In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JOSHUA MARTIN MIRACLE,** Defendant and Appellant.	**CAPITAL CASE** Case No. S140894

Santa Barbara County Superior Court Case No. 1200303
The Honorable Brian E. Hill, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On March 7, 2005, the Santa Barbara County Grand Jury returned an indictment charging appellant and codefendant Robert Quinoes Ibarra[1] with murder (Pen. Code,[2] § 187, subd. (a); count 1), and alleging the special circumstance that they intentionally committed the murder while lying in wait (§ 190.2, subd. (a)(15)). Appellant was separately charged with attempted murder (§§ 664/187, subd.(a); count 2), and the lesser offense of assault with a deadly weapon, to wit, a knife (§ 245, subd. (a)(1)). As to count 1, it was alleged that appellant and codefendant Ibarra each personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), and committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (a)(22)). The indictment further alleged that appellant intentionally committed the murder while an active participant in a criminal street gang, and that the offense was committed to further the activities of a criminal street gang (§ 190.2, subd. (a)(22)). As to count 2, it was alleged that appellant committed the attempted murder with premeditation and deliberation, personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), personally inflicted great bodily injury (§ 12022.7, subd. (a)), and committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)). As to both

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[1] Codefendant Robert Ibarra is not a party to this automatic appeal; his case was severed from appellant's. Codefendant Ibarra was separately tried, convicted, and sentenced to life without the possibility of parole. Codefendant Ibarra's appeal was heard by the Court of Appeal, Second Appellate District, and an opinion was filed on March 11, 2014. (See *People v. Ibarra* (Mar. 11, 2014, B243065) 2014 Cal.App.Unpub. LEXIS 1706 [unpub. opn.].)

[2] All statutory references are to the Penal Code unless otherwise noted.

counts, it was further alleged that appellant suffered a prior serious or violent felony (§§ 667, subds. (d)(1) & (e)(1), 1170.12, subds. (b)(1) & (c)(1), 1192.7, subd. (c)). (1CT 1-6.)

On March 23, 2005, the prosecutor informed the trial court that he intended to seek the death penalty. (1CT 21.) Appellant indicated his intent to file a motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] (*Faretta*) against his appointed counsel's advice. (1RT 29-33.) On April 20, 2005, the court heard and granted appellant's motion to represent himself and appointed advisory counsel. (2CT 534.)

On July 29, 2005, appellant pled guilty with the consent of advisory counsel to murder (count 1), and admitted the special circumstances, special allegations, and prior strike conviction. (2CT 690; 3CT 601-610.) On September 8, 2005, appellant pled guilty to amended count 2, assault with a deadly weapon, to wit, a knife (§ 245, subd. (a)(1)), and admitted that he personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)). The court dismissed the gang allegation in count 2.[3] (3CT 613-614, 618-625.)

The penalty phase trial on count 1 was held before a jury. (4CT 948-949.) The jury returned a verdict of death. (4CT 1062-1065, 1116.) The court denied appellant's automatic motion for modification of the death

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[3] It appears that there is a clerical error in the minutes for the September 8, 2005, plea proceedings. The minute order and reporter's transcript show that appellant admitted the great bodily injury enhancement. (3CT 613; 2RT 335.) In contrast, another minute order indicates that the trial court dismissed the great bodily injury enhancement. (3CT 614.) The minutes should be corrected to reflect the oral pronouncement. (*People v. Jones* (2012) 54 Cal.4th 1, 89.)

sentence[4] (§ 190.4, subd. (e)). (4RT 1142-1145.) The court struck the prior strike conviction. (4CT 1166-1167.) Appellant was sentenced to death, plus 10 years in state prison for the gang enhancement in count 1. The execution of the gang enhancement was stayed pending appellant's automatic appeal on his death sentence. As to count 2, appellant was sentenced to a consecutive seven years in state prison, the execution of which was stayed pending the execution of the sentence in count 1. The court stayed the enhancements for personal use of a weapon pursuant to section 654. Appellant was ordered to pay $3,401.12 in victim restitution, a $10,000 restitution fine (§ 1202.4) and a $10,000 parole revocation fine, but the fines were stayed pending successful completion of parole if the execution on count 1 is not carried out (§ 1202.45). Appellant was awarded 549 days in presentence custody credit, consisting of 478 actual days and 71 days of conduct credit. (4CT 1150-1153, 1155-1159, 1166-1171.)

As to the companion case, case number 1202051, which involved charges stemming from his behavior while in custody, including assault with a deadly weapon (§ 245, subd. (a)(1)), assault on a custodial officer (§ 241.1), possession of a weapon while in custody (§ 4502, subd. (a)), criminal threats (§ 422), and battery on emergency personnel (§243, subd. (c)(1)), appellant pled guilty and was sentenced to three years and ten months, which was stayed pending execution of the death sentence in count 1 of case number 1200303. Appellant was ordered to pay a $2,400 restitution fine (§ 1202.4) and a $2,400 parole revocation fine. The fines were stayed pending successful completion of parole (§ 1202.45). (1CT 1168-1169.)

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[4] Appellant declined to move for a new trial and opted for the statutory motion for modification of the death sentence pursuant to section 190.4, subdivision (e). (4CT 1143.)

This appeal is automatic. (§ 1239; 4CT 1160-1161.)

STATEMENT OF FACTS

A. Prosecution's Evidence at the Penalty Phase

1. Evidence Supporting Count 2 (attempted murder)

Jaime Lopez was an Eastside gang member with the nickname "Chaparro." He had tattoos of his last name, nickname, and sports teams on his back. (6RT 1595, 1600-1601.) Lopez had known appellant for about four years. During that time, appellant stayed at Lopez's home a few times. Appellant had a tattoo that stated "ESG" on the back of his head. "ESG" stood for "Eastside Gang." (6RT 1595-1596.)

On September 23, 2004, Lopez drove his Cadillac to a Circle K store located on Milpas Road in Santa Barbara. He stopped his car in the parking lot. The driver's side window was down. Lopez saw a knife and moved out of the way, but was stabbed in the upper back. He was also punched above the eye and suffered a cut over it. After Lopez was stabbed, he drove to work, and his boss took him to the hospital. At trial, he denied that appellant was in the parking lot and had stabbed him. (6RT 1598-1606.) Lopez also denied testifying before the grand jury that he saw appellant in the parking lot before he arrived. He also did not tell Santa Barbara Police Detective Gary Siegel that appellant extended his arm as if to shake Lopez's hand, then punched him in the eye, pulled out a knife, and stabbed him. Rather, Lopez testified that it was a "Mexican" who stabbed him. (6RT 1598, 1603-1604.)

Detective Siegel was assigned to investigate the attack on Lopez. Detective Siegel knew Lopez to be an Eastside gang member. Detective Siegel spoke to Lopez and Eastside gang members about the stabbing. (7RT 1609-1610.) During the interview, Lopez described what had happened, but refused to identify who had stabbed him. As the interview

progressed, Lopez identified appellant as the assailant and stated they belonged to the same gang. As a detective who had investigated hundreds of gang-related crimes, Detective Siegel explained to the jury that it was common for gang members to say that they did not know who their attackers were, but later, admit that they knew the identities of their assailants. (7RT 1611-1612, 1617.)

During the interview, Lopez told Detective Siegel that he was in the parking lot area of the Circle K and heard someone call out his name. After he stopped his car in the parking lot, appellant came over. Lopez thought appellant came over to greet him; instead, appellant punched Lopez just above the left eye. Lopez fell forward and saw appellant with a knife in his hand. Lopez moved away while appellant stabbed him. Appellant cut Lopez on the left shoulder area by the neck and slashed him a few times. Lopez stepped on the accelerator and left the area. Lopez identified appellant by name and out of a photographic lineup. (7RT 1612-1613, 1615, 1617-1618.)

Lopez told Detective Siegel that he would not testify at trial because he was afraid for his life and the safety of his children. Lopez was threatened by other Eastside and non-Eastside gang members who called him a "rat." Someone told Lopez, "You'll get yours." Detective Siegel testified that it was common in gang culture for this to occur when a gang member testified in court. (7RT 1615-1616.)

2. Evidence in Support of the Capital Murder (Count 1)

In October of 2005, Robert Galindo lived across the street from San Marcos High School.[5] Robert lived in the apartment with his brother, Rodney,[6] and Phillip Aliano. Robert was not a gang member. (7RT 1619-1621, 1717-1718.)

Robert had known codefendant Ibarra for four years, but did not know him as a gang member. Occasionally, codefendant Ibarra and his girlfriend came over to Robert's apartment to record music on Robert's laptop. Codefendant Ibarra also visited people he knew who lived in Robert's apartment complex. When codefendant Ibarra was at Robert's apartment, they both used crystal methamphetamine together. Sometimes, codefendant Ibarra spent the night in Robert's apartment. (7RT 1620-1622, 1625-1626, 1718.)

Robert had known Elias Silva for three years. Robert met Silva through Danny Ramirez, who was also known as "Prankster." Silva was previously in a gang, but he no longer acted like he was part of it. Robert bought drugs from Silva. (7RT 1622, 1710, 1718-1719.) Codefendant Ibarra and Silva were familiar with each other. Codefendant Ibarra did not like Silva because they both dated the same woman. On prior occasions, codefendant Ibarra and Silva had verbal altercations outside Robert's apartment. (7RT 1627-1628.)

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[5] Robert Galindo pleaded guilty to a voluntary manslaughter charge in connection with Elias Silva's death. Robert faced 11 years in prison. (7RT 1623.)

[6] Robert and Rodney Galindo share the same last name. Therefore, for ease of reference, respondent will refer to them by their first names.

On the Wednesday before Silva's death, codefendant Ibarra was at Robert's apartment.[7] Codefendant Ibarra and Robert shared a glass pipe and used methamphetamine together. (7RT 1627, 1706-1707.) The following day, Ramirez asked Robert if he could tattoo Silva in Robert's house, and Robert did not object. Ramirez was a tattoo artist and planned to tattoo Silva in exchange for the money Ramirez owed to Silva. (7RT 1627-1629, 1631.) Ramirez came over to Robert's apartment with appellant, who was introduced to Robert as "Junior." Appellant and codefendant Ibarra knew each other. (7RT 1622-1623, 1629-1630, 1704-1705.) On Thursday, they were in and out of Robert's apartment. Appellant, codefendant Ibarra, and Ramirez spent the night in Robert's apartment. (7RT 1631-1632.)

