the manager, Wilson. (8RT 1451-1452.) Frederickson described to Fisher how he entered the store intending to commit the robbery, and he waited until he saw Wilson going to the safe before he demanded money from Wilson, and that instead of giving him the money, Wilson slammed the door to the safe shut, and as a result, Frederickson shot him. (8RT 1452, 1454.) Frederickson stated that he told Wilson to put the money in a box, but Wilson refused to do so. Frederickson said he shot Wilson out of frustration because he would not give him the money. (8RT 1456.) Frederickson explained how he thought Wilson was "brave, but stupid," and how "he admired his courage," but thought Wilson "should have complied with his request for money." (8RT 1452.)

Finally, Frederickson's own cousin, Nick Peres, testified that Frederickson confessed to murdering Wilson, stating that Wilson did not do what he was supposed to do, so Frederickson "got mad and shot him." (9RT 1812.)

Thus, even if the court erred in admitting Frederickson's June 14, 1996 and August 12, 1996 statements, any error was harmless beyond a reasonable doubt.

IV. THE TRIAL COURT PROPERLY DENIED FREDERICKSON'S UNTIMELY MOTION TO SUPPRESS

Frederickson contends the trial court erred by denying his motion to suppress evidence found during a parole search of his camper following his arrest. He argues that the court improperly concluded that Frederickson's motion was untimely, and that the court erroneously determined the search of his camper did not require a warrant because it was a valid parole search. (AOB 145-157.) His argument is without merit.

A. Factual and Procedural Background

The evening of Frederickson's arrest, Santa Ana Police Corporal Richard Reese, along with other law enforcement personnel, including his Parole Officer Jan Moorehead, conducted a parole search of Frederickson's camper. (8RT 1386, 1390.) Reese found a chrome .32-caliber revolver under a blanket on a bed. (8RT 1387-1388.) At a later date, Officer Lozano obtained a search warrant and searched Frederickson's camper again in an effort to locate "the casing that was supposed to be with the gun." (8RT 1394.)

Frederickon objected to the warrantless search and subsequent introduction into evidence of the gun for the first time during the direct examination of Corporal Reese during the trial. (8RT 1389.) The prosecution responded that Frederickson should have objected to the search prior to trial, and further, that a warrant was not required because Frederickson was on parole at the time of the search. (8RT 1389-1390.) Frederickson maintained that because he had been arrested just prior to the search, he was no longer on parole, thus the parole search exception to the warrant requirement was not longer applicable. (8RT 1390.)

Frederickson argued that he did not become aware that the gun was found pursuant to Reese's investigation until trial. He stated that he initially assumed the gun was found during the subsequent search pursuant to a warrant. (8RT 1396-1397.)

The prosecution argued that it was clear from the discovery provided to Frederickson that the gun was discovered pursuant to a warrantless parole search. The discovery included Reese's report from the warrantless search, stating that he obtained the gun during his search. The discovery also included the affidavit from Lozano's search pursuant to a warrant, indicating that he had found only six pairs of men's trousers, a black cloth and Velcro straps. (8RT 1394-1396.)

The court denied appellant's motion on timeliness grounds and on the merits, ruling:

> If there's nothing in any of the discovery to indicate that the weapon was taken during a search pursuant to a warrant, I'm somewhat confused as to how you would not be aware that it was taken by Corporal Reese during his search of the camper. . . .
>
> The problem presented here is that if I were to allow this motion to be heard at this time, it would be granting favoritism to an individual who decided to represent himself. I don't believe that it's fair to the process of justice to do that. The defendant, having chosen to represent himself, is bound to know the rules and procedures. I frankly can't see any justification for waiting mid-trial to make a motion to suppress.

(8RT 1396-1397.)

The court also ruled that Reese did not need a warrant to conduct a parole search of Frederickson's camper, and that he was under arrest at the time of the search did not affect the validity of the parole search. (8RT 1413.)

B. The Court Properly Ruled Frederickson's Motion Was Untimely

Frederickson argues that although he moved to suppress evidence made during the warrantless search for the first time during trial, that his motion was nevertheless timely because he was not aware Reese had obtained the gun during a warrantless search. (AOB 149-152.)

Penal Code section 1538.5, subdivision (h) provides a defendant the right to make a motion to suppress evidence during trial if, prior to trial, "opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion."

Here the court found that the discovery provided to Frederickson clearly indicated that the gun was found during a warrantless search, and that Frederickson should have been aware of such a fact. (8RT 1396-1397.) The court properly ruled that Frederickson should have been aware of the grounds for his motion prior to trial, and therefore properly denied his untimely motion to suppress.

C. The Court Properly Denied Frederickson's Motion to Suppress Because Reese Obtained the Gun Pursuant to a Valid Parole Search

In any event, the court decided Frederickson's motion on its merits, properly ruling that Reese's search was a valid parole search.

It was undisputed that Frederickson was on parole when he was arrested for murder, and when his camper was searched later that same day. Frederickson admitted that he had been on parole leading up to his arrest. His claim was that he did not consider himself on parole once he was arrested. (AOB 145; 8RT 1391.) The prosecutor specifically did not introduce the fact of Frederickson's parole because of potential prejudice, stating in response to Frederickson's objection "I didn't want to get into the parole search aspect, the fact that he was on parole. I didn't think at this

moment, anyway, that's not relevant and could be highly prejudicial, so I left that out." (8RT 1390.) Frederickson responded "I was in custody. . . I was no longer on parole. It may have been minutes, it may have been half an hour or an hour, but no longer was I on parole. I was in custody. There was no exigent circumstances for an unconstitutional search and seizure." (8RT 1390.)

The court ruled that the parole search was "reasonable within the contemplation of the Fourth Amendment" pursuant to *People v. Burgener* (1986) 41 Cal.3d 505. (8RT 1413.)

The court's ruling was correct because

> a parole search is reasonable under the Fourth Amendment 'if there is a reasonable nexus (a direct and close relationship) between the search and the parole process, and a reasonable suspicion, based on articulable facts, that the parolee has violated the terms of his parole or engaged in criminal activity.'

(*People v. Stanley* (1995) 10 Cal.4th 764, 790; citing *People v. Johnson* (1988) 47 Cal.3d 576, 594.) Neither police participation nor the fact the parolee is already under arrest invalidates an otherwise proper parole supervision purpose. (*People v. Stanley, supra,* 10 Cal.4th at 790; *People v. Burgener* (1986) 41 Cal.3d at p. 536.) And "[c]learly, investigation of defendant's involvement in a murder would have a parole supervision purpose." (*People v. Stanley, supra,* 10 Cal. 4th at p. 790.) The search at issue here was conducted the day of Frederickson's arrest, by his parole officer, as part of a murder investigation. (8RT 1390.) There is no question it was a valid parole search.

D. The Gun Would Have Inevitably Been Discovered in the Subsequent Search of the Camper, and Any Error Was Harmless

In any event, even if the court improperly denied Frederickson's motion to suppress, any error was harmless. First of all, the gun inevitably would have been discovered in Officer Lozano's subsequent search conducted pursuant to a search warrant. (8RT 1394.) The doctrine of inevitable discovery recognizes that if the prosecution can establish by a preponderance of the evidence that the information inevitably would have been discovered by lawful means, such evidence will not be excluded. (*Nix v. Williams* (1984) 467 U.S. 431, 443–444 [104 S.Ct. 2501, 81 L.Ed.2d 377]; *People v. Coffman and Marlow, supra,* 34 Cal.4th 1, 62.) In addition, regardless whether the court denied Frederickson's motion on timeliness grounds, or on the merits, given the strength of the prosecution's case as discussed in Argument III, which included significant circumstantial evidence, and a multitude of Frederickson's own confessions and self-incriminating statements, it is not reasonably probable that a different result would have been obtained absent introduction of the gun. (*People v. Watson* (1956) 46 Cal.2d 818, 836–837.)

V. FREDERICKSON WAS NOT PREJUDICED BY TRIAL COURT'S REFUSAL TO REQUIRE MARLA JO FISHER TO DISCLOSE UNPUBLISHED INFORMATION FROM HER JAILHOUSE INTERVIEW

Frederickson contends the court erred by refusing to require a newspaper reporter to disclose notes of her jailhouse interview with him, or to alternatively strike her testimony. (AOB 158-179.) Because he suffered no conceivable prejudice, his argument is without merit.

A. Procedural and Factual Background

Marla Jo Fisher, a reporter for the Orange County Register (The Register), interviewed Frederickson in jail the night of his arrest. During the interview Frederickson told Fisher that in the course of attempting to rob the Home Base store, he shot the manager, Scott Wilson. (8RT 1451-1452.)

Frederickson described to Fisher how he entered the store intending to commit the robbery, that he waited until he saw Wilson going to the safe, and then he demanded money from him. (8RT 1452, 1454.) Frederickson stated that he told Wilson to put the money in a box, but Wilson refused to do so, instead shutting the door to the safe. (8RT 1452, 1454.) Frederickson admitting shooting Wilson out of frustration because Wilson would not give him the money. (8RT 1456.)

Frederickson explained how he thought Wilson was "brave, but stupid," and how "he admired his courage," but thought Wilson "should have complied with his request for money." (8RT 1452.)

Frederickson also told Fisher that he called the Home Base store after the shooting, and that he thought he was speaking to a manager, but it turned out he was actually speaking to a police officer. (8RT 1453.) Just as Officer Dryva testified, Frederickson told Fisher that during that phone call, he blamed Home Base management for failing to train their managers to immediately hand over money, rather than risking their lives in a robbery attempt. (8RT 1453; 1371-1375.) The following day The Register published Fisher's article containing Frederickson's statements and admissions. (3RT 342-343; 2CT 521-523.)