When Robert woke up on Friday morning, appellant and codefendant Ibarra were inside the apartment and Ramirez had left with Silva to have the tattoo work done somewhere else. Robert asked appellant why he was staying in the apartment. Appellant stated that Ramirez told him that he could stay in the apartment until Ramirez returned. Appellant and codefendant Ibarra stayed in the apartment for a while, and then codefendant Ibarra left to visit other people he knew in the apartment complex. Codefendant Ibarra returned to the apartment, and then he and appellant left together to run errands. They later returned, and appellant spent Friday night in the apartment, but codefendant Ibarra left. (7RT 1632-1633, 1637.)

On Saturday morning, Robert awoke to find codefendant Ibarra in his apartment telling appellant about his previous night out while appellant

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[7] Robert was uncertain as to the timing of the events. Elias Silva was murdered sometime during the night of October 2, 2004 (Saturday), and the early morning hours of October 3, 2004. (7RT 1625, 1627.)

used Robert's computer. Rodney had returned home from his job at Chumash Casino, and Aliano was getting ready to go to work. (7RT 1634, 1637-1639.)

Appellant and codefendant Ibarra spent a lot of time together in the bathroom using methamphetamine. Codefendant Ibarra had a glass pipe that he used to smoke methamphetamine. Additionally, Robert gave codefendant Ibarra needles to use the methamphetamine intravenously. While Robert used crystal methamphetamine on Wednesday, he did not use it on Saturday because he had to take a drug test the following week. (7RT 1639, 1699-1700, 1713-1714.)

On the Saturday morning before the murder, Nicole P.,[8] who was 14 years old and lived in Robert's apartment complex,[9] came over to Robert's apartment to pick up her purse that she had left behind on Friday. She stood at the door and did not enter the apartment. Robert asked codefendant Ibarra not to have Nicole P. in his apartment and said that she needed to leave. Codefendant Ibarra gave her the purse and asked her to leave. (7RT 1696-1698, 1732-1733.)

Later, when Santa Barbara Sheriff's Deputy Victor Alvarez interviewed Nicole P., she stated that she was very familiar with the people inside Robert's apartment. She stated that she was inside the apartment on the day of the murder. Codefendant Ibarra told her to leave and said, "Meja [*sic*], you need to leave. You can't be here. Something bad is going to happen. I don't want you to get hurt." (7RT 1740-1741.)

Sometime during Saturday, codefendant Ibarra left the apartment to go visit his daughter. Appellant remained in the apartment with Robert,

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[8] Nicole P. did not recall what she told the sheriff's deputies. (7RT 1734.)

[9] Nicole P. was staying at a friend's grandmother's apartment because she was "on the run." (7RT 1736.)

Rodney, and Aliano. During the afternoon, Robert's friend, "Darren," called and came over to pick Robert up. Robert asked Darren to take him to go see Silva. (7RT 1634, 1640.) When Robert arrived at Silva's house, Silva told Robert to get appellant out of his apartment because "[h]e's no good." Darren drove Robert back to his apartment. Some time later, Robert and appellant went to Vons to buy food, and Robert went to use a pay phone. (7RT 1634-1636, 1643-1644.)

Around 8:30 or 9:00 p.m., codefendant Ibarra returned to Robert's apartment. After codefendant Ibarra returned to the apartment, appellant's and codefendant Ibarra's moods changed. Codefendant Ibarra came to the apartment with a large black duffle bag with wheels and told Robert that it contained codefendant Ibarra's and appellant's clothes. They planned to go out to party with girls whom they had met at the casino. Robert did not see what was inside the bag. Appellant was in the kitchen cooking, and codefendant Ibarra called for him. Robert observed codefendant Ibarra to be antsy and hyper. Robert asked codefendant Ibarra to move his duffle bag; however, codefendant Ibarra told Robert to remove it, so he placed it on the patio. The duffle bag was open, and Robert saw a white plastic bag inside. (7RT 1641-1644.)

Appellant and codefendant Ibarra were smoking cigarettes in the apartment. Robert heard appellant talk about "rats" and that he needed to "take care of this rat." Robert understood the term "rat" as a reference to someone who cooperated with law enforcement. Appellant and codefendant Ibarra also had discussions in the bathroom, but Robert could not hear them because either the fan was on or the door was closed. Whenever appellant and codefendant Ibarra spoke to each other, they would become quiet when Robert came near them. (7RT 1640, 1645-1646, 1662, 1715.)

Codefendant Ibarra asked Robert to call Silva, who sold crystal methamphetamine, so that codefendant Ibarra could buy some drugs from Silva. Robert used Rodney's phone to call Silva because Robert did not have a phone. Silva refused to come over to Robert's apartment. Silva told Robert that he did not want to have anything to do with codefendant Ibarra and appellant, and that Robert should remove them from his apartment. (7RT 1647-1648.)

Codefendant Ibarra and appellant told Robert to call Silva again. Because codefendant Ibarra's cell phone was out of battery power, he instructed Robert to use a pay phone to call Silva. Robert left the apartment with Aliano to go use the pay phone at San Marco High School, but he did not call Silva. Instead, he made a phone call to arrange plans to go somewhere for the night. Robert returned to the apartment without Aliano and found appellant and codefendant Ibarra in the bathroom. Robert was surprised that codefendant Ibarra had drugs on him. (7RT 1649-1651, 1706.) Again, codefendant Ibarra and appellant told Robert to call Silva. Codefendant Ibarra told Robert that they would leave the apartment after he made the call. Robert pretended to call Silva by dialing the wrong number several times. Codefendant Ibarra and appellant told Robert to keep calling Silva. Robert tried to get appellant and codefendant Ibarra to leave because he made plans to go out for the evening and did not want them to stay in his apartment. (7RT 1650-1651.)

Sometime after 10:00 p.m., Robert told codefendant Ibarra that he needed cigarettes and would walk down to the store to buy some and use the pay phone to call Silva. When Robert returned from the store, he told codefendant Ibarra that he had left several messages for Silva, who did not return any of his calls. Appellant was in the kitchen holding a butcher knife taken from Robert's cutlery set. (7RT 1651-1654, 1681-1682, 1716.) Codefendant Ibarra remained persistent and repeatedly told Robert to call

Silva, but Robert refused. Codefendant Ibarra was mad, and he and appellant became agitated and jumpy. (7RT 1653-1654, 1656.) Robert and appellant were standing in the kitchen. Codefendant Ibarra insisted that Robert call Silva. Robert asked codefendant Ibarra, "Why are you doing this to me?" Codefendant Ibarra told Robert to shut up and call Silva. Near midnight, Robert agreed to walk to the store to use the pay phone to call Silva. Robert went inside Rusty's Restaurant to get change, but he did not call Silva. Instead, he smoked a cigarette because he was "tripping out" over the situation—he was thinking of a way to get appellant and codefendant Ibarra out of his apartment. (7RT 1655-1658, 1660.)

When Robert returned to his apartment, he observed that his furniture had been moved to create an open space in the living room. He asked codefendant Ibarra why his furniture was moved. Codefendant Ibarra told Robert to shut up and to call Silva immediately. Robert shut the front door and turned around to find appellant standing next to him. Appellant told Robert to call Silva. Robert asked, "Why are you guys doing this to me, you know?" Appellant told Robert to shut up and call Silva. Appellant took out the butcher knife with a tapped handle that he had taken out of Robert's cutlery set,[10] held it up to Robert's throat, and demanded that Robert call Silva. Appellant stood behind Robert with his arm around Robert and held the butcher knife to Robert's throat so that appellant could listen in on Robert's call to Silva. Codefendant Ibarra was facing Robert. (7RT 1655-1658, 1660.)

Robert asked if appellant was going to stab him. Appellant told Robert that he would not stab him because Robert had not disrespected him. Appellant demanded that Robert call Silva. Robert refused to call

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[10] Earlier that day, Robert saw appellant used a different knife to do his nails. (7RT 1683-1685, 1711; Peo. Exhs. 10, 13.)

because he had already called Silva. Appellant threatened to stab Robert if he did not call Silva. Appellant's personality changed and became more direct. He told Robert, "You don't—you don't even know. It's like you don't even know me." Appellant, codefendant Ibarra, and Robert cussed and yelled at each other. Appellant and codefendant Ibarra told Robert that they would not hurt him and that "it has nothing to do with [him]." Robert was upset and cried. (7RT 1659-1661.)

Eventually, Robert used codefendant Ibarra's cell phone to call Silva. Codefendant Ibarra told Robert to leave a voicemail message instructing Silva to bring drugs. Robert left a message for Silva stating that he was going out with his cousins and asked Silva to come over to his apartment with some drugs. A few minutes later, Silva called back and said that he would come over to Robert's apartment. Robert told Silva to pick him up in the back of the complex. Since Silva always picked Robert up in the front of the complex, Robert hoped that Silva would think something was wrong because of the change in the pick up location. Robert believed codefendant Ibarra intended to steal or rob Silva's drugs because codefendant Ibarra had used the word "gaffle," which meant "steal it." Silva called a second time to let Robert know that he was exiting the freeway.[11] (7RT 1662-1665, 1719.)

Appellant told Robert not to go out to meet Silva and to wait by the door for Silva to arrive. Robert repeatedly asked codefendant Ibarra why he was doing this. Silva called a third time and asked Robert why he did not come out to meet him. Silva told Robert that he was coming to Robert's apartment's door. Appellant instructed Robert to wait for Silva to come and then open the door for Silva to come in. (7RT 1665-1667.)

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[11] Robert bought the cell phone that Silva was using. (7RT 1682-1683, 1710; Peo. Exh. 10.)

Appellant continued to hold a knife to Robert's throat. Robert stood behind the door, emotionally distraught. Because the kitchen window was cracked open, appellant ran over to close the kitchen window. He told Robert not to move, and codefendant Ibarra gave Robert a look meaning for him not to move. Codefendant Ibarra stood near the opening of the door and did not have anything in his hands. Appellant returned from the kitchen and again stood behind Robert with the knife in his hand. (7RT 1668-1669, 1711.) Codefendant Ibarra yelled, "Whatever comes in that fucking door," "[w]e'll kill him, you know, I'll kill whoever comes in that door." Codefendant Ibarra did not care if it was Aliano or someone else. Codefendant Ibarra instructed Robert not to allow anyone to come inside the apartment. (7RT 1670-1671.)

Silva came to the apartment, and the door was open. Robert told Silva to wait and began to pull the door back. Silva did not knock and started to walk into the apartment. When Silva walked in, codefendant Ibarra pulled and dragged him to the center of the living room. Silva asked, "What the fuck, what the fuck did I do?" Codefendant Ibarra and Silva struggled in the middle of the living room. Appellant pushed Robert aside and shut the door. Appellant ran over with a knife in his hand and "rushed" Silva to assist codefendant Ibarra. Appellant ordered Robert to lock the front door. (7RT 1669-1671, 1677-1678, 1681.) Robert was scared and saw an opportunity to get out of the apartment. He ran out and crossed the street to look for Aliano and Silva's friends, who had weapons, to help Silva. He did not see codefendant Ibarra stab Silva prior to his departure. When he left the apartment, the lights were on and he placed codefendant

Ibarra's cell phone in his pocket.[12] (7RT 1686, 1689-1670, 1693-1694, 1711, 1720-1721.)

About 20 minutes after Robert had left the apartment, he returned to his apartment complex and saw a trail with bloody footprints and blood drops leading towards the parking lot where Silva had parked his car. He thought Silva was hurt and had driven himself to the hospital. Robert walked back to his apartment and opened the door, but did not enter. The lights were turned off. Robert saw blood and Silva lying in the center of the living room. The furniture was moved, and an antique drawer was broken. (7RT 1690-1694, 1712, 1727.)

Robert was in shock and ran away to look for Aliano. He ran across San Marcos High School and then toward Elia Alvarado's house. When he arrived at Alvarado's house, he did not call 911 or tell Alvarado what had happened. Instead, he gave Aliano codefendant Ibarra's cell phone and asked him to call his uncle who was a sheriff's deputy. However, Aliano called Megan Pope. Robert did not want to tell Aliano anything because codefendant Ibarra threatened Aliano's life. Sometime later, someone called 911. (7RT 1695-1696, 1723-1724.)

Robert was shown a video taken from Home Depot depicting codefendant Ibarra at the register purchasing some items the afternoon before the murder. (7RT 1701-1702.)

3. Police Investigation

Santa Barbara County Sheriff's Deputy Lawrence Hess investigated the murder. Around 3:48 a.m., Aliano and Pope called 911. Deputy Hess responded to Robert's apartment. There, he found Aliano and Pope outside

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[12] Codefendant Ibarra's cell phone record showed that there was a call from his cell phone to Silva around 11:30 p.m. on Saturday. (7RT 1723.)

the apartment, but Robert was not present. (7RT 1743-1747.) Deputy Hess observed a blood trail leaving the apartment. There were footprints and drops of blood. When Deputy Hess entered the apartment, the furniture was in different locations and things were tipped over and scattered about. A cabinet in front of the doorway had its doors broken, and chairs were tipped over in the kitchen area. There was a large amount of blood in the living room where Silva lay. (7RT 1745-1746.) Silva's cell phone and a knife were found next to the daybed in the living room. A computer mouse and codefendant Ibarra's glass pipe were also found inside the apartment. (7RT 1700, 1713.)

Lisa Hemman was a senior identification technician in the forensics unit of the Santa Barbara County Sheriff's Department. She photographed the crime scene and the evidence recovered in Robert's apartment. She photographed a duffel bag that was found on the balcony of the apartment. Inside the duffel bag, there was a smaller black duffel bag containing a hammer, two tarps, duct tape, pliers, a workman's knife, and a dark-colored jacket. There was no blood on the duffel bags or the duct tape. (7RT 1749-1751, 1757.) Also, a knife with blood on it was found on the ground next to a cell phone on the opposite side of the daybed. There was a bloodstain on the light switch. There were bloody footprints in the carpet and around Silva, who suffered stab wounds to the side of his neck, a wound to the front of his neck, and other stab wounds on his body. (7RT 1752-1753, 1755-1756.)

The parties stipulated that seven photographs would be shown to the jury with an explanation by the prosecutor. The first photograph depicted the inside of Silva's car which was driven away from Robert's apartment complex by codefendant Ibarra and appellant, who were arrested in San Diego. (7RT 1760; Peo. Exh. 28.) The second photograph depicted the floor of the driver's side of the car, which appeared to have fresh blood

stains and blood it. (7RT 1760; Peo. Exh. 27.) The third photograph depicted codefendant Ibarra's bandaged left leg. (7RT 1760; Peo. Exh. 33.) The fourth photograph depicted codefendant Ibarra's left leg without the bandage, which showed a puncture wound to his leg. (7RT 1760; Peo. Exh. 32.) The fifth photograph depicted codefendant Ibarra's back with a large tattoo that stated "Santa Bruta." (7RT 1760; Peo. Exh. 31.) The sixth photograph depicted the back of appellant's head with a tattoo that stated "ESG." (7RT 1760-1761; Peo. Exh. 29.) The last photograph depicted appellant's chest with a tattoo that stated "Brown Pride" and a number of smaller tattoos. (7RT 1761; Peo. Exh. 30.) The parties stipulated that Silva was stabbed 48 times. (8RT 1874-1875.) In addition, the parties stipulated to the admission of the autopsy photographs because the pathologist who performed the autopsy was on vacation. (8RT 1824, 1872-1874.)

4. Gang Evidence

Santa Barbara County Sheriff's Detective Gary Siegel testified as a gang expert. He was assigned to investigate gang crimes and had training and experience as a gang detective. He was familiar with gang dress, graffiti, tattoos, and symbols. In Santa Barbara, the primary gangs were Eastside and Westside. Within the Eastside gang, there were different cliques. (8RT 1876-1880.) Detective Siegel spoke to gang members and identified them by their self-admitted status, law enforcement contacts and reports, and tattoos. (7RT 1609; 8RT 1879, 1886-1887.)

Detective Siegel explained the concept of respect in the gang culture. He explained that respect was one of the highest priorities for gang members who sought to raise their status or level in the gang. Detective Siegel also explained that fear created respect in the gang culture. Gang members instilled fear within their gang to show their commitment and willingness to do things for the gang. They also instilled fear among rival gangs and the community to show their fearlessness. (8RT 1881-1882.)

For instance, when a rival gang member entered another gang's territory and made graffiti, the gang whose territory was vandalized was expected to retaliate against the rival gang. If the gang failed to retaliate, it would be perceived as weak. (8RT 1884.)

Detective Siegel also explained the concept of "putting in work," which was done by younger gang members who were trying to establish themselves as gang members or further their reputation. "Putting in work" meant committing a crime or fighting with rival gangs. Gang members were expected to challenge rival gang members to a fight. (8RT 1882.)

The Eastside gang had approximately 250 to 300 gang members, including non-active members. An active gang member was someone who committed crimes for the gang. Older gang members might not commit crimes, but they remained in the gang to assist when needed. The Eastside gang territory was from State Street to the Foothill area, and Anapamu down to the ocean. The gang's cliques included Eastside Krazies and Eastside Traviesos. The gang's common tattoos included ESG, E.S., K for Eastside Krazies, or EST for Eastside Traviesos. The gang also had common hand signs. The gang's primary activities were murder, attempted murder, assault with deadly weapons, possession of deadly weapons, narcotics offenses, theft-related offenses, burglaries, carjackings, and assaults. An Eastside gang member might use a gang hand sign to challenge a rival gang. Eastside gang members were expected to take action against a Westside gang member. (8RT 1886-1889.)

In April of 2002, police officers made contact with Eastside gang members who were drinking at a park. Two Eastside gang members and an associate were in possession of handguns. They told officers that they carried guns for protection against rival gangs. They were arrested. (8RT 1891.)

In July of 2004, an older Eastside gang member led a group of gang members into the Westside area. The older gang member brandished a knife at a Westside gang member, Daniel Sotello, and then ordered the younger gang members to attack Sotello using a chain and a wooden stick or bat. The older gang member was arrested for assault with a deadly weapon, brandishing, and participating in a criminal street gang. (8RT 1890-1891.)

In August of 2004, two carloads of Eastside gang members were involved in the stabbing of two Westside gang members in an area where Westside gang members were known to congregate. (8RT 1889.)

In May of 2004, appellant was with two Eastside gang members when they were arrested for possession of a stolen car. Appellant announced his gang affiliation and threatened a witness, which bolstered appellant's reputation and created fear in that witness such that the witness refused to cooperate with law enforcement in fear of retaliation. The witness knew that appellant was an Eastside gang member based on his tattoos and having seen him in the area. Appellant was arrested for intimidating a witness and participating in a criminal street gang. Detective Siegel explained that an Eastside gang member obtains his power from respect or fear from these acts. (8RT 1892-1893.)

Detective Siegel stated that appellant was involved in gang-related incidents while placed in the California Youth Authority ("CYA") because a Westside gang member was placed near his cell. Appellant would have been subjected to retaliation if he did not challenge a rival gang member. Detective Siegel explained that retribution within the gang for "ratting" or "snitching" was a high priority because gang members do not cooperate with the police or any authority figures. A gang member would not reveal to law enforcement the identity of the rival gang member who committed the assault against him. Gang members committed assaults against snitches

because the gang would be considered weak and lose its violent reputation within the community and among rival gangs. (8RT 1883-1884.)

Detective Siegel opined that appellant was an active Eastside gang member. His opinion was based on the reports he reviewed where appellant admitted to being an Eastside gang member. Appellant's gang monikers were "Junior" and "Professor." Detective Siegel also opined that appellant committed the crimes in this case for the benefit of the gang. His opinion was based on appellant admitting to the gang allegations and coming to court with a shaved head, as well as the large "ESG" tattoo on the back of his head, which was visible to let everyone know that he was an Eastside gang member. (7RT 1609; 8RT 1887, 1893.)