The prosecution subpoenaed Fisher to testify at trial, and Frederickson responded by subpoenaing The Register for, inter alia, any notes Fisher may have regarding her interview with him. (2CT 516-517.) The Register moved for a protective order limiting the scope of Frederickson's subpoena

to information not protected by the state newsperson's shield law, ie., any unpublished material, as set forth in article I, section 2(b) of the California Constitution.[18] (2CT 501-502.) Frederickson opposed The Register's request for a protective order. He argued, in part, that the notes were necessary because statements he made during his interview would establish mitigating circumstances relative to the penalty determination, and may establish that the slaying was not in furtherance of a robbery. He also intended to use the notes to impeach Fisher's credibility, and to show that Fisher was acting as a government agent when she conducted the interview. (2CT 545-550.)

The court initially ruled that Frederickson could cross-examine Fisher concerning

> all of the circumstances surrounding this interview, including any statements that he may have made that were not published. His fundamental right to cross-examine and confront witnesses takes precedence over the shield law under the circumstances presented in this case.

(3RT 334-335.)

However, the court declined to require Fisher to provide Frederickson with her unpublished notes, ruling

> As far as turning over the reporter's notes, at this point I'm not going to make such an order. It will depend on what the testimony is, whether or not the witness has relied on those notes in refreshing her recollection in testifying.

(3RT 334-335.)

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[18] Article I, section 2(b) provides that a newsperson "shall not be adjudged in contempt . . . for refusing to disclose the source of any information procured while so connected or employed [as a newsperson] . . . or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public."

The court then conducted an Evidence Code section 402 hearing to determine the extent to which any notes Fisher may have taken would be admissible at trial. (8RT 1434-1445.) At the hearing, Fisher did not disclose whether or not she had taken notes of the interview. (8RT 1434-1436.) She testified that she used only the newspaper article itself, and a videotape of a television interview to refresh her recollection prior to testifying. (8RT 1435.)

The court ruled that if Fisher "has not relied on [her notes] to refresh her recollection in the giving of testimony, then I don't see that they can legitimately or legally be produced under the shield law." (8RT 1444.) Frederickson objected that he was unable to "test" Fisher's "credibility" without her notes. (8RT 1444.) The court responded that "considering the interview was of you, I think there is significant areas of testing the credibility available to you." (8RT 1444.) The court then ruled that Frederickson

> may inquire about matters that were discussed during his interview with her. . . anything that he recalls that he wants to talk to her about that occurred during the course of that interview is subject to be examined upon, but declined to order Fisher or The Register to produce interview notes.

(8RT 1445.)

B. The Court's Application of the Newsperson's Shield Law Did Not Prejudice Frederickson

The California newsperson's shield law "provides newspersons, including reporters who are engaged in legitimate journalistic pursuits, protection against compulsory disclosure of the information they acquire in gathering news." (*People v. Ramos* (2004) 34 Cal.4th 494, 523.) Specifically, "Art. I, section 2(b) protects a newsperson from being adjudged in contempt for refusing to disclose either: (1) unpublished

information, or (2) the source of information, whether published or unpublished." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 797.)

In order to compel disclosure of information covered by the shield law, the defendant "must show a reasonable possibility the information will materially assist his defense. . . [his] showing need not be detailed or specific, but it must rest on more than mere speculation." (*Delaney v. Superior Court, supra,* 50 Cal.3d at p. 809.) If the defendant meets the threshold requirement, the court then balances the defendant's and the newsperson's interests to determining whether to compel disclosure of the information. (*Ibid.*) These interests include whether the unpublished information is confidential or sensitive, the interests sought to be protected by the shield law, the importance of the information to the defendant, and, whether there is an alternative source for the information. (*Id.,* at pp. 810-812.)

1. The newsperson's shield law applies even when the defendant is the source of the information sought to be protected

Frederickson argues that the shield law did not apply in this case at all because he was seeking disclosure of unpublished information for which he was the source. He urges this Court to issue a blanket rule that the shield law does not apply "when the defendant in a criminal case is both the source and the seeker of the "unpublished" information." (AOB 168-173.) This Court has previously declined to issue such a rule. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 811.) Frederickson does not offer a persuasive reason as to why this Court should change its position.

In *Delaney,* this Court held that

> [O]ther circumstances may, as a practical matter, render moot the need to avoid disclosure. If. . . the criminal defendant seeking disclosure is himself the source of the information, it cannot be seriously argued that the source (the defendant) will feel that his confidence has been breached. The reporter's news-gathering ability will not be prejudiced.

(*Delaney v. Superior Court*, *supra,* 50 Cal.3d at p. 811.)

Thus, *Delaney* rejected Frederickson's proposed blanket rule, holding that such circumstances *may*, not *must*, "as a practical matter, render moot the need to avoid disclosure." (*Delaney v. Superior Court*, *supra,* 50 Cal.3d at p. 811.) In so holding, *Delaney* recognized that each case must be analyzed on its own facts, and that the trial court is in the best position to determine the issue of disclosure, noting that

> Other circumstances may also mitigate or eliminate the adverse consequences of disclosure. We do not purport to decide the significance to be given to any future set of facts before a trial court. The point is simply that a trial court must determine whether the policy of the shield law will in fact be thwarted by disclosure.

(*Id.* at pp. 810-811.)

The *Delaney* framework already adequately protects a defendant's interests while at the same time protecting journalistic integrity. A blanket rule denying application of the newsperson's shield law when the defendant is the source and seeker of the information is unnecessary, and Frederickson's argument advancing such a rule should be denied.

2. Application of the shield law did not result in prejudice

Frederickson acknowledges that it is unknown whether any notes of the interview even existed, because the trial court did not require Fisher to disclose whether or not she had taken notes of the interview. (3RT 327-328; 8RT 1434-1436; AOB 160.) Without knowing if Fisher had notes of her interview with Frederickon, and what those notes may have contained,

it is impossible to determine whether the trial court properly ruled on the matter. However, under *Delaney*, it does appear that if Fisher did indeed have notes from her interview, the court should have conducted an in camera review of the notes to determine whether any discoverable information existed, and whether Frederickson's interest in the information was such that the immunity from contempt granted to newspersons by the shield law should yield to Frederickson's right to a fair trial. (*Delaney v. Superior Court, supra,* 50 Cal.3d at p. 793 [The court has discretion to determine whether a newsperson's claim of confidentiality or sensitivity is colorable. "If the court determines the claim is colorable, it must then receive the newsperson's testimony in camera.") In any event, any conceivable error was harmless.

Frederickson contends that without Fisher's notes he was "unable to effectively cross-examine her on her critical testimony regarding [his] purported confession." (AOB 175.) He argues that as a result, reversal of the entire judgment is required. This argument is without merit.

First of all, the court allowed Frederickson to cross-examine Fisher about all aspects of the interview. In addition, Frederickson took the stand and testified on his own behalf, thus he could have pointed out to the jury any discrepancies or inaccuracies he perceived in Fisher's testimony.

Moreover, Fisher's testimony regarding Frederickson's confession was entirely consistent, and in some places identical, to his statements to Officer Dryva immediately following the attempted robbery and murder, and to the investigators the following day. (8RT 1371-1375; 1CT 295-340.) This includes Frederickson's statement to Fisher regarding murdering Wilson in part so that he could return to prison. While he lends great weight to this statement and his alleged inability to cross-examine Fisher about it, the next day he essentially told the police the same thing, stating his purpose for attempting the robbery was "not entirely" for money,

it was also because he "just got frustrated with life and shit and said well fuck it man if I get caught you know I'll go back in for about two or three years and you know. . . get out and try it again later." (1CT 329.)

The fact that Frederickson made the same statements in every interview weighs heavily against his assertion that notes of the interview "might cast doubt on [Fisher's] testimony." (AOB 165.)

Furthermore, as he points out in his brief, Frederickson confessed to the attempted robbery and murder to the police. (AOB 177.) Finally, Frederickson admitted to the jury that he murdered Wilson. (10RT 2013-2014.) Overwhelming evidence supports Frederickson's murder conviction and special circumstance finding, thus the exclusion of notes Fisher may or may not have taken would not have altered the outcome and is therefore harmless under either standard. (*People v. Sapp* (2003) 31 Cal.4th 240, 274-275; *Chapman v. California, supra,* 386 U.S. at p. 24.) If, however, this Court should determine that such error was not harmless, it does not require reversal of the any part of the judgment. Instead, the trial court should be allowed to review Fisher's notes, if such notes exist, to determine whether or not they contain any discoverable information.

VI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER, AND WAS NOT REQUIRED TO INSTRUCT THE JURY THAT IT MUST UNANIMOUSLY AGREE ON A THEORY OF MURDER

Frederickson contends the trial court prejudicially erred by instructing the jury on first degree premeditated murder and first degree felony-murder because the information only charged appellant with second degree malice murder in violation of Penal Code section 187. He further contends the court erred by not requiring the jury to agree unanimously on whether he committed a premeditated murder or a felony murder. (AOB 180-184.) Because Frederickson did not object to the instructions below, he has

forfeited this claim of error. In any event, his argument fails. As Frederickson concedes, this Court has repeatedly held felony murder and premeditated murder are not distinct crimes, and need not be separately pleaded; and further, when evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed, the jury need not unanimously agree on the theory under which the defendant is guilty. Thus, the jury was properly instructed.

The information alleged that Frederickson "in violation of section 187(a) of the Penal Code (MURDER), a FELONY, did willfully and unlawfully and with malice aforethought murder Scott Wilson, a human being." (1CT 68.) At the conclusion of the guilt phase, the court instructed the jury that it could convict Frederickson of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; 3CT 774-775; 10RT 1975-1976), or killed during the commission or attempted commission of a robbery (CALJIC No. 8.21; 3CT 776, 10RT 1976-1977.) The court did not instruct the jury that it had to reach a unanimous decision with regard to the theory of murder. Frederickson did not object to the murder instructions, or request a unanimity instruction. The jury convicted him of first degree murder. (3CT 810.)

Frederickson now asserts the jury was improperly instructed on first degree premeditated murder and first degree felony-murder because the information only charged him with second degree malice-murder in violation of Penal Code section 187. As such, he claims the trial court lacked jurisdiction to try him for first degree murder, and violated his rights to proof beyond a reasonable doubt, to trial by jury, to adequate notice of the charges, to due process, and to a reliable determination of allegations that he committed a capital offense under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and parallel provisions of the state Constitution. (AOB 181.) Frederickson's argument has been repeatedly

rejected by this Court. Because appellant offers no valid reason to overturn these past decisions, his claim should be rejected here.