Detective Siegel had training and experience with prison gangs and how they were related to street gangs. He stated that prison gangs were tied to street gangs. He explained that there was an unwritten code within gang members in jail or prison that child molesters were at the bottom, and gang members were expected to take action against child molesters when given an opportunity. A gang member who took action against child molesters would further his reputation and show his willingness to follow the code of conduct that benefited his gang. Appellant attacked a child molester while in county jail. Detective Siegel explained that appellant furthered the reputation of his gang by showing that he would do things that were expected of him.[13] Similarly, appellant's attacks on correctional officers showed his commitment to his gang and his intent to build his reputation that would precede him to prison. Based on appellant's actions, Detective Siegel opined that appellant was a "hard core" gang member because he

[13] Detective Siegel was present in the courtroom when District Attorney Investigator James Nalls testified that appellant had stated that he wanted to build a reputation in the county jail that would follow him once in prison. (8RT 1894.)

sought recognition for following the code of gang conduct. (8RT 1894-1896, 1898.)

Detective Siegel opined that both the assault with a knife on Lopez and the murder of Silva were committed for the benefit of the Eastside gang. Since Silva was a Goleta gang member, appellant's attack on a Goleta gang member benefited the Eastside gang because it showed that an Eastside gang member was willing to commit homicide against a rival gang. The Eastside gang benefited from the violent reputation and the fear it instilled in its own gang members, rival gangs, and the community. (8RT 1898.)

5. Appellant's Conduct While in Custody

a. Incident in the Courthouse Holding Facility

Santa Barbara County Sheriff's Deputy Jesse Ybarra assessed the need for security in the courtroom and transported inmates and suspects to the courthouse. He was familiar with appellant. (7RT 1766.)

On November 30, 2005, around 9:45 a.m., Deputy Ybarra assisted two other deputies in placing shackles on appellant in the holding facility that was located in the basement of the courthouse. There was a lockbox into which appellant placed his hands side-to-side. Appellant complained that the shackles were too tight and became very agitated. Appellant lifted his hands and said that the shackles were too tight. Deputy Ybarra asked another correctional officer to verify that the lockbox was correctly placed on appellant. The correctional officer determined that the lockbox was properly placed on appellant and that it was not too tight. Deputy Ybarra opined that appellant was playing a game in order to have the shackles loosely placed on him. The correctional officers re-tightened the shackles, and appellant became very upset and aggressive. (7RT 1767-1769, 1771.) Appellant used profanity and threatened Deputy Ybarra's life. He

threatened to hurt someone as soon as the shackles were removed. He complained about being in a lot of pain and wanted to "go off and kick someone's ass." He told Correctional Officer Morales and Deputy Ybarra, "I'm going to get you." (7RT 1769.)

As the deputies transported appellant from the holding cell and down a long hallway, appellant continued to use profanity, yell loudly, and threaten Deputy Ybarra. Appellant was very agitated and upset. Deputy Ybarra told appellant that he could not transport appellant if he did not calm down. Deputy Ybarra also told appellant that he could not go into the courtroom if he continued to be uncontrollable. Appellant said that he did not want to go into the courtroom. He made more threats and ordered Deputy Ybarra to take him back to the county jail. Appellant threated to take a swing at Deputy Ybarra as soon as his restraints were removed.[14] (7RT 1770-1771.)

b. Incidents at the CYA

Randall Miller was a retired deputy probation officer with Santa Barbara County Probation Department. Miller was appellant's supervising probation officer prior to appellant being sent to CYA. (7RT 1832.)

In 1994, Miller was working at the juvenile hall in Santa Maria. Appellant was awaiting transportation to a group home placement in Nevada. He refused to go to the facility. Miller and his partner, Bruce Cortwright, attempted to place handcuffs on appellant so they could transport him. Appellant immediately struck Cortwright in the face several times. Cortwright's glasses broke, and he sustained a broken nose. (7RT 1832-1834.)

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[14] Deputy Ybarra later became aware that appellant was complaining about the waist chain and not the lockbox. Subsequent adjustments to the restraints were made to solve the alleged discomfort. (7RT 1771-1773.)

District Attorney Investigator Nalls read a list of 27 incidents[15] involving appellant during his period of incarceration in the CYA from 1993 to 1995, and the state prison from 1995 to 2005, which included: appellant attacking another inmate, barricading himself in the cell, threatening correctional officers, and attempting to assault correctional officers. Specifically, appellant told another inmate that he was willing to "go off on random correction officers, and building his reputation so it would follow him to prison." Some of the incidents were gang-related. (8RT 1840-1844-1861, 1865-1872; Peo. Exh. 36.)

c. Incidents at County Jail

Santa Barbara County Sheriff's Deputy Paul Deslaurier was responsible for accompanying inmates on the bus from the court to the county jail. On May 18, 2004, appellant had just returned to the county jail from the courthouse. His restraint was removed so that he could be searched and then placed in his cell. Appellant was waiting in the hallway with other inmates. A correctional officer walked over with two other inmates. Deputy Deslaurier stepped up behind appellant to allow the other officer to pass by. As the officer passed by with the two inmates, appellant bolted toward one of the inmates and punched him in the face. The inmate suffered an abrasion to his left cheek. Appellant and the injured inmate did not know each other. (7RT 1774-1779.)

Sheriff's Deputy Jeffrey Bradshaw was a corrections officer in the county jail. On November 26, 2005, Deputy Bradshaw was conducting a check of appellant's jail cell, which had a sally port set up and a door to peek into the cell. Appellant was alone inside his jail cell. Deputy Bradshaw lifted the door to look inside appellant's cell, but he could not see

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[15] The parties stipulated to 27 incidents involving appellant during his incarcerations. (8RT 1839-1840.)

inside because appellant had covered the opening with a sheet. Deputy Bradshaw opened the outer door to determine if there was anything wrong with appellant. As soon as he opened up the door, a gush of clear liquid sprayed onto Deputy Bradshaw's body, and appellant told him to leave. (7RT 1781-1782.)

Consequently, Deputy David Panel was notified of the incident involving Deputy Bradshaw and determined that appellant had to be extracted from his cell and placed in a safety cell. Deputy Panel led the Special Operations Response Team ("SORT") to extract appellant from his cell. Deputy Panel was armed with a Taser and a pepper ball launcher, which was similar to a paint ball gun but more powerful. Each round contained three grams of pepper powder. (7RT 1784-1785, 1788-1789.)

Prior to the extraction, Sergeant Avila repeatedly asked appellant to "cuff up" and peacefully exit his cell, but he refused. Appellant acted in an aggressive manner and prepared for "battle." He placed a sheet around his property box lid and made a shield to block anything that might come his way. He made goggles out of a plastic sandwich bag and tied the door shut with blankets and sheets. He was upset because the officers went into his cell while he was doing "private things." (7RT 1787-1788, 1791, 1796.)

As Deputy Panel entered appellant's cell, he fired several pepper balls at appellant's legs and told him to get on his belly to be handcuffed. Appellant refused. He had a shield tied to his left arm, goggles on his face, and a T-shirt over his nose. Appellant grabbed a mattress to cover his body and left his shoulders exposed. Deputy Panel fired a pepper ball at appellant's shoulders while ordering appellant to get onto the ground. Appellant refused. He curled up against the wall with the mattress covering him, his head exposed, and his shoulder occasionally exposed. The pepper balls did not have any effect on appellant. The extraction team entered and removed the mattress. Appellant refused to comply with any commands

and continued to fight the officers. Deputy Panel used a Taser, and a team member held appellant's right arm. Appellant yelled profanities and threatened the officers. Deputy Panel stunned appellant a second time and held onto appellant's other arm. Appellant threatened to cut the officers. He was removed from his cell and placed inside a safety cell.[16] (7RT 1790-1793.) Deputy Panel fired the pepper ball launcher 37 times, and about a dozen balls might have struck appellant. Appellant was shot with a Taser two times. (7RT 1795-1796.)

Deputy Panel previously participated in another cell extraction involving appellant in May of 2005, where both appellant and the inmate next door to him barricaded themselves and covered up their windows. (7RT 1814-1815.) A video of the May 2005 extraction was played for the jury. (7RT 1797-1798; Peo. Exh. 35.) The video depicted Sergeant Ruple speaking through the cell door to get appellant to peacefully exit his cell. The negotiation lasted eight hours before the extraction team was summoned. An inmate next door to appellant alerted him about what the officers were doing in the hallway before they went inside appellant's cell. (7RT 1799-1801, 1805.) Appellant taped papers on his cell window so that corrections officers could not see inside the cell. He used a box top lid to block the food pass slot. A deputy used a baton to move the box top lid away while Deputy Panel fired a chemical agent through the food pass slot. (7RT 1801-1802.)

When the cell door was opened, appellant charged out of the cell and attempted to strike the officers. He made a gas mask out of a plastic sheet that he had fashioned into a pair of goggles and used a cleaning sponge as a

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[16] Deputy Panel explained that an inmate would be removed from his cell and placed in a safety cell when he made threats toward other inmates, staff, or themselves. (7RT 1806.) The parties stipulated that the temperature of the safety cell was between 68 and 72 degrees. (8RT 1875.)

filter. He tied his shoes to his feet so that he would not lose his shoes in a fight. Appellant's hands were handcuffed behind his back and a hobble restraint was placed on his legs so that he could not kick or pull his feet apart. (7RT 1803-1805, 1809-1812.) Appellant yelled profanities at the correctional officers and alleged that they were pulling his arm out of the socket. Appellant told the officers, "Next round is mine." The officers placed appellant in the safety cell, and the restraints were removed. As appellant was being escorted past numerous jail cells, he said, "What's up, homies, this is Miracle from Bruta." Bruta meant Santa Barbara. (7RT 1807-1809.)

Appellant told the officers that they should have tried to communicate with him before the situation escalated. He claimed that he was not resisting the officers. The Taser was used twice on appellant. Appellant sustained some scrapes and bruises. (7RT 1812-1814.)

6. Appellant's Statements Made during the Guilt Phase

On October 25, 2005, Investigator Nalls heard appellant say in open court, "I believe in accepting the consequences of my actions, good or bad, and maintaining my principles regardless of the cost, including death. I feel that if I'm willing to kill I should also be willing to die." He also said, "I didn't show any mercy, I'm not going to ask for any mercy." Additionally, Investigator Nalls listened to one of appellant's phone conversations where he stated, "The way I see it, if I'm willing to kill I should be willing to die too." (8RT 1837-1839.)