Felony-murder and premeditated murder are not distinct crimes, and need not be separately pleaded. (*People v. Geier* (2007) 41 Cal.4th 555, 591; *People v. Nakahara, supra*, 30 Cal.4th at p. 712; *People v. Hughes* (2002) 27 Cal.4th 287, 369; *People v. Kipp* (2001) 26 Cal.4th 1100, 1131; *People v. Silva* (2001) 25 Cal.4th 345, 367; *People v. Carpenter, supra*, 15 Cal.4th at pp. 394-395.) A pleading charging murder in violation of section 187 adequately notifies a defendant of the possibility of conviction of first degree murder on a felony-murder theory. (*People v. Geier, supra*, 41 Cal.4th at p. 591; *People v. Kipp, supra,* 26 Cal. 4th at p. 1131; *People v. Gallego* (1990) 52 Cal.3d 115, 188.) Moreover, appellant's jurisdictional argument has been rejected numerous times. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1237; *People v. Hughes, supra*, 27 Cal.4th at p. 369.)

To the extent that Frederickson claims he received inadequate notice of the prosecution's theory of the case, this Court has explained that "generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing or at the indictment proceedings." (*People v. Morgan* (2007) 42 Cal.4th 593, 617, quoting *People v. Diaz* (1992) 3 Cal.4th 495, 557.) The information here alleged that Frederickson committed the murder during the special circumstances of attempted robbery. (1CT 68.) That allegation provided adequate notice that the prosecutor would proceed under a felony-murder theory. (*People v. Morgan, supra,* 42 Cal.4th at p. 617; *People v. Kipp, supra,* 26 Cal.4th 1100, 1131–1132.)

Frederickson additionally argues the trial court erred by failing to instruct the jury that it had to unanimously agree as to whether he committed a premeditated murder or a first degree felony-murder, although he never requested such a unanimity instruction at trial. He contends this

omission violated his rights to proof beyond a reasonable doubt, to due process, and to a reliable determination of allegations that he committed a capital offense pursuant to the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and parallel provisions of the state Constitution. (AOB 182-183.)

As appellant acknowledges, this Court has repeatedly rejected this claim, holding that jurors need not unanimously agree on a theory of first degree murder as either felony-murder or murder with premeditation and deliberation. (*People v. Morgan, supra,* 42 Cal.4th at p. 617; *People v. Geier, supra,* 41 Cal.4th at pp. 592-593; *People v. Benavides, supra*, 35 Cal.4th at pp. 100-101; *People v. Nakahara* (2003) 30 Cal.4th 705, 712. This rule of state law passes federal Constitutional muster. (*Schad v. Arizona* (1991) 501 U.S. 624, 630-646 [111 S.Ct. 2491, 115 L.Ed.2d 555]. Because this Court has previously considered and rejected Frederickson's claims and he offers no persuasive reason for this Court to reconsider its prior decisions, his argument must be rejected.

VII. THE COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.21.1

Frederickson contends that the court erred in instructing the jury with CALJIC No. 8.21.1, because it amounted to a "directed verdict on the issue of whether the killing occurred during the commission of an attempted robbery." (AOB 185-196.) He is wrong.

As an initial matter, Frederickson forfeited this claim by failing to object to the instruction, even when specifically given the opportunity by the court to do so. (*People v. Harris* (2008) 43 Cal.4th 1269, 1313.) (2CT 687; 8RT 1483-1484; 9RT 1575, 1579.)

In any event, the jury was properly instructed. As Frederickson concedes, CALJIC No. 8.21.1 is a proper instruction. (AOB 191.) He contends however, the court erred in giving the instruction in his particular

case because, in his view, the robbery had ended before Wilson was killed, relieving him of liability for felony-murder. (AOB 186.) Frederickson interprets the felony-murder rule far too narrowly.

This Court has consistently rejected a '"strict construction of the temporal relationship' between felony and killing as to both first degree murder and [the] felony-murder special circumstance," holding instead that for purposes of Penal Code 189, "a killing is committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction.'" (*People v. Cavitt* (2004) 33 Cal.4th 187, 208; *People v. Sakarias* (2000) 22 Cal.4th 596, 624.)

The court instructed the jury with a modified version of CALJIC No. 8.21.1 as follows:

> For purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time.
>
> An attempted robbery is still in progress after the attempted taking of the property and while the perpetrator is fleeing in an attempt to escape. Likewise it is still in progress so long as immediate pursuers are attempting to capture the perpetrator. An attempted robbery is complete when the perpetrator has eluded any pursuers, and has reached a place of temporary safety.

(3CT 790; 10RT 1981.)

Contrary to all logic, Frederickson argues the evidence showed the attempted robbery and murder were two completely separate crimes, but that CALJIC No. 8.21.1 erroneously directed the jury that the attempted robbery was still in progress when he shot Wilson. (AOB 191.) However, the People argued that Frederickson killed Wilson while actually engaged in the attempted robbery, and at the very least, before he reached a place of temporary safety. (10RT 1995-1997.) Thus, the court accordingly instructed the jury with CALJIC No. 8.21.1.

Unlike the court's response to a jury question in *People v. Sakarias* (2000) 22 Cal.4th 596, nothing in CALJIC No. 8.21.1 directed the jury to find that the killing occurred during the commission of an attempted robbery as Frederickson contends. CALJIC No. 8.21.1 merely correctly explained the "escape rule" to the jury, which "defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony, by deeming the felony to continue until the felon has reached a place of temporary safety." (*People v. Cavitt* (2004) 33 Cal.4th 187, 208.)

Thus, if anything, instructing the jury with CALJIC No. 8.21.1 was unnecessary because it was clear Frederickson shot Wilson while simultaneously attempting to rob him, but even if superfluous, the instruction did not prejudice him. The court also properly instructed the jury with CALJIC No. 8.81.17, which explained that to find Frederickson murdered Wilson in the commission of an attempted robbery, it must find that the murder was committed in "the course of the robbery," and that the robbery could not be "merely incidental to the commission of the murder." (3CT 782; 10RT 1978-1979; CALJIC 8.81.17.) The court further instructed the jury that not all instructions were necessarily applicable, and to "disregard any instruction which applies to facts determined by you not to exist," (3CT 798; 10RT 1986; CALJIC 17.31) and that the instructions are to be considered as a whole and in light of all others. (3CT 744; 10RT 1962; CALJIC 1.01.)

Moreover, despite Frederickson's self-serving view of the facts, the evidence overwhelmingly showed that he murdered Wilson during the commission of an attempted robbery. It was a matter of seconds between the time Wilson walked to the safe where Frederickson confronted him demanding money, and the time Frederickson shot him point blank in the head. Only seconds after the fatal shot, Frederickson was waiving the gun

around and running out of the store. (8RT 1318, 1322, 1323.) Further, during his phone conversation with Officer Dryva following the murder, Frederickson stated "You need tell to your employees that money is not worth getting killed over," admitting that he shot Wilson because

> he didn't do what I told him. . . . While I pointed the gun at him and told him to put the money in the bag, he just started counting the money. I told him not to count the fucking money. I told him to put the money in the box. He just closed the safe and started walking away. . . . He didn't believe I was serious. I got mad, flustrated [sic], so I shot him.

(8RT 1374-1375.) In addition, Frederickson told Marla Jo Fisher that he thought Wilson was "brave, but stupid," and how he "should have complied with his request for money." (8RT 1452.) His argument that he murdered Wilson "simply out of frustration," and not during the commission of the attempted robbery, is belied by the evidence and cannot possibly absolve Frederickson of felony-murder. As such, his claim must be denied.

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH REGARD TO THE SPECIAL CIRCUMSTANCE ALLEGATION

Frederickson contends the trial court erred by instructing the jury with a modified version of CALJIC No. 8.81.17. He contends that this instruction, combined with CALJIC No. 8.21.1, permitted the jury to find the special circumstance true without finding Frederickson killed Wilson while engaged in an attempted robbery, requiring reversal of the finding and the death judgment. (AOB 197-215.)

The court instructed the jury with CALJIC No. 8.81.17, after slightly modifying paragraph 2, as follows:

> To find that the special circumstance referred to in these instructions as murder in the commission of attempted robbery is true, it must be proved,

1. That murder was committed while the defendant was engaged in the attempted commission of a robbery, or

The murder was committed during the immediate flight after the attempted commission of a robbery by the defendant, and

2. The murder was committed in the course of the commission of the crime of attempted robbery, or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the attempted robbery was merely incidental to the commission of the murder.

(3CT 782; 10RT 1978-1979.)

Paragraph 2 of the modified instruction varied slightly from the standard CALJIC No. 8.81.17, at that time, which read:

2. The murder was committed in *order to carry out or advance* the commission of the crime of attempted robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the attempted robbery was merely incidental to the commission of the murder.

The italicized portion is the only modification to the instruction. Yet, Frederickson contends the change in language from "in order to carry out or advance the commission" to "in the course of the commission" of the crime, followed by the requirement that the attempted robbery cannot be "merely incidental to the commission of the murder" did not adequately convey to the jury the "carry out or advance the felony requirement." (AOB 206.) Frederickson is mistaken. The "carry out or advance the felony" language is not an element of the felony-murder special-circumstance-allegation. "To prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder." (*People v. Mendoza* (2000) 24 Cal.4th 130, 182.)

CALJIC No. 8.81.17 as read to the jury here adequately instructed the jury on this requirement.

Furthermore, this Court recently rejected Frederickson's argument in *People v. Horning* (2004) 34 Cal.4th 871, 907-908. In *Horning,* the court did not instruct the jury with paragraph 2 of CALJIC No. 8.81.17 at all. *Horning* stated simply that in order to find the special circumstance true, the jury need only find that the felony was not merely incidental to the murder. *Horning* reiterated that CALJIC No. 8.81.17 does not require that victim was killed in order "to carry out or advance the robbery or burglary." (*Ibid.*) *Horning* specifically stated that "there is nothing magical about the phrase "to carry out or advance" the felony," noting that "we ourselves have stated the requirement without using that phrase." (*Ibid.*) *Horning* held that "even if it might have been better to give the entire second paragraph of CALJIC No. 8.81.17, the court's explanation that the burglary or robbery must not be "merely incidental to the commission of the murder," adequately conveyed the requirement," and that no "precise language was required to explain the concept to the jury." (*Ibid.*) Here, the modified CALJIC No. 8.81.17 properly instructed the jury that in order to find the special circumstance true, it must find the attempted robbery was not merely incidental to Wilson's murder.

Frederickson rehashes his Argument XII here as well, repeating verbatim his claim that CALJIC No. 8.21.1 directed the jury to find that he murdered Wilson in the course of an attempted robbery. He then goes a step further, arguing that the error in giving CALJIC No. 8.21.1, and order in which it was given, was "exacerbated" by the "flight" language in CALJIC No. 8.81.17, and permitted the jury to find the special circumstance true without finding the murder was committed in order to "carry out or advance" the commission of the attempted robbery. (AOB 207-215.) As explained in Argument XII above, the court properly

instructed the jury with CALJIC No. 8.21.1. The court instructed the jury that "the order in which the instructions are given has no significant as to their relative importance." (10RT 1962; 3CT 744.) Additionally, as explained above, there is no requirement the jury find Frederickson murdered Wilson to "carry out or advance" the attempted robbery, the jury need only find that the attempted robbery was not "merely incidental" to the murder. (*People v. Horning, supra,* 34 Cal.4th at pp. 907-908.) The jury was thus properly instructed.

In any event, as explained in Argument XII, there was no evidence whatsoever to suggest the robbery was merely incidental to Wilson's murder. To the contrary, the evidence overwhelmingly showed that Frederickson shot Wilson in the head in the course of robbing him. Frederickson admitted that because Wilson did not follow his command to "put the money in the bag," and instead "just closed the safe and started walking away," Frederickson got "mad" and "frustrated," so he shot him. (8RT 1374-1375, 1456.)

This case is completely unlike *People v. Green* (1980) 27 Cal.3d at p. 61, relied upon by Frederickson. (AOB 203-204.) In *Green,* the defendant had taken the murder victim's clothing at gunpoint in order to attempt to conceal the murder. *Green* held that "although the taking constituted a technical robbery, the robbery-murder special circumstance was not established because the crime was not a murder in the commission of robbery, but a robbery in the commission of murder." (*Ibid.*) Here, the evidence was overwhelming that the attempted robbery was not merely incidental to Wilson's murder, and Frederickson's argument is wholly without merit.

IX. THE JURY WAS PROPERLY INSTRUCTED REGARDING CIRCUMSTANTIAL EVIDENCE

Frederickson contends the jury instructions regarding circumstantial evidence unconstitutionally diluted the reasonable doubt standard, requiring reversal of the entire judgment. (AOB 216-227.) As an initial matter, Frederickson did not object to these instructions or on these grounds at trial, and thus has forfeited his claim on appeal. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1122 ["Although defendant contends that the ruling denied him various rights under the state and federal Constitutions, he did not object on these grounds in the trial court, and thus he has not preserved these constitutional claims for appellate review"].) In any event, because the instructions were accurate statements of the law, his arguments fail.

First, Frederickson argues that references to reasonable inferences in standard instructions on the use of circumstantial evidence (CALJIC Nos. 2.01, 2.02, 8.83, 8.83.1) diluted the proof beyond a reasonable doubt standard. (3CT 749, 770, 791-793, 10RT 1965, 1973-1974, 1982-1983, 1983-1984.) (AOB 216-219.) This contention is groundless. As this Court has explained:

> Two of the instructions defendant complains of (CALJIC Nos. 2.01, 8.83) explicitly told the jury that every fact necessary to circumstantial proof of an offense or a special circumstance must be shown beyond a reasonable doubt. All the instructions complained of explicitly told the jury that if two possible inferences, both reasonable, could be drawn from the circumstantial evidence, the jury was required to reject the inference pointing to guilt or the presence of a required mental state and accept only the inference pointing to innocence or the lack of a required mental state. The instructions told the jurors they must accept a reasonable inference pointing to guilt *only* where any other inference that could be drawn from the evidence was *unreasonable*. That direction is entirely consistent with the rule of proof beyond a reasonable doubt, because an *unreasonable* inference pointing to innocence is, by definition, not grounds for a *reasonable* doubt. The circumstantial evidence instructions are thus correct.

(*People v. Brasure* (2008) 42 Cal.4th 1037, 1058-1059, citing *People v. Cleveland* (2004) 32 Cal.4th 704, 750; *People v. Nakahara* (2003) 30 Cal.4th 705, 713–714; *People v. Hughes, supra*, 27 Cal.4th at pp. 346–347.)

Additionally, Frederickson argues various standard instructions individually and collectively dilute the reasonable doubt standard: CALJIC No. 2.21.1, discrepancies in testimony (3CT 754; 10RT 1967); CALJIC No. 2.21.2, false witnesses (3CT 755; 10RT 1967); CALJIC No. 2.22, weighing conflicting testimony (3CT 756; 10RT 1968); CALJIC No. 2.27, sufficiency of evidence of one witness (3CT 757; 10RT 1968); and CALJIC No. 8.20, deliberate and premeditated murder (3CT 774-775; 10RT 1975-1976). (AOB 219-223.) This Court has rejected this argument as well, recently holding that in light of the jury instructions as a whole:

> none tends to suggest that defendant bears a burden of proving his innocence or that the prosecution's burden is less than one of proof beyond a reasonable doubt. Jurors are not reasonably likely to draw, from bits of language in instructions that focus on how particular types of evidence are to be assessed and weighed, a conclusion overriding the direction, often repeated in voir dire, instruction and argument, that they may convict only if they find the People have proven guilt beyond a reasonable doubt.

(*People v. Brasure, supra,* 42 Cal.4th at pp. 1058-1059.)

Frederickson concedes that this Court has repeatedly rejected these exact arguments. (AOB 225.) He has raised no persuasive basis for reconsideration of this Court's prior decisions, and as such his argument fails.

X. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FLIGHT PURSUANT TO CALJIC NO. 2.52

Frederickson contends the trial court deprived him of his constitutional rights by instructing the jury on flight pursuant to CALJIC No. 2.52. He argues the instruction was unnecessary and argumentative, and that it permitted the jury to draw constitutionally impermissible inferences against him, requiring reversal of the entire judgment. (AOB 228-236.) The instruction was properly given, and even assuming it was error, it was harmless and reversal is not required.

The court instructed the jury as follows:

> Flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide [sic].

(10RT 1968-1969; 3CT 759; CALJIC No. 2.52.)

Frederickson first claims the flight instruction was unnecessary because it was duplicative of the general instructions regarding circumstantial evidence. (AOB 229-230, citing CALJIC Nos. 2.00, 2.01, and 2.02.) Frederickson is wrong. CALJIC Nos. 2.00, 2.01, and 2.02 instructed the jurors regarding the definition of circumstantial evidence and the sufficiency of circumstantial evidence to establish facts leading to a finding of guilt. On the other hand, CALJIC No. 2.52 was a cautionary instruction which benefitted the defense by "admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson* (1996) 13 Cal.4th at p. 1224.)

Moreover, Frederickson's argument misses the point. In support of his claim, he cites cases which stand for the proposition that a trial court does not abuse its discretion in declining to give a defendant's proposed instructions if such instructions are duplicative of standard instructions. (AOB 229.) These cases are not relevant to whether the trial court erred in giving a standard instruction. Further, the flight instruction must be given where evidence of flight is relied upon by the prosecution. (*People v. Howard, supra*, 42 Cal.4th at p. 1020; *People v. Abilez* (2007) 41 Cal.4th 472, 521-522; *People v. Turner* (1990) 50 Cal.3d 668, 694; *People v. Cannady* (1972) 8 Cal.3d 379, 391.) Here, the instruction was properly given because evidence was presented that Frederickson ran from the store and fled the scene immediately after shooting Wilson in the head. Indeed, Frederickson does not contest that the evidence was sufficient to support giving the instruction. Accordingly, the trial court was required to give the flight instruction regardless of the general instructions on circumstantial evidence.

Frederickson next claims that the flight instruction was argumentative and focused the jury's attention on evidence favorable to the prosecution. (AOB 229-231.) As he acknowledges, his claims have been repeatedly rejected by this Court. (*People v. Howard, supra*, 42 Cal.4th at p. 1021; *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181; *People v. Jackson, supra,* 13 Cal.4th at p. 1224.) (AOB 231.)

Frederickson nevertheless urges this Court to reconsider its holdings in light of *People v. Mincey* (1992) 2 Cal.4th at p. 437, which he contends rejected as argumentative an instruction analogous to CALJIC No. 2.52. (AOB 230-231.) In *Mincey*, this Court held that the trial court properly rejected proposed defense instructions as argumentative because the "defendant sought to have the court invite the jury to infer the existence of his version of the facts, rather than his theory of defense." (*Mincey, supra*,

2 Cal.4th at p. 437.) CALJIC No. 2.52 is not analogous to the argumentative instruction in *Mincey*, and did not invite the jury to infer the existence of the prosecution's version of facts.

This Court recently rejected this identical claim in *People v. Bonilla.* There the defendant argued CALJIC No. 2.03, a similar consciousness of guilt instruction, was argumentative in light of *Mincey.* This Court held that while CALJIC No. 2.03 and the proposed defense instruction in *Mincey* both contained the propositional structure "If certain facts are shown, then you may draw particular conclusions," "it was not the structure that was problematic in *Mincey*." (*People v. Bonilla* (2007) 41 Cal.4th at p. 330.) Rather, *Bonilla* held, "it was the way the proposed instruction articulated the predicate 'certain facts': 'If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may . . . .'" (*Ibid.*) *Bonilla* explained that "this argumentative language focused the jury on defendant's version of the facts, not his legal theory of the case; this flaw, not the generic 'if/then' structure, is what caused us to approve the trial court's rejection of the instruction." (*Ibid.*) *Bonilla* held that "[a]ny parallels between the argumentative instruction in *Mincey* and CALJIC No. 2.03 are thus immaterial," and adhered to this Court's prior decisions rejecting the argument that CALJIC No. 2.03 is impermissibly argumentative. (*People v. Bonilla, supra*, 41 Cal.4th at p. 330.)