7. Victim Impact Evidence

Deanna Garcia was Silva's wife. They had three children together. The oldest child's name was Elias, and he was nine years old at the time of trial. Their daughter Maya was five years old, and Eiliano was three years

old. (8RT 1989-1900.) Silva worked at U.C. Santa Barbara. He was a good father and very active in his children's lives. (8RT 1901-1902.)

Suzanne Silva was Elias Silva's mother. Elias Silva was 30 years old at the time of the murder. Suzanne Silva was close to her son and did not know him to be a violent person. She stated that her son was a Goleta 13 gang member when he was younger, but had left the gang life a long time ago. He tried to be a better person by getting a good job at U.C. Santa Barbara, doing things in the community, and spending time with his family. Suzanne Silva missed her son. She lost several close family members in 2005. (8RT 1903-1906.)

B. Mitigation Evidence

Appellant presented no mitigation evidence on his own behalf. (8RT 1906.)

ARGUMENT

I. APPELLANT'S GUILTY PLEA WAS VALID UNDER THE CIRCUMSTANCES

Citing section 1018[17] and this Court's opinion in *People v. Chadd* (1981) 28 Cal.3d 739, appellant contends that section 1018 prohibits accepting a guilty plea to capital murder from a defendant who is representing himself. Accordingly, he contends his guilty plea was invalid, and that his plea must be stricken and his conviction and sentence of death

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[17] Section 1018 states in pertinent part:

> Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel.

reversed. (AOB 19-48.) Respondent disagrees, and submits section 1018 should be construed to allow a capital defendant to discharge his attorney, represent himself, and enter a guilty plea. Moreover, even assuming this Court concludes section 1018 should not be construed in such a fashion, under the circumstances of the present case, advisory counsel was the functional equivalent of counsel for purposes of section 1018. Therefore, appellant effectively pled guilty with the consent of counsel, and the purpose and intent of section 1018 were satisfied. In the alternative, any violation of section 1018 was harmless under the facts.

A. Factual Background

At the arraignment hearing on March 23, 2005, Mr. Carty, appellant's appointed defense counsel, informed the trial court that appellant intended to move to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562]. Mr. Carty and appellant had extensive discussions about the matter, and appellant was aware of the downsides of self-representation. (1RT 27.) Mr. Carty also stated that appellant satisfied the requirements to represent himself and was not mentally incompetent pursuant to section 1368. The court told appellant that this was a complicated case with many legal issues; it did not recommend that appellant represent himself even though he had the constitutional right to do so. The court continued the hearing and directed Mr. Carty to have further discussions with appellant about the implications of self-representation and the complexity of the legal issues involved in this case. Mr. Carty noted that the *Faretta* motion was against his advice. (1RT 29-33.)

On April 5, 2005, Mr. Carty informed the trial court that appellant intended to plead guilty to murder (count 1) and attempted murder (count 2), and admit to at least one of the special circumstance allegations. Mr. Carty had discussed section 1018's requirement that a guilty plea

required the consent of counsel with appellant. Appellant requested that Mr. Carty consent to the plea, but he refused to do so. Specifically, Mr. Carty refused to consent because he needed to conduct further review of the discovery and to investigate witnesses as to both phases of trial. Mr. Carty informed the court that if he withheld consent, then appellant wished to proceed with his *Faretta* motion against his advice. (1RT 57-58.)

Mr. Carty informed the trial court that he did not find any evidence that appellant had a mental incapacity and that appellant qualified under *Faretta* to represent himself. Mr. Carty stated that he presently would not consent to a change of plea. If appellant wanted to proceed in pro per, then Mr. Carty said the court should make a ruling on the *Faretta* motion. In the event the court granted appellant's *Faretta* motion, Mr. Carty requested that an advisory counsel be appointed to assist appellant, and that the court set the scope and duties of the advisory counsel to include a discussion between advisory counsel and appellant about the entry of a change of plea, and that the advisory counsel should be authorized to be involved in the change of plea to satisfy section 1018. (1RT 58-59.) The court asked Mr. Carty if his request was that if appellant's *Faretta* motion were granted and an advisory counsel were appointed, then the court would set the terms of the appointment of advisory counsel to include the consent of advisory counsel before permitting appellant to change his plea. Mr. Carty affirmed. He requested that the advisory counsel have an active role because of appellant's desire to enter a guilty plea and proceed to a penalty phase trial. (1RT 59.)

The court inquired of appellant:

> THE COURT: [Appellant], you probably understood all of what your attorney just said, but I want to ask you a couple of questions in regard to statements that he made.
>
> First, as I understand it, you wish to change your plea today, is that correct?

[APPELLANT]: Yes, sir.

THE COURT: Okay. You hear your attorney indicate he's not prepared to consent to that. I have not looked at the provision of Penal Code Section 1018, but I accept the representation of Mr. Carty that those provisions require the consent of your attorney before you enter a plea in a capital case.

What I understand your attorney saying is that you're comfortable with Mr. Carty representing you, but since he's not willing to consent to your desire to enter a plea in this case and admit the special allegations that have been filed, you want to represent yourself.

[APPELLANT]: Yes.

THE COURT: Okay. Your attorney has indicated that at this point in time he's not prepared to consent, because at this point in time he's not reviewed all of the relevant documents, he's not reviewed the Grand Jury transcript, and, therefore, is not prepared to consent.

So what it sounds like to me is, that your desire to represent yourself is conditional on Mr. Carty, your present attorney, not being prepared to consent to your additional desire to enter a plea; in other words, what you're telling the Court is, you're comfortable with Mr. Carty, but you're not happy with him because at this point in time he's not willing to consent to your desire to enter a plea, is that correct?

[APPELLANT]: It's not correct.

[DEFENSE COUNSEL]: Can I add one quick—

THE COURT: Go ahead, Mr. Carty.

[DEFENSE COUNSEL]: Just so [appellant] can respond to this.

It's not just the entry of a plea, there have been no plea bargain negotiations about the dismissal of special circumstances which would make the mandatory punishment life without possibility of parole. [Appellant's] intent is to not only enter a plea to the homicide and attempt homicide charges, but to admit the special circumstances which leave him death

penalty eligible. That is the primary objection I have to this, because it subjects him to a potential death penalty.

THE COURT: Okay. And again, [appellant], what you're indicating to the Court is that you wish to represent yourself because at this point in time [defense counsel] has indicated he's not prepared to consent to the entry of the plea in conjunction with your desire to admit all of the special circumstances that are alleged against you, is that correct?

[APPELLANT]: He hasn't given me any reason to believe that he would support my plea at any time.

THE COURT: Okay.

[APPELLANT]: That's why I wanted to pursue the *Faretta* motion. If he's not going to support my decision to plea today, I don't see any reason of his continued involve[ment] in my case because he's just going to interfere with what I want to do.

(1RT 59-62.)

The court informed appellant that it could "condition the appointment of advisory counsel on compliance with Penal Code section 1018 which requires consent of that advisory counsel." The court advised appellant to give Mr. Carty an opportunity to review the entire record with appellant, and then make a determination about whether Mr. Carty would oppose appellant's desire to enter a guilty plea and admit the special circumstance allegations. (1RT 62-63.)

Mr. Carty informed the court that appellant had a strong opinion about the type of defense evidence to present at the penalty phase as well as the guilt phase. Appellant was pursuing the *Faretta* motion to exert control over his defense and the presentation of mitigating evidence at the penalty phase. Mr. Carty asserted that case law provided that a defendant could not prohibit counsel from presenting mitigating evidence and that counsel's decision would override a defendant's objection. Mr. Carty stated that

granting the *Faretta* motion would allow appellant to present or limit the presentation of mitigating evidence, and "any other ethical lawyer" would not agree to allow appellant to have control over the defense. The court explained to appellant that an entry of a plea and admissions of guilt required consent of counsel, and Mr. Carty was not yet ready to do so. The court continued the hearing on appellant's *Faretta* motion so that Mr. Carty could review the entire record. (1RT 64-66.)

On April 19, 2005, appellant made an unequivocal and timely *Faretta* motion to represent himself and advised the court of his intent to enter a guilty plea to all counts and admit the special circumstance allegations. He also requested that an advisory counsel be appointed. (1RT 72-73.)

On April 20, 2005, the parties appeared before the court on appellant's *Faretta* motion. Mr. Carty informed the court that he completed his review of the grand jury transcripts and the record; however, he was unwilling to consent to appellant's guilty plea. Mr. Carty explained, "in all fairness to [appellant] and to the record," that his refusal to consent was not limited to appellant's decision whether to plead guilty; rather, "a big part of the picture" was appellant's "very strong preferences" over what evidence to present at the penalty phase and whether appellant would cooperate with the investigation and any expert witnesses who might be used in mitigation. Mr. Carty would not consent to appellant's guilty plea because of appellant's desire to control the presentation of mitigation evidence at the penalty phase. According to Mr. Carty, no attorney would agree not to present mitigating evidence. Mr. Carty believed that caselaw

did not permit attorneys to forego presenting mitigating evidence except based on a tactical decision that was agreed upon.[18] (1RT 84-85.)

Based on Mr. Carty's representation, the court understood appellant's main desire was to represent himself at the penalty phase and decide whether to present mitigating evidence. The court told appellant that he could have Mr. Carty represent him at the guilt phase and that he would not be precluded from representing himself at the penalty phase. Mr. Carty informed the court that he had provided appellant with copies of the Supreme Court's decision in *Chadd*, *supra*, 20 Cal.3d at page 736, and section 1018. Appellant and Mr. Carty had extensive discussions about *Chadd* and section 1018. (1RT 86-87.)

The court inquired:

> THE COURT: Okay. Have you had a chance to go through the indictment with you attorney, Mr. Carty?
>
> [APPELLANT]: Yes.
>
> THE COURT: And did you read the indictment?
>
> [APPELLANT]: Yes.
>
> THE COURT: So you understand the nature of the charges?