The same logic applies to CALJIC No. 2.52, as both are similarly structured consciousness of guilt instructions, and CALJIC No. 2.52 did not highlight the prosecution's version of facts. (See *People v. Morgan, supra,* 42 Cal.4th at pp. 593, 621 [treating claims relating to CALJIC Nos. 2.03 and 2.52 uniformly]; accord, *People v. Thornton* (2007) 41 Cal.4th 391, 438; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439; *People v. Jackson,*

supra, 13 Cal.4th at pp. 1223-1224.) Accordingly, this Court should follow its previous holdings and reject Frederickson's claim.

Lastly, Frederickson contends the flight instruction permitted the jury to draw improper and unconstitutional inferences about his mental state. Specifically, he argues since there was no dispute that he caused Wilson's death, the only issue was his mental state at the time the charged crimes were committed. Therefore, he contends, the instruction improperly permitted the jury to use the evidence that he fled the scene to prove that he had the mental states required for conviction of first degree murder. (AOB 231-232.) Frederickson acknowledges that this Court has repeatedly held CALJIC No. 2.52 does not permit the jury to draw such irrational or impermissible inferences. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1160 ["We have explained that the flight instruction, as the jury would understand it, does not address the defendant's specific mental state at the time of the offenses, or his guilt of a particular crime, but advises of circumstances suggesting his consciousness that he has committed some wrongdoing"]; accord, *People v. Howard, supra*, 42 Cal.4th at p. 1021; *People v. Thornton, supra*, 41 Cal.4th at p. 438; *People v. Bolin* (1998) 18 Cal.4th at p. 327; see also *People v. Mendoza, supra*, 24 Cal.4th at pp. 179-180.) "Even where the defendant concedes some aspect of a criminal charge, the prosecution is entitled to bolster its case, which requires proof of the defendant's guilt beyond a reasonable doubt, by presenting evidence of the defendant's consciousness of guilt." (*People v. Loker* (2008) 44 Cal.4th 691, 707, internal citations omitted.) Frederickson has raised no persuasive basis for reconsideration of this Court's prior decisions. Accordingly, the trial court properly instructed the jury pursuant to CALJIC No. 2.52.

In any event, any error in giving the flight instruction was harmless. It is not reasonably probable Frederickson would have achieved a more favorable result had the instruction not been given. (See *People v. Turner, supra*, 50 Cal.3d at p. 695 [error in giving flight instruction at guilt phase is reviewed under *People v. Watson, supra*, 46 Cal.2d at p. 836]; accord, *People v. Silva, supra*, 45 Cal.3d at p. 628.) The instructions as a whole informed the jury that the prosecution had the burden of proof beyond a reasonable doubt regarding every fact establishing Frederickson's guilt. (See CALJIC No. 1.01, CALJIC No. 2.01, CALJIC No. 2.90, CALJIC No. 8.71; 3CT 743, 749, 767, 779; 10RT 1962, 1965-1966, 1972, 1977; see *People v. Frye* (1998)18 Cal.4th 894, 957 [appellate court looks to the entire charge to the jury to determine whether there is a reasonable probability the jury improperly applied a challenged instruction].) The instructions also made it clear to the jury that the flight instruction might not apply. ([CALJIC No. 17.31 ["All Instructions Not Necessarily Applicable"]] 3CT 798; see *People v. Richardson* (2008) 43 Cal.4th 959, 1020.)

Moreover, as set forth fully in Argument III, the evidence of Frederickson's flight was a very small portion of the overwhelming evidence of his guilt. Accordingly, it is not reasonably probable he would have achieved a more favorable result had the flight instruction not been given. For the same reasons, any error was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 18.)

XI. THE COURT PROPERLY INSTRUCTED THE JURY REGARDING MOTIVE

Frederickson contends the court erred in instructing the jury with CALJIC No. 2.51, regarding motive, because the instruction impermissibly allowed the jury to find him guilty based solely upon motive, and placed the burden on him to show absence of motive to prove innocence. (AOB 237-242.) This Court has repeatedly rejected these claims.

The court instructed the jury regarding motive as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(CALJIC No. 2.51; 10RT 1968; 3CT 758.)

This Court has repeatedly rejected Frederickson's challenges to CALJIC No. 2.51. (*People v. Crew* (2003) 31 Cal.4th 822, 848; *People v. Prieto* (2003) 30 Cal.4th 226, 254; *People v. Snow* (2003) 30 Cal.4th 43, 57.)

As this Court has explained, "the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) In *People v. Snow*, the defendant argued CALJIC No. 2.51 suggested to the jury that proof of motive alone could establish guilt as the instruction did not further caution the jury that proof of motive alone was insufficient to establish guilt. (*People v. Snow, supra*, 30 Cal.4th at p. 97.) This Court disagreed, explaining:

> If the challenged instruction somehow suggested that motive alone *was* sufficient to establish guilt, defendant's point might have merit. But in fact the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of the murder. When CALJIC No. 2.51 is

> taken together with the instruction on the concurrence of act and specific intent (CALJIC No. 3.31) and the instruction outlining the elements of murder and requiring each of them to be proved in order to prove the crime (CALJIC No. 8.10), there is no reasonable likelihood (*People v. Frye, supra*, 18 Cal.4th at p. 958) it would be read as suggesting that proof of motive alone may establish guilt of murder.

(*People v. Snow, supra,* 30 Cal.4th at p. 97.)

Soon after *Snow*, in *People v. Prieto*, this Court rejected the contention that the phrase "tend to establish innocence" in CALJIC No. 2.51 led the jury to believe that the defendant had to establish his innocence. (*People v. Prieto, supra*, 30 Cal.4th at p. 254.) This Court reasoned:

> CALJIC No. 2.51 [does] not concern the standard of proof . . . but merely one circumstance in the proof puzzle-motive. [Citation.] 'The instruction merely uses innocence as a direction signal or compass. It does not tell the jurors they must find innocence, nor does it lighten the prosecution's burden of proof, upon which the jury received full and complete instructions.' Thus, no reasonable juror would misconstrue CALJIC No. 2.51 as 'a standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90.' Accordingly, the instruction did not violate defendant's right to due process.

(*Ibid,* internal citations omitted; accord, *People v. Crew, supra*, 31 Cal.4th at p. 848.)

Frederickson further contends that "the jury would not have been able to separate instructions defining "motive" from "intent."" He argues that the jury was confused because it was (properly) instructed to determine whether appellant had the requisite intent for attempted robbery, and instructed that motive was not an element of the crime of murder. (AOB 238-239.)

Frederickson cites *People v. Maurer* (1995) 32 Cal.App.4th 1121, which found error in giving CALJIC No. 2.51 under its facts. (AOB 239.) There the defendant had been convicted of misdemeanor child annoyance under Penal Code section 647.6. The court found that, although motive is not generally an element of a criminal offense, "the offense of section 647.6 is a strange beast," because motive is an element (an unnatural or abnormal sexual interest.) (*People v. Maurer, supra*, 32 Cal.App.4th at pp. 1126-1127.) Thus the court found the instructions contradictory, and thereby erroneous. (*Ibid.*) This case is distinguishable--motive is not an element of the charged offense.

Frederickson's claim that jurors and judges are unable to draw the distinction between intent and motive is unfounded. (AOB 238.) "Motive, intent, and malice--contrary to appellant's assumption--are separate and disparate mental states. The words are not synonyms." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) "Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice." (*Ibid.*)

Thus, Frederickson has raised no persuasive basis for reconsideration of this Court's prior decisions. Accordingly, the trial court properly instructed the jury pursuant to CALJIC No. 2.51.

XII. THE TRIAL COURT PROPERLY INSTRUCTED THE PENALTY PHASE JURY WITH REGARD TO AGGRAVATING FACTORS

Frederickson contends the trial court improperly refused his two proposed special jury instructions that would have prohibited the jury from what he characterizes as improper double-counting of guilt phase facts in the penalty phase. (AOB 243-247.)

His first proposed instruction stated:

> You must not consider as an aggravating factor the existence of any special circumstances if you have already considered the facts of the special circumstance as a circumstance of the crime for which the defendant has been convicted.
>
> In other words, do not consider the same facts more than once in determining the presence of aggravating factors.

(3CT 1013.)

The trial court properly refused Frederickson's proposed instruction, finding that his concerns were addressed by other instructions, and further, that his special instruction was unnecessary absent a misleading argument by the prosecutor. (16RT 3003.)

Frederickson cites *People v. Monterroso* (2004) 34 Cal.4th 743, to support his claim. (AOB 244.) *Monterroso* held that a "trial court should, when requested, instruct the jury against double-counting." (*Id.*, at p. 790.) However, *Monterroso* found the trial court's failure to do so was not prejudicial, reasoning that

> The jury was instructed in accordance with CALJIC No. 8.85, which instructed the jury to consider, take into account, and be guided by, inter alia, the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . Even without a clarifying instruction, the possibility that a jury would believe it could 'weigh' each special circumstance twice on the penalty 'scale' is remote. Thus, in the absence of any misleading argument by the prosecutor or an event demonstrating the substantial likelihood of 'double-counting,' reversal is not required.

(*Ibid*, internal citations omitted.)

In the present case, the court also instructed the jury with CALJIC No. 8.85. (16RT 3090-3091; 3CT 1049-1050.) The prosecutor did not argue the issue in a misleading manner, and there was no "event demonstrating the substantial likelihood of 'double-counting.'" (*People v. Monterrosso supra,* 34 Cal.4th at p. 790. In sum, "there was no reasonable likelihood that the jury applied the instructions given it in a legally improper manner." (*People v. Chatman* (2006) 38 Cal.4th 344, 409; see also *People v. Ayala* (2000) 24 Cal.4th 243, 288–290; *People v. Melton, supra,* 44 Cal.3d at pp. 768–769.) Thus, even assuming that the judge should have given Frederickson's proposed instruction, the failure to do so was harmless.