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[18] Respondent notes that Mr. Carty erred in opining that his ethical duty required him to present mitigating evidence over appellant's objection. On the contrary, Mr. Carty's paramount duty of loyalty to his client required him to agree to his client's request. (*People v. Lang* (1989) 49 Cal.3d 991, 1030-1031.) This Court has warned that requiring an attorney to present mitigating evidence over his client's objection would undermine the attorney-client trust relation and cause the defendant to seek self-representation in order to retain control over the presentation of evidence at the penalty phase. (*Id.* at p. 1031.) In addition, an attorney's tactical assessment of his client's case cannot override a defendant's decision to forego mitigation evidence based on non-legal factors. (*Ibid.*; accord, *People v. Brown* (2014) 59 Cal.4th 86, 111-112.)

[APPELLANT]: Yeah.

THE COURT: Do you understand what the penalty may be in this case?

[APPELLANT]: Yeah.

THE COURT: What is that?

[APPELLANT]: A sentence of death or possibility of life without parole?

(1RT 87-88.)

The court proceeded to conduct a *Faretta* inquiry in which appellant stated that he had never represented himself, he was 26 years old, he had gone through the criminal justice system, he had attended high school and college classes while at CYA, his last formal education was in the seventh grade, he could read and write, and that he had enrolled in a trade program. (1RT 88-91.) Appellant wanted to represent himself because "[he] believed up to this point [Mr.] Carty's just been interference." Appellant explained that he wished to plead guilty and did not want to present a defense or any mitigating evidence, but Mr. Carty objected to appellant's wishes. Appellant stated that he and Mr. Carty had a disagreement about the mitigating evidence that Mr. Carty wanted to present at the penalty phase. Appellant objected to the mitigating evidence that Mr. Carty wanted to present. Appellant had no intent of cooperating with any professional investigator or psychologist. (1RT 91.)

The court asked appellant if he intended to present mitigating evidence if he were to represent himself. Appellant stated, "No." He told the court that he had spent time with Mr. Carty and concluded that they were not able "to compromise on the major issue that [they're] having conflict over." The court inquired if the "major conflict" was appellant's

desire to enter a guilty plea or no contest and admit to the special circumstance allegations. Appellant agreed. (1RT 91-92.)

The court inquired if appellant understood what a special circumstance allegation was. Appellant explained that if he were found guilty of the special circumstance allegation, he would qualify for the death penalty. The court informed appellant that it could not accept a guilty plea even if it granted appellant's *Faretta* motion and that there would be a guilt trial. Appellant disagreed with the court's assessment, requested an appointment of an "assistant counsel" who would be willing to consent to his guilty plea, and argued that would be the same as having Mr. Carty consent. The court informed appellant that it was not likely that an advisory counsel would consent to a guilty plea and admission of the special circumstance allegations; thus, there would be a guilt phase trial either with appellant representing himself with the assistance of an advisory counsel or an appointed counsel. Appellant disagreed with the court and stated that he did not intend to present a defense if his case proceeded to trial. (1RT 92-94.)

The court questioned appellant about his background and knowledge of legal proceedings, and advised appellant about the risks and disadvantages of self-representation. The court asked appellant if he understood that he would be in a better position if he were represented by counsel. Appellant answered, "No. Because like I said—well, I understand what you're saying, but I don't feel that's a valid point, because I don't intend on offering a defense anyways." (1RT 95-96.) The court further inquired if appellant understood that he would have to abide by the rules as an attorney, and appellant affirmed. The court asked Mr. Carty if he had discussed with appellant the dangers of self-representation and if Mr. Carty opined that appellant was competent to represent himself and knowingly and intelligently waive his right to counsel under *Faretta*. Mr. Carty agreed

that appellant had the mental capacity to waive his constitutional rights to counsel, that he understood the risk and consequences of his action, and that his decision was voluntary and intelligent. Mr. Carty wanted the record to reflect that he was against the *Faretta* motion. Appellant reaffirmed his desire to represent himself. The court granted appellant's *Faretta* motion and relieved Mr. Carty as counsel. (1RT 96-99.) The court explained to appellant that an advisory counsel had a passive role because it was appellant's responsibility to represent himself and decide how to present his case. The court appointed Joseph Allen as advisory counsel. (1RT 99-100, 143.)

At the continued arraignment on June 14, 2005, appellant informed the court that he wanted to plead guilty to all counts and admit all special allegations. (1RT 228.) The court informed appellant that it could not accept appellant's plea, but he could invoke his right to have a trial within 60 days. However, Mr. Allen disagreed because he had not yet found any law on whether the concurrence of advisory counsel was equivalent to counsel's consent within the meaning of section 1018. Appellant inquired if he could be relieved of his pro per status and have Mr. Allen appointed as his counsel for the purpose of proceeding with the arraignment. (1RT 229-231.) The court declined because it would not permit appellant to "flip back and forth" between self-representation and representation by counsel. The court told appellant that he was both a defendant and an attorney representing himself; however, appellant could request appointed counsel if some time later he felt he could not adequately and completely represent himself. The court reiterated appellant's previously stated desire to represent himself, but it appeared now that appellant wanted Mr. Allen to represent him. The court warned appellant not to vacillate between requesting self-representation or appointed counsel. Mr. Allen requested to

speak to the court in chambers about appellant's defense strategy. (1RT 231-232.)

Before they entered the chambers, the court told Mr. Allen and appellant that the court could not accept a guilty plea without the concurrence of counsel. The court reminded Mr. Allen and appellant that Mr. Carty had declined to concur in appellant's decision to plead guilty and admit all the allegations. The court inquired if it was appellant's wish to have Mr. Allen appointed as counsel to concur with appellant's desire to plead guilty. Mr. Allen affirmed and stated that he would explain to the court in chambers appellant's reasons for pleading guilty and Mr. Allen's reasons for consenting. (1RT 233.)

In chambers,[19] Mr. Allen informed the court that Mr. Carty and appellant had explored the issue of pleading guilty and admitting to the special circumstance allegations. Indeed, Mr. Carty consulted with Mr. Allen prior to being relieved as counsel for a period of a month to six weeks about the ethical obligations of counsel in a situation like this case. Mr. Carty had sought Mr. Allen's advice because Mr. Allen had "some experience in this sort of case." (1RT 239.)

Prior to his appointment as advisory counsel, Mr. Allen had discussions with Mr. Carty about appellant's reasons for pleading guilty. Since his appointment, Mr. Allen and appellant had extensive discussions about appellant's decision to plead guilty. Appellant's motivation to plead guilty was based on his assessment that the evidence against him was very strong and that a trier of fact would highly likely find the charges and allegations true. "[Appellant was] quite concerned about *avoiding a death*

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[19] On June 25, 2014, this Court granted appellant's motion to unseal the transcript of the hearing held on June 14, 2005, and ordered the transcript unsealed with a copy to respondent.

sentence if he can do so." Coupled with his personal beliefs and outlook on life, he was not interested in a plea bargain because he wanted the record to show that he did not "receive[] any guarantees of any kind of consideration, leniency, or anything else in exchange for the plea." Appellant's desire was to show that he took responsibility for what he had done. Based on these discussions, Mr. Allen concluded that appellant was "correct in two fundamental points:" (1) the evidence against appellant "[was] very strong and that a judge or a jury would be highly likely to find that these charges are true and that the special allegations are true"; and (2) appellant's analysis was correct about "his chance of avoiding a death sentence, which he [was] anxious to do" and he was "quite concerned about avoiding a death sentence if he could do so." Appellant was not interested in a plea bargain with the prosecutor. (1RT 239-241, italics added.)

As to avoiding the death sentence, there were two things to be presented to the trier of fact: accepting responsibility and the facts of this case. Appellant wanted the record to show that he took full responsibility for what he did. The other point, which Mr. Allen disagreed with Mr. Carty on, was appellant's defense strategy to convince a jury or some members of the jury not to vote for a death sentence. Mr. Allen stated that appellant's defense strategy of accepting responsibility by entering a guilty plea and admitting all allegations was the best defense strategy available based on the facts of this particular case. (1RT 241.)

Mr. Allen told the court:

> [¶]
>
> And obviously if that acceptance of responsibility is something less than completely free and unconditional it loses its moral strength as an argument to the jury, to the sentencing jury; the more unconditional it is the stronger the moral argument in favor of giving [appellant] a break on the sentence because of his willingness to completely accept responsibility for what he did.

> So, my analysis of the ethical situation from an attorney's point of view is that if your client is attempting to do this sort of thing out of some motive that either makes no sense or is contrary to the client's best interests then you have an ethical obligation not to cooperate, but if what the client is trying to do is coherent with the evidence in the case, and here it is.

(1RT 242.)

Further, Mr. Allen's assessment and evaluation of the evidence against appellant was that it was "*extremely* strong" and that the likelihood of a conviction was "extremely high." Indeed, Mr. Allen stated that "[a] great many police investigators would have to have heart attacks between now and the trial date for the situation to change" and there was "no real likelihood of [appellant's] acquittal." (1RT 242-243, italics added.)

Mr. Allen's experience in criminal matters involved litigating more than 65 murder cases, of which eight cases Mr. Allen was the prosecutor, 15 cases which were potentially capital cases, three capital penalty jury trials, and one capital appeal in the California Supreme Court. Based on his experience, he "under[stood] what [he was] doing when [he] appraise[d] the evidence in [appellant's] case." (1RT 243.) Mr. Allen stated that appellant did not have a reasonable defense to present at the guilt phase. Mr. Allen reasoned that having jurors listen to uncontested evidence against appellant for a few weeks, which would be a charade and irritate them, eventually would work against appellant at the penalty phase. In addition, appellant felt he had caused codefendant Ibarra to be so deeply involved that he felt obligated to take responsibility for the capital murder in both his and codefendant Ibarra's cases. Appellant offered to give a pretrial deposition of what his testimony would be at codefendant Ibarra's trial and testify as a witness for codefendant Ibarra's trial. He believed that his testimony would have more weight in codefendant Ibarra's trial if he pled unconditionally without any consideration in return. Mr. Allen asserted that he would argue

appellant's willingness to help codefendant Ibarra as a factor in favor of a life sentence instead of death at the penalty phase. (1RT 244-246.)