Frederickson next contends the trial court erroneously refused to instruct the jury with the following special instruction:

> In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact that was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree.

(AOB 246-247; 3CT 1014.)

As Frederickson acknowledges, this Court has rejected his claim multiple times. (*People v. Earp* (1999) 20 Cal.4th 826, 900; *People v. Moon* (2005) 37 Cal.4th 1, 40.) He offers no persuasive reason for this Court to reconsider its prior decisions, thus his argument must be rejected.

XIII. THE TRIAL COURT PROPERLY REFUSED CERTAIN OF FREDERICKSON'S PROPOSED SPECIAL PENALTY PHASE INSTRUCTIONS, AS THEY WERE CUMULATIVE OR CONTRARY TO THE LAW

Frederickson argues that the trial court erred in refusing his proposed instructions regarding the jurors' consideration of mitigating evidence (AOB 251-260), the jurors' consideration of aggravating factors (AOB 260-266), and instructions that would have explained the task of weighing aggravating and mitigating factors and consideration of mercy and sympathy. (AOB 266-273.) He acknowledges that this Court has previously rejected similar arguments but asks this Court reevaluate those decisions. Because he offers no persuasive reason for doing so, his arguments should be rejected.

A. The Court Properly Denied Frederickson's Special Instructions Regarding Mitigating Evidence and Factors as Cumulative

Frederickson requested the following instruction:

> The existence of any of the following circumstances is mitigating and mitigating only:
>
> 1. That the defendant acted under extreme mental or emotional disturbance;
>
> 2. That at the time of the offense, the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired as a result of mental disease or the results of intoxication;
>
> 3. That there were other circumstances that extenuate the gravity of the offense.
>
> If you find that any of these circumstances is absent, their absence is not and cannot be aggravating.

(3CT 1000.)

The court refused to read this instruction, ruling that it was duplicative of CALJIC No. 8.85. (16RT 2999.) The court did, however, instruct the jury with Frederickson's requested special instruction "B" that:

> Although a number of possible mitigating factors have been listed in these instructions, you cannot consider the absence of any such factors in this case as an aggravating factor. Aggravating factors are limited to those that have been listed for you in these instructions.

(3CT 1051; 16RT 3092.)

Frederickson nonetheless maintains that because the court did not instruct the jury as he requested above, the jury was "free to conclude" that the absence of a mitigating factor could establish an aggravating circumstance. (AOB 252.) He requests that this Court reconsider prior cases holding that a trial court need not instruct the jury that certain sentencing factors are only relevant as mitigating factors. (AOB 252.) This is unnecessary, because as this Court has previously held, "[t]he aggravating or mitigating nature of the factors is self-evident within the context of each case." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268.) Frederickson provides no persuasive reason for this Court to reconsider its previous holdings and as such his claim should be denied. In any event, Frederickson's special instruction the court did read to the jury specifically instructed the jury with regard to which factors were aggravating, and how aggravating factors must be weighed. (3CT 1051; 16RT 3092.) Thus, any conceivable error was harmless.

Next Frederickson contends the court erred by refusing to instruct the jury with proposed special instructions "E" and as follows:

> You have previously been given a number of mitigating factors that you may consider in determining the penalty that you consider to be appropriate.
>
> Your consideration of mitigating factors is not limited to those that have been given you.
>
> You may also consider any other facts relating to the circumstances of the case or to the character and background of the defendant as a reason for not imposing the sentence of death.

(AOB 253; 3CT 1003.) The court ruled that this proposed instruction was duplicative of CALJIC No. 8.85, factors (a) and (k). (16RT 3000.)

Frederickson contends that the court further erred by refusing to instruct with proposed special instruction "F" as follows:

> The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence in this case. You should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But you should not limit your consideration of mitigating circumstances to these specific factors.
>
> You may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty.

(AOB 253; 3CT 1004.) The court ruled this proposed special instruction was cumulative of other instructions. (16RT 3000.)

Frederickson acknowledges that this Court's previous decisions have held his proposed instruction "E" to be unnecessary because "the catchall section 190.3, factor (k) instruction 'allows the jury to consider a virtually unlimited range of mitigating circumstances.'" (*People v. Smithey* (1999) 20 Cal.4th 936, 1006, quoting *People v. McPeters* (1992) 2 Cal.4th 1148,

1192.) (AOB 254.) He further acknowledges this Court has found it proper to decline instructions such as his proposed instruction "F" because the standard jury instructions '"are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*People v. Kelly* (2007) 42 Cal.4th 763, 799, quoting *People v. Barnett* (1988) 17 Cal.4th 1044, 1176-1177.) (AOB 255.) Frederickson asks this Court to reconsider its holdings, but offers no persuasive reason to do so. His argument must therefore be denied.

Frederickson next argues the court erred in refusing to instruct the jury with the following instructions:

> You may consider as a mitigating circumstance whether the offense was committed while the defendant was under the influence of any mental or emotional disturbance.

and

> You may also consider as a mitigating circumstance whether at the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct was impaired as a result of mental defect, mental disease, or the effects of intoxication.

(AOB 255; 3CT 1007, 1008.)

The court ruled that Frederickson's proposed instructions were cumulative to CALJIC No. 8.85, factors (d) and (h). (16RT 3000.) Frederickson contends that the court's conclusions were wrong because, unlike CALJIC No. 8.85, his requested instructions did not contain the word "extreme." This, he argues, prevented the jury from considering his entire personal history, instead only allowing the jury to consider characteristics that may be considered "extreme." (AOB 255-256.) However, as Frederickson conceded, this Court has repeatedly concluded that the use of restrictive adjectives, including "extreme," in jury instructions "does not act unconstitutionally as a barrier to the consideration of mitigation." (*People v. Harris* (2005) 37 Cal.4th 310, 365.) Further, this

Court has repeatedly held that Penal Code section 190.3, factor (k) allows the jury to consider as mitigation a defendant's less-than-extreme mental or emotional disturbance. (*People v. Babbit* (1988) 45 Cal.3d 660, 721.) Because Frederickson offers no persuasive reason for this Court to overturn its prior holdings, his argument must be rejected.

Frederickson next argues that the court erred by refusing to instruct the jury that it could not consider evidence of his lifestyle or background as aggravating, but could only consider it as a mitigating factor, ruling that it was cumulative of CALJIC No. 8.85, factor (k). (AOB 256-258; 3CT 1010; 16RT 3002.) This Court rejected Frederickson's argument in *People v. Ochoa* (2001) 26 Cal.4th 398, 457, holding that the trial court did not err in refusing an identical instruction because the jury was properly instructed on aggravating and mitigating factors. The trial court here properly instructed the jury on aggravating and mitigating factors, and Frederickson does not contend otherwise.

Additionally, in *People v. Hardy* (1991) 2 Cal.4th 86, 207-208, this Court held that even assuming that the court erred in refusing to give defendant's proposed instruction, there was no prejudice because the prosecutor in his closing argument did not urge the jury to find the case was aggravated by the defendant's "unemployment, drug use, or aimless life-style." Here, the prosecutor did not urge the jury to find Frederickson's lifestyle to be an aggravating circumstance. Instead, during closing argument, the prosecutor carefully explained to the jury the three factors the jury could consider in aggravation, emphasizing that those factors were the only factors to be considered in aggravation. (16RT 3127.) The prosecutor then moved on to discuss mitigating factors, explaining to the jury that "any negative comments about mitigating factors or incidents or events is not meant for you to throw into the aggravating category, okay?. . . Aggravation I'm leaving. I'm leaving that now. We're looking at

mitigation." (16RT 3127.) The prosecutor emphasized that anything negative he discussed about Frederickson only served to negate the mitigating factors, and that the jury could not "add on [those factors] to aggravation." (16RT 3127.) The prosecutor in no way urged the jury to find the case was aggravated by childhood behavior problems, history of violent thoughts, problems in school or early institutionalizations. Thus, even if the court somehow erred in not giving Frederickson's proposed instruction, there was no prejudice. (*People v. Ochoa, supra,* 26 Cal.4th at p. 457; *People v. Hardy, supra,* 2 Cal.4th at p. 208.)

Frederickson next complains that the court erred in refusing his proposed special instructions explaining that no burden of proof applies to the consideration of mitigating factors, ruling they were cumulative of CALJIC No. 8.85. (AOB 258-259; 16RT 3003.) The trial court did not err by refusing his instructions. (*People v. Riggs, supra,* 44 Cal.4th 248, 328; *People v. Carpenter, supra,* 15 Cal.4th 312, 417–418 [except as to other-crimes aggravating evidence under Pen. Code, § 190.3, factors (b) & (c), "instructions associated with the usual fact-finding process—such as burden of proof—are not necessary"].) There is no reasonable likelihood the jury was left with the impression that Frederickson bore a burden in proving facts in mitigation.

Frederickson further contends that the trial court erred when it refused his proposed special instruction which told the jury that they need not unanimously agree on any mitigating factor, ruling that it was cumulative of CALJIC No. 8.88. (AOB 259; 16RT 3003.) As he acknowledges, this Court has repeatedly held that the trial court is not required to instruct that unanimity is not required before a juror may consider the evidence to be mitigating. (*People v. Breaux* (1991) 1 Cal.4th 281, 314.) (AOB 259.) Frederickson presents no compelling reasons to revisit these prior decisions, thus his argument must be rejected.

B. The Court Properly Refused Frederickson's Proposed Special Instructions Regarding the Jury's Consideration of Aggravating Factors.

Frederickson contends the court erred in refusing to instruct the jury with his proposed special instruction regarding limitations on the prosecutor's rebuttal evidence during the penalty phase as follows:

> Evidence has been presented by the prosecution as rebuttal to evidence presented by the defense in mitigation. You cannot consider such rebuttal evidence as an aggravating factor unless the evidence is specifically within one or more of the factors in aggravation that have been given to you in these instructions. You may consider such evidence only as it relates to the existence or weight of a mitigating factor.