Appellant told the court that he did not want a jury trial: "I just want to make it clear that the only reason that I would like [to] enter a guilty plea and accept responsibility is because I feel that I'm the sole individual that is responsible, and that's the only motive I have is that I want to do the right thing and take responsibility and offer exonerating testimony on behalf of Mr. Ibarra." As to offering his guilty plea as mitigating evidence, appellant became aware of the benefit after he made his decision to plead guilty. Using appellant's plea as mitigating evidence was a very important factor to Mr. Allen's consent. (1RT 246-247.)

Addressing his ethical obligation, Mr. Allen stated that appellant's approach to the penalty phase was "very rational" "from a lawyer's point of view" of the situation and was one of Mr. Allen's motives for using the guilty plea as mitigating evidence. Appellant stated that he preferred not to offer any defense or mitigating evidence at the penalty phase because he believed in accepting responsibility. Mr. Allen advised appellant that he would help in the presentation of appellant's defense, which would be based on his acceptance of responsibility. The court advised appellant that if he were represented by counsel at the guilt phase, it would not allow appellant to represent himself at the penalty phase, and counsel would present the mitigation evidence even if appellant objected. (1RT 247-248.) The court warned that it would not allow Mr. Allen to represent appellant, enter a plea, and then relieve him as counsel. The court informed appellant that it was bound by state law to accept a plea with consent of counsel. (1RT 250-251, 257.) Appellant asked the court to consider accepting his plea as pro per with consent of advisory counsel. (1RT 250-251.) The court told appellant it would not accept his plea even with the concurrence

of advisory counsel, since the statute did not include concurrence of advisory counsel. (1RT 251-252.)

In open court, the trial court summarized appellant's statement, both made in court and chambers, that he was contemplating withdrawing his request for self-representation and have Mr. Allen appointed as counsel. The court continued the hearing so that appellant could discuss possibly withdrawing his pro per status and having Mr. Allen represent him. (1RT 255-256; 2CT 690.)

Subsequently, the parties appeared for arraignment, where appellant requested to represent himself pursuant to *Faretta*, enter a guilty plea, and admit to all special allegations. Mr. Allen contended that there was a constitutional conflict between section 1018 and the Sixth Amendment right to act as one's own counsel as set forth in *Faretta*. Mr. Allen argued that section 1018 predated *Faretta* and should be read in light of the decision in *Faretta* that appellant, acting as his own counsel, "consented" to his client's, in this instance himself, guilty plea. Mr. Allen also argued that section 1018 was enacted at a time when a defendant and his attorney were different persons. *Faretta* held that there was a constitutional right for the attorney and the defendant to be the same person. He further argued that *Faretta* established that a defendant had the right to control his case during the critical stages of a criminal case, including the choice of pleas and admissions, the right to confrontation, the right to remain silent, and the type of trial. Mr. Allen argued that if the fundamental right to enter a plea was not included in the right to self-representation, then the right to self-representation was empty. (2RT 260-262.)

The court stated that *Faretta* permitted a defendant to represent himself at trial; however, when a defendant chose not to present a defense or exercise his right to trial and to enter a plea, then the defendant was outside the purview of *Faretta*. The court referenced *Chadd*'s

reconciliation of *Faretta* and section 1018 by holding that the State has a compelling interest in ensuring a correct result is reached in a capital case, and that interest was furthered by requiring the consent of counsel to a guilty plea. The court expressed concern that appellant's preference was to represent himself and enter a guilty plea, and in the alternative, have counsel appointed to consent to the plea. The court cautioned appellant that once the decision was made to have Mr. Allen appointed to represent him, there would not be an opportunity to make a motion for self-representation if he did not like the manner in which the defense was presented. (2RT 263-266.)

On July 11, 2005, Mr. Allen filed a memorandum brief in support of appellant's right to enter a guilty plea to a capital charge as a self-represented defendant. (2CT 581-591.) The prosecutor did not submit a written memorandum or opposition. In his brief, Mr. Allen informed the court that appellant intended to enter a guilty plea to the capital murder and the other non-homicide charges, enter a not guilty plea to the attempted murder charge, and deny the special allegations. Appellant requested a court trial on the attempted murder charge. (2RT 275-276.)

The court reviewed Mr. Allen's legal memorandum and the cases cited therein. The court noted that the role and responsibilities of an advisory counsel were limited, but that it had the discretion to expand them at the request of the pro per defendant. Based on the motion by Mr. Allen as well as his participation in the proceedings, it appeared that appellant wanted Mr. Allen to have an active role in assisting him. The court also noted that the case was presently in pretrial proceedings where the court had discretion to permit Mr. Allen to have a more active role in the presentation of appellant's case; however, that role would not be permitted "absent extraordinary circumstances" during the trial to avoid confusion about who was directing the defense, which was a risk not present during

pretrial proceedings. (2RT 278-280.) The court stated that it "want[ed] to be very clear in terms of the role that Mr. Allen is assuming in terms of duties and responsibilities at this stage of the proceedings because I want to make sure that we comply with the spirit of Penal Code section 1018." (2RT 280.)

The court inquired of Mr. Allen:

> THE COURT: Mr. Allen, for your part, at least up until this point in the proceedings, you are willing to accept the duties and responsibilities of counsel for [appellant] within the meaning of Penal Code section 1018?
>
> MR. ALLEN: Absolutely.
>
> And I have, basically, as I understand those responsibilities, I have discharged them during my service as his advisory counsel.
>
> [¶]
>
> We have explored all the facts relating to the capital charge and I'm satisfied that [appellant's] decision is a tactically intelligent one. It's not only voluntary and intelligent on his part in that he understands what his legal alternatives are, but it's an intelligent one in that I think it plays a proper role in an intelligent penalty phase strategy.
>
> [¶]
>
> [¶]
>
> THE COURT: Okay. So in terms of the representation that you've provided to [appellant] thus far, that you would characterize that representation as being one of counsel and not advisory counsel in terms of the duties and the functions that you've performed for him and the assistance that you've provided to him.
>
> MR. ALLEN: I've spent the same time and diligence and explored the same information and issues to the extent as if I had been appointed to represent him.

THE COURT: Okay. And that's with particular reference to the spirit of Penal Code section 1018?

MR. ALLEN: Yes.

THE COURT: Okay. *And you understand, of course, that your representation of [appellant], at least up to this point in the proceedings, would be examined by an appellate court in terms of effective assistance of counsel just as your representation of him would be examined by an appellate court if you were appointed counsel?*

MR. ALLEN: Of course. I've assumed that all the way along.

[¶] . . . [¶]

THE COURT: But you accept the much—the greatly expanded role that he's played thus far in assisting you?

[APPELLANT]: Yeah. *Not only do I accept it, I've actually encouraged him to do that.*

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

(2RT 280-283, italics added.)

The court asked again if it was appellant's desire to plead guilty and admit to the capital charges. Appellant affirmed. The court informed the prosecutor, Mr. Allen, and appellant that it wanted to be certain that appellant and Mr. Allen had reviewed and examined the entire discovery in the case before taking the pleas and admissions. The court continued the matter to give appellant and Mr. Allen an opportunity to review all the evidence and to further consider appellant's decision. (2RT 283-284.) Mr. Allen stated that he was satisfied that both he and appellant had reviewed

the entire discovery. The prosecutor invited Mr. Allen to his office to review everything that he had, which Mr. Allen previously had done. (2RT 285-286.) The court stated that Mr. Allen's unequivocal consent to the entry of guilty plea and admissions to the capital charges was based on his review of the record, but the court expressed its concern that there might be materials that Mr. Allen had not reviewed which might affect his advice. Mr. Allen indicated that both he and appellant were ready to enter the plea. (2RT 288-289.) Nevertheless, the court continued the hearing and directed Mr. Allen to review the waiver of rights form with appellant and fully discuss the rights that appellant would be waiving. (2RT 289-290.) The prosecutor, again, invited Mr. Allen on behalf of appellant to come over to his office to review all the materials. The court stated that a guilty plea in a capital case must be conducted deliberately and carefully. The court "want to [e]nsure that the person who has been the attorney, who has been designated advisory counsel, is one hundred percent comfortable with the giving of consent within the meaning of Penal Code Section 1018," and directed the attorneys to meet and ensure that all of the evidence had been reviewed by the defense. (2RT 293.)

On July 29, 2005, appellant represented himself before the court with Mr. Allen as advisory counsel for the arraignment. The court noted that during the last proceeding, the court and the parties "had a discussion about what we needed to do to enable you, [appellant], to enter a plea of guilty or no contest to the capital charges. . . ." (2RT 299.) The court inquired:

> THE COURT: . . . . When we were last here last time, we had a discussion about, first of all, making sure that the defense, you, [appellant], and you, Mr. Allen, had reviewed all the materials in the possession of the District Attorney and also to give you further opportunity to review again the discovery already provided to you. So were you able to meet with [the

prosecutor] at some point in the last two weeks to confirm that everything that he had you were in possession of?

MR. ALLEN: I did.

THE COURT: Okay. And are you satisfied that you have all the discovery in the case?

MR. ALLEN: I am.

THE COURT: And for your part, [appellant], have you reviewed all the materials in this case along with your advisory counsel Mr. Allen?

[APPELLANT]: Yes.

(2RT 300.)

Appellant affirmed that it was his desire to enter a guilty plea to murder and admit all the special allegations. Mr. Allen indicated that he was prepared to consent *unequivocally* to appellant's guilty plea. (2RT 300-301.) The court further inquired of Mr. Allen and appellant:

THE COURT: And you've explained to [appellant] the consequences of entering a guilty plea and admitting the special allegations?

MR. ALLEN: Yes.

THE COURT: And, [appellant], let me ask you a couple questions. You're proceeding today without *any equivocation, without any debate in your mind about whether you want to go forward*; is that correct?

[APPELLANT]: Yes.

THE COURT: *And there's no question in your mind that what you want to do today is enter a plea of guilty to the capital charge?*

[APPELLANT]: *Yes.*

THE COURT: *Have you discussed that thoroughly with Mr. Allen?*

[APPELLANT]: *Yes.*

THE COURT: Okay. Well, I'm going to accept the consent to the guilty pleas as is required by Penal Code section 1018. And I saw the parties filling out a Waiver of Rights Form prior to going on the record. Has that been filled out?

MR. ALLEN: Yes, it has. . . .

(2RT 301-302, italics added.)