(AOB 260; 3CT 1015.) There was no error. As the court correctly noted – the prosecutor did not present any rebuttal evidence, thus there was no basis to instruct the jury with Frederickson's proposed instruction. (16RT 3073-3074.)

Frederickson contends that despite the fact that the prosecutor did not introduce rebuttal evidence following the defense case-in-chief, that the prosecutor nonetheless presented rebuttal evidence – albeit improperly – during its own case-in-chief, and as such, the instruction should have been given. (AOB 261.) As he acknowledges, Frederickson forfeited this claim by failing to object below. (AOB 261.) In any event, the prosecution did not present any improper evidence as Frederickson suggests. Moreover, even if it had somehow introduced "rebuttal evidence" during its case-in-chief, the jury would not possibly have understood Frederickson's proposed instruction to apply to such evidence.

Frederickson next contends the court erred in refusing to instruct the jury with his proposed special instruction imposing a beyond a reasonable doubt standard on aggravating factors. (AOB 261-262; 16RT 3004.) As the trial court ruled, and as Frederickson concedes, California law does not

require a reasonable doubt standard be used during any part of the penalty phase except as to proof of prior criminality. (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255.) (AOB 261-262.) Frederickson asks this Court to reconsider its prior decisions on this issue, but offers no persuasive reason for this Court to do so. Therefore, his argument must be rejected.

Frederickson also asserts the trial court prejudicially erred in failing to give an instruction that would have explained the proper use of victim impact evidence and admonished the jury not to base its decision on emotion or improper facts. (AOB 263-264.) At trial, he proposed the following special instruction:

> Evidence has been introduced in this case that may arouse in you as [sic] natural sympathy for the victim or the victim's family.
>
> You must now allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case.
>
> You may not impose the penalty of death as a result of an irrational, purely emotional response to this evidence.

(3CT 1019.)

The court agreed with the prosecution that this proposed instruction was cumulative of other instructions, and declined to give it. (16RT 3005.) The trial court did not err in doing so. As Frederickson acknowledges, this Court found no error in the trial court's refusal to give an almost identical instruction in *People v. Zamudio* (2008) 43 Cal.4th 327. (AOB 267.) *Zamudio* held that the substance of the requested instruction, insofar as it correctly stated the law, was adequately covered by CALJIC No. 8.84.1, and "[t]he proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1. . . ." (*People v. Zamudio, supra,* 43 Cal.4th at pp. 368-369, citing *People v.*

Ochoa, supra, 26 Cal.4th 398, 455 [affirming refusal to give virtually identical proposed instruction].) Additionally, *Zamudio* held

> [T]he requested instruction is misleading to the extent it indicates that emotions may play no part in a juror's decision to opt for the death penalty. Although jurors must never be influenced by passion or prejudice, at the penalty phase, they 'may properly consider in aggravation, as a circumstance of the crime, the impact of a capital defendant's crimes on the victim's family, and in so doing [they] *may exercise sympathy for the defendant's murder victims and . . . their bereaved family members.*' 'Because the proposed instruction was misleading . . . , and because the point was adequately covered by the instructions that the court did give, the trial court acted correctly in refusing to use' the instruction defendant proposed.

(*People v. Zamudio, supra,* 43 Cal.4th at pp. 368-369, internal citations omitted.)

Frederickson points to state court decisions from outside California in support of his argument that the court erroneously rejected his proposed instruction. (AOB 264-265.) He states, without authority or reason, that the admonition in CALJIC No. 8.84.1 was inadequate because the jury would be unable to understand the meaning of the instruction. (AOB 265-266.)

CALJIC No. 8.84.1 instructs the jury that it must not "be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings". Frederickson contends that the jury would determine that "bias" and "prejudice" referred only to racial or religious discrimination, not to victim impact testimony. He further argues that the jury would not "understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions and feelings of the victims' relatives or co-workers." (AOB 265-266.) However, jurors are presumed to understand and follow the court's instructions. (*People v. Hovarter* (2008)

44 Cal.4th 983, 1005.) Frederickson does not offer a persuasive explanation as to why the jury would not understand CALJIC No. 8.84.1, nor does he offer a persuasive reason for this Court to reconsider its prior holdings. His argument must be rejected.

C. The Court Properly Declined Frederickson's Proposed Special Instructions Regarding the Jurors' Weighing of Factors and Its Consideration of Mercy and Sympathy.

Frederickson contends the court erred in declining his proposed special instruction to the jury that it could impose a sentence of life imprisonment without parole even if it found no mitigating evidence whatever. (AOB 266-267; 3CT 1001.) The prosecutor argued, and the court agreed, the instruction was unnecessary. (16RT 2999.) Frederickson acknowledges that this Court has rejected this argument. (AOB 267.) (See *People v. Johnson* (1993) 6 Cal.4th 1, 52 [CALJIC No. 8.88 "adequately advised the jury of its sentencing responsibilities. No reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances, merely because no mitigating circumstances were found to exist."]; see also *People v. Perry* (2006) 38 Cal.4th 302, 320.) Frederickson argues, however, that the "pertinent question" is not whether a juror would assume that death had to be imposed even if there were insubstantial aggravating factors, but whether a juror would feel free to return a verdict of life in prison without the possibility of parole if there were substantial aggravating factors and no mitigating factors. (AOB 267.) Frederickson's framing of the issue is simply a matter of semantics, creating only a distinction without difference. It is not a persuasive reason for the Court to reconsider *Johnson,* and this argument must be rejected.

Fredrickson next contends the court erred in declining his proposed special instruction telling the jury that the presence of a single mitigating factor is sufficient to support its decision to vote against the death penalty. (AOB 267-268; 3CT 1002.) He acknowledges that this Court has held it is not error for a trial court to refuse such an instruction. (AOB 269.) (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1161 [There is no need to "specially instruct the jury on the appropriate process of weighing mitigating factors" because CALJIC No. 8.88 "properly describes the weighing process."]; see also *People v. Bolin* (1998) 18 Cal.4th 297, 343.) Frederickson submits no persuasive reason for this Court to reconsider its prior holdings, and as such, his argument fails.

Frederickson further contends the court erred by declining to instruct the jury with the following proposed special instruction:

> The law of California does not require that you ever vote to impose the penalty of death. After considering all of the evidence in the case and instructions given to you by the court, it is entirely up to you to determine whether you are convinced that the death penalty is the appropriate punishment under all of the circumstances of the case.

(AOB 269-270; 3CT 1017.)

This Court has previously rejected this argument, holding that the instruction is misleading and argumentative. (*People v. Earp* (1999) 20 Cal.4th 826, 903.) Frederickson appears to argue that the trial nonetheless had a sua sponte duty to correct the deficiencies in this instruction, and instruct the jury with a corrected version. He offers no support for his position. This proposed instruction is not the type to give rise to a sua sponte duty to instruct. "A trial court must instruct sua sponte only on those general principles of law that are closely and openly connected with the facts before the court and necessary for the jury's understanding of the case." (*People v. Bramit* (2009) 46 Cal.4th 1221, 1245.) The court fully

instructed the jury following the penalty phase and with regard to the death penalty. No further instruction was necessary for the jury's understanding of the case. As such, Frederickson's argument must be rejected.

Finally, Frederickson argues the court erred by declining to instruct the jury with his proposed special jury instructions telling the jury that it could base its penalty determination wholly based on mercy and sympathy for him. (AOB 270-271; 3CT 1004-1006.) The court properly ruled that Frederickson's proposed instructions were duplicative of CALJIC No. 8.85, factor (k), which instructs the jury that in determining penalty, it may consider, "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial;" and CALJIC No. 8.88, instructing the jury that it was "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (16RT 3000; 3CT 1049-1050, 1068-1069.)

Moreover, the jury was well aware it could base its penalty determination on sympathy and mercy. During closing argument, while discussing the mitigating factors, the prosecutor told the jury it must consider the "the (k) factor" which was "the everything else category." The prosecutor explained that factor (k) included "sympathy, mercy, whatever you want to put in there." (16RT 3141.) The prosecutor made it clear the jury could and should consider mercy, arguing that "[w]hen the question of sympathy and mercy comes up, I want to ask how much mercy and sympathy has the defendant used already from a social standpoint?" (16RT 3142.) Thus, the jury was correctly instructed.

In any event, Frederickson acknowledges that this Court has repeatedly rejected the claim that sentencing jurors must be instructed on sympathy and mercy. (AOB 271.) (*People v. Griffin, supra,* 33 Cal.4th at

pp. 590-591; *People v. Lewis* (2001) 26 Cal.4th at p. 393; *People v. Benson* (1990) 52 Cal.3d 754, 808-809.) He offers no compelling reason for this Court to reconsider its prior holdings. As such, his argument must be denied.

XIV. THE COURT PROPERLY INSTRUCTED THE JURY TO CONSIDER THE APPLICABLE SENTENCING FACTORS IN DETERMINING THE APPROPRIATE PENALTY

Frederickson contends the court's error in misreading one word of an instruction violated his Eighth and Fourteenth Amendments to the United States and California Constitutions, and his liberty interest in having correct instructions given to the jury. (AOB 280-284.) Because the jury received the correct written instructions, his argument is without merit.

As part of the penalty phase instructions, the court read CALJIC No. 8.85 to the jury as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may hereafter be instructed. You may consider, take into account and be guided by the following factors, if applicable. . .

(16RT 3090.)

The court misspoke with regard to one word when reciting this instruction – stating that the jury "may consider, take into account. . . ," instead of stating that the jury "shall consider, take into account. . . ," factors (a) through (k) when determining which penalty to impose. The court, however, provided the jury with this instruction in written form as well. The written version of CALJIC No. 8.85 correctly instructed the jury that "you shall consider, take into account. . . " (3CT 1049.)

In addition, the court instructed the jury with CALJIC No. 8.88, which stated, in part, that

> [A]fter having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

(16RT 3100; 3CT 1068-1069.)