Before taking appellant's waiver of constitutional rights and pleas, the court wanted to make a clear statement on the record about appellant's guilty plea. The court stated:

THE COURT: Before you go through the Waiver of Rights Form in case 1200303, let me just state for the record for anyone who is reading this transcript alone that at least part of the justification and explanation for Mr. Allen providing consent within the meaning of Penal Code section 1018 is to be found in a transcript of an in-camera hearing held several weeks ago where the prosecutor was not present. And Mr. Allen, during the course of that proceeding, explained at some length why he felt that *consent was appropriate in this case.*

(2RT 303, italics added.) The prosecutor proceeded to take appellant's plea:

[THE PROSECUTOR]: And are you representing your self [*sic*] in pro per today?

[APPELLANT]: Yes.

[THE PROSECUTOR]: Are you also represented by your advisory counsel Joseph Allen?

[APPELLANT]: Yes.

[THE PROSECUTOR]: I'm going to hand this form back to your advisory counsel and ask that he fill in your pro per status in addition to his advisory role so that it's clear for the record.

THE COURT: And what is being written in?

MR. ALLEN The words after my name, comma, "Advisory Counsel."

[¶]

MR. ALLEN: And then "Defendant in pro per."

THE COURT: And pursuant to that, I said it last week, so anyone reviewing last week's transcript and proceeding would certainly understand that your role as advisory counsel at least through this proceeding today is really the role of counsel. We're *not relieving or withdrawing [appellant's] pro per status.* He's entitled to that and he retains it both now and into future proceedings.

But your role as advisory counsel has been greatly expanded. In effect, you're proceeding as counsel to [appellant]. You've represented on the record both last—in the last couple proceedings and today that you've been treating your role as advisory counsel as if you were appointed counsel? Is that correct?

MR. ALLEN: And by the same standards for behavior, exactly. That's correct Your Honor.

[¶]

[THE PROSECUTOR]: [¶]

Sir, you're represented by your advisory counsel Joe Allen; is that correct?

[APPELLANT]: Yes.

[THE PROSECUTOR]: Have you had a chance to go over this Felony Plea Form and Waiver of Rights Form that I'm showing you now?

[APPELLANT]: Yes, sir.

[THE PROSECUTOR]: And did you go over that at length with your advisory counsel Mr. Allen?

[APPELLANT]: Yes.

[THE PROSECUTOR]: Do you feel you've fully had a chance to read through this form and each of the paragraphs before initialing them?

[APPELLANT]: Yes.

(2RT 304-305, italics added; 3CT 602.)

Appellant affirmed that he initialed all the boxes and signed the form after he had discussed it with his advisory counsel, and did not need additional time to have further discussions. (2RT 305-306.) The prosecutor further inquired:

[THE PROSECUTOR]: Is it your understanding that you're going to be pleading guilty or no contest today to the murder of Elias Sylva, violation of Penal Code section 187?

[APPELLANT]: Yes.

[THE PROSECUTOR]: And that you're going to be admitting in the course of that murder there is true several special circumstances, first, lying in wait in violation of Penal Code section 190.2(a)(15)?

[APPELLANT]: Yes.

[THE PROSECUTOR]: And secondly, as to the special circumstance allegations that this murder was to further the activities of the Eastside gang in violation of Penal Code section 190.2(a)(22)?

[APPELLANT]: Yes.

[THE PROSECUTOR]: Do you further understand, sir, that you are going to be admitting the use of a deadly weapon in violation of Penal Code section 12022(b)(1)?

[APPELLANT]: Yes.

[THE PROSECUTOR]: And that you are also going to admit a second street gang enhancement in that this crime was committed for the benefit of the Eastside gang in violation of Penal Code section 186.22(b)(1)?

[APPELLANT]: Yes.

[THE PROSECUTOR]: Do you understand that there is no plea bargain in this case? There is no agreement with the Court. This is what's known as an open plea.

[APPELLANT]: Yes.

(2RT 306-307.)

Appellant affirmed that the prosecutor and the court did not represent or intimate that there was a deal in exchange for his plea, and that he understood that the maximum penalty for this case was death. He indicated that he understood that the only other possible sentence besides the death penalty was life imprisonment without the possibility of parole. (2RT 307.) The prosecutor reviewed with appellant that he had the right to a jury trial, the right to confront and cross-examine witnesses, to testify or remain silent, and to call witnesses. (*Id.*)

The prosecutor inquired:

[THE PROSECUTOR]: Having each of those rights in mind, do you waive and give them up in this case?

[APPELLANT]: Yes.

[THE PROSECUTOR]: Sir, do you have any questions at all about what you are getting into today?

[APPELLANT]: No.

[THE PROSECUTOR]: Does your advisory counsel join in the waiver?

MR. ALLEN: Yes.

(2RT 307-308.)

The court asked appellant if he had reviewed the waiver of rights form with Mr. Allen, and whether he understood each page of the waiver form. Appellant affirmed that he understood the waiver form and had reviewed it with Mr. Allen. Appellant also affirmed that Mr. Allen had

reviewed all of appellant's constitutional rights. Appellant indicated that he understood the waiver form. (2RT 308-309.)

The court inquired if appellant believed there was a factual basis to support a conviction for murder and the allegations as alleged in the indictment. Appellant affirmed and indicated that he had reviewed those facts and circumstances with Mr. Allen, who concurred in a finding that there was factual basis for the plea. (2RT 309.)

The court further stated:

> THE COURT: All right. I find that the defendant has *knowingly, intelligently, and understandably waived his rights.* Let me add that with respect to appellant's pro per status, I've observed him in court over the last month or so since I permitted him to represent himself in this proceedings. And I continue to be of the view that he has the intelligence and capability of representing himself. And, therefore, there's nothing my mind that would suggest that there's not a legal basis to go forward today.

(2RT 309-310, italics added.)

The prosecutor proceeded to take appellant's guilty plea on count 1 and his admissions as to all special allegations. (2RT 309-313.) The court found "that the plea admissions are knowing, intelligent, and made understandably and that they are free and voluntary. . . ." (2RT 313.)

On October 28, 2005, Mr. Allen indicated that he took "a more active role, in effect, *as appointed counsel* for purposes of addressing the issue whether [appellant] could enter a guilty plea and admit the special circumstances." He consented to the plea because he anticipated introducing mitigating evidence that appellant made an early admission of guilt, took responsibility for his action, and hoped that the prosecutor would consider a life imprisonment without the possibility of parole. (2RT 372-

376.) Mr. Allen reaffirmed his consent to the guilty plea.[20] (2RT 378-379, 2CT 690.)

B. Section 1018 Should Be Construed to Allow a Capital Defendant to Discharge His Attorney, Represent Himself, and Enter a Guilty Plea Where, As Here, the Plea Is Part of a Strategy to Obtain a Life Sentence at the Penalty Phase

Section 1018 should be construed to permit a capital defendant to discharge his counsel, represent himself, and plead guilty, especially where the plea is part of a strategy to obtain a life sentence at the penalty phase as in the present case. Interpreting section 1018 as requiring that a capital defendant must be represented by counsel and must have counsel's consent prior to pleading guilty infringes not only on the fundamental right of self-representation as set forth in *Faretta*,[21] but more importantly, a defendant's Sixth Amendment right to present a defense.

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[20] The trial court later stated that Mr. Allen "certainly at one point in time . . . was the functional equivalent of retained counsel, or appointed counsel, he was someone who was actively representing you at the time you entered your guilty plea." The court observed that Mr. Allen continued to "assume that role from time to time during the course of the [trial.]" Appellant told the court that Mr. Allen had done a good job. (8RT 1951.)

[21] Commentators have criticized and questioned the constitutionality of section 1018, and suggested that the holding of *People v. Chadd* (1981) 28 Cal.3d 739, was inconsistent with the United States Supreme Court's holding in *Faretta*, because the goals espoused in *Chadd* were insufficient to warrant an intrusion into a defendant's rights to self-representation and to enter a guilty plea. (Bonnie, *The Dignity of the Condemned* (1988) 74 Vir. L Rev. 1363, 1370, fn. 18; Rieder, *The Right of Self-Representation in the Capital Case* (1985) 85 Colum. L. Rev. 130, 151-152, fn. 133.) Additionally, it has been argued that prohibiting or limiting a capital defendant's ability to plead guilty is a violation of his fundamental right and autonomy to make a decision to plea. (Fisher, *Judicial Suicide Or Constitutional Autonomy? A Capital Defendant's Right To Plead Guilty* (2001) 65 Alb. L. Rev. 181, 183-190, 200-203.)

1. A Capital Defendant Has the Rights to Self-Representation and to Defend His Case in the Manner He Chooses under the Sixth Amendment

In 1975, the United States Supreme Court held the Sixth Amendment guaranteed that a criminal defendant has a right to counsel. (*Faretta, supra,* 422 U.S. at p. 819.) Implicit in this right was the right to self-representation so that the defendant could personally make his own defense because "[i]t is he who suffers the consequences if the defense fails." (*Id.* at pp. 819-820.) This Court subsequently recognized that a capital defendant has the fundamental right of self-representation in California even when faced with a possible death sentence. (*People v. Joseph* (1983) 34 Cal.3d 936, 939.) This is so because the right to self-representation is absolute.[22] Because a defendant has the personal and fundamental right to determine his own fate, the defendant "has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'" (*Florida v. Nixon* (2004) 543 U.S. 175, 187 [125 S.Ct. 551, 160 L.Ed.2d 565], citing *Jones v. Barnes* (1983) 463 U.S. 745, 751 [103 S.Ct. 3308, 77 L.Ed.2d 987].) That being the case, unless a defendant agrees to representation, the defense presented will not be the defense guaranteed to him by the Constitution, as it is not his own defense. (*Faretta, supra,* 433 U.S. at p. 820.)

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[22] Respondent recognizes that the United States Supreme Court in *Indiana v. Edwards* (2008) 554 U.S. 164, 174, 177-178 [128 S.Ct. 2379, 171 L.Ed.2d 345], and this Court in *People v. Johnson* (2012) 53 Cal.4th 519, 528, held that "gray-area defendants"—defendants who were mentally competent to stand trial but still suffered from severe mental illness that prevented them from competently conducting trial proceedings by themselves may be denied self representation. Appellant was not a "gray-area" defendant.

After *Faretta