Finally, the court instructed the jury that "you are to be governed only by the instruction in its final wording." (16RT 3103; 3CT 803.)

Frederickson contends that the court's error in orally instructing the jury requires reversal of his death sentence. (AOB 284.) There is no merit to his claim.

To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control. (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) "As long as the court provides the jury with the written instructions to take into the deliberation room, they govern in any conflict with those delivered orally." (*People v. Osband* (1996) 13 Cal.4th 622, 687-688; citing *People v. Crittenden* (1994) 9 Cal.4th 83, 138.) If the jurors have the written version of the instruction when they began to deliberate, this Court presumes that the jury was guided by those copies. (*People v. Osband, supra*, 13 Cal.4th at pp. 687-688, citing *People v. Crittenden, supra*, 9 Cal.4th at p. 138.) This principle was reinforced by the court's admonition that "[y]ou are to be governed only by the instruction in its final wording whether printed, typed or handwritten." (16RT 3103; 3CT 803; *People v. Osband, supra*, 13 Cal.4th at pp. 687-688.)

Here, the court provided the correct version of CALJIC No. 8.85 to the jury in written form. The court also correctly instructed the jury with regard to this principle in CALJIC No. 8.88. It is beyond reason to argue that the jury, hearing the word "may" instead of "shall" in the middle of one instruction, during a long recitation of all instructions, remembered or

relied on the oral version of CALJIC No. 8.85 rather than the correct written version. There is certainly no basis upon which the presumption of reliance on the written version can be rebutted. Thus, the error committed in misstating the instructions was harmless.

XV. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Frederickson raises several "routine" challenges to the constitutionality of California's death penalty statute, which he acknowledges have been repeatedly rejected by this Court. (AOB 285-299.) Frederickson has not presented sufficient reasoning to revisit these issues; therefore, extended discussion is unnecessary and his claims should all be rejected consistent with this Court's previous rulings.

Frederickson claims that Penal Code section 190.2 is impermissibly broad, because it fails to meaningfully narrow the pool of murderers eligible for the death penalty. He claims the large number of special circumstances makes almost all first degree murderers eligible for the death penalty. (AOB 285-287.) This Court has consistently rejected this claim. (*People v. Davis*, *supra*, 46 Cal.4th at p. 648; *People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Cook* (2007) 29 Cal.4th 566, 617; *People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Harris* (2005) 37 Cal.4th 310, 365.) Frederickson has not presented any reason to reconsider this issue.

Frederickson next claims that Penal Code section 190.3, subdivision (a), which requires the finder of fact to consider "the circumstances of the crime" in determining the appropriate penalty in capital cases, has been applied in such a broad manner that it virtually applies to every feature of every murder, including those that contradict each other, which results in arbitrary and contradictory application, in violation of his constitutional rights. (AOB 287-289.) This Court has consistently rejected this argument.

> It is not inappropriate . . . that a particular circumstance of a capital crime may be considered aggravating in one case, while a contrasting circumstance may be considered aggravating in another case. The sentencer is to consider the defendant's individual culpability; there is no constitutional requirement that the sentencer compare the defendant's culpability with the culpability of other defendants. [Citation.] The focus is upon the individual case, and the jury's discretion is broad.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1051; accord *People v. Hamilton* (2009) 45 Cal.4th 863, 960; *People v. Ramos, supra,* 34 Cal.4th 494, 533; *People v. Maury* (2003) 30 Cal.4th 342, 439.) Frederickson has not presented any reason to reconsider this issue, therefore, his claim should be rejected.

Frederickson further claims the death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof. He argues his death sentence is unconstitutional because it is not premised upon findings made beyond a reasonable doubt. He claims some burden of proof is required, or the jury should have been instructed that there was no burden of proof. (AOB 289-291.) This claim has been repeatedly rejected. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Michaels*, *supra*. 28 Cal.4th at p. 541.) California's death penalty statute is constitutional.

As this Court's precedent makes clear:

> The death penalty law is not unconstitutional for failing to impose a burden of proof–whether beyond a reasonable doubt or by a preponderance of the evidence–as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citation.] Unlike the statutory schemes in other states cited by defendant, in California "'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." [Citations.] ¶ The jury is not constitutionally required to achieve unanimity as to

> aggravating circumstances. [Citation.] ¶ Recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 have not altered our conclusions regarding burden of proof or jury unanimity.

(*People v. Brown* (2004) 33 Cal.4th 382, 401-402.)

In California

> once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole.

(*People v. Ward* (2005) 36 Cal.4th 186, 221 quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263.)

The United States Supreme Court's decisions, including *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], "interpreting the Sixth Amendment's jury trial guarantee [citations] have not altered our conclusions in this regard." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 227-228.) *Cunningham* "involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law" (*People v. Prince* (2007) 40 Cal.4th at pp. 1179, 1297), and thus has no bearing on this Court's earlier decisions upholding the constitutionality of the state's capital sentencing scheme (*People v. Stevens* (2007) 41 Cal.4th 182, 212). Thus, California's death penalty withstands constitutional scrutiny, even after reexamination in light of *Apprendi* and *Cunningham*. Frederickson has not presented any reason to reconsider this issue.

Frederickson additionally claims his death verdict was not premised on unanimous jury findings, as to either the aggravating factors or the unadjudicated criminal activity. (AOB 291-293.) This Court has consistently rejected these claims. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Ward*, *supra*, 36 Cal.4th at pp. 186, 221-222; *People v.*

Riggs, *supra*, 44 Cal.4th at pp. 248, 329; *People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 228; *People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Anderson* (2001) 25 Cal.4th 543, 589.)

Frederickson further contends his constitutional rights were violated because the phrase "so substantial" in the penalty phase instructions is impermissibly vague and ambiguous. (AOB 293-294.) This Court has previously rejected that argument. (*People v. Breaux* (1991) 1 Cal.4th 281, 315.) Frederickson has offered no persuasive reason for this Court to reconsider this argument.

Frederickson next contends the jury instructions failed to tell the jury that the central determination is whether death is the appropriate punishment. (AOB 294.) This Court has previously rejected this argument. (*People v. Arias* (1996) 13 Cal.4th 92, 171.) Frederickson has offered no persuasive reason to reconsider its prior holding.

Frederickson additionally claims the jury instructions failed to tell the jury that if it determined that mitigation outweighed aggravation, it was required to return a sentence of life without the possibility of parole. (AOB 295.) This Court has rejected this argument. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Frederickson has offered no persuasive reason for this Court to reconsider its position.

Frederickson next contends the penalty jury should have been instructed on the presumption of life. (AOB 295-296.) This Court has repeatedly rejected the argument that there is a presumption of life in the penalty phase of a capital trial that is analogous to the presumption of innocence at the guilt trial. (*People v. Abilez*, *supra*, 41 Cal.4th at pp. 472, 532; *People v. Perry* (2006) 38 Cal.4th 302, 321; *People v. Kipp*, *supra*, 26 Cal.4th at pp. 1000, 1137.) Frederickson has not presented any compelling reason for this Court to revisit these holdings.

Frederickson also contends the jury's failure to make written findings violated his right to meaningful appellate review. (AOB 296-297.) This Court has consistently rejected any claim that written findings are required. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Riggs*, *supra*, 44 Cal.4th at p. 329; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Cornwell*, *supra*, 37 Cal.4th at pp. 50, 105; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.) This Court should follow its prior rulings.

Frederickson further claims the court erred by not deleting inapplicable sentencing factors from the instructions. (AOB 297.) This Court has rejected the same challenge. (*People v. Cook* (2006) 39 Cal.4th 566, 618.) This Court should deny Frederickson's challenge as he presents no compelling reason for this Court to deviate from its prior holdings.

Frederickson further claims the prohibition against inter-case proportionality review guarantees arbitrary and disproportionate impositions of the death penalty. (AOB 297.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Cornwell*, *supra*, 37 Cal.4th at pp. 50, 105; *People v. Elliot*, *supra,* 37 Cal.4th at pp. 453, 488; *People v. Smith*, *supra,* 35 Cal.4th at p. 374; *People v. Jones*, *supra*, 29 Cal.4th at pp. 1229, 1267.)

Frederickson also claims the California capital sentencing scheme violates the Equal Protection Clause. (AOB 298.) This Court has previously rejected this claim. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.)

Lastly, Frederickson claims California's use of the death penalty as a regular form of punishment falls short of international norms. (AOB 298.) This Court has repeatedly rejected similar arguments and should do so again here. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citation.]" (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1322; accord *People v. Mungia*, *supra*, 44 Cal.4th at pp. 1101, 1143; *People v. Panah* (2005) 35 Cal.4th 395, 500; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488.) Frederickson does not present any reason to revisit these holdings.

In sum, Frederickson's constitutional challenges to California's death penalty statute have been repeatedly rejected by this Court, and should likewise be rejected here.

XVI. FREDERICKSON RECEIVED A FAIR TRIAL

Frederickson contends that the cumulative effect of the trial court's errors compels reversal of the judgment. (AOB 300-302.) His trial was conducted with due process and fairness, thus, this argument fails.

A defendant is entitled to a fair trial, but not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Notwithstanding his arguments to the contrary, the record contains few, if any, errors, and no prejudicial error has been shown. To the extent any error arguably occurred, the effect was harmless. As shown in the arguments above, the record demonstrates that Frederickson received a fair trial and the verdicts were supported by compelling evidence. His claims of cumulative error should, therefore, be rejected.

CONCLUSION

Respondent respectfully requests the judgment of convictions and sentence of death be affirmed in its entirety.

Dated: March 4, 2010

Respectfully submitted,

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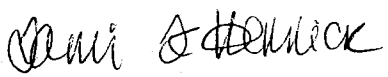

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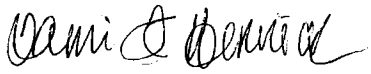
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 35,283 words.

Dated: March 4, 2010

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE

Case Name: **People v. Frederickson** No.: **S067392**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 5, 2010, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 5, 2010, at San Diego, California.

Olivia de la Cruz
Declarant

Olivia de la Cruz
Signature

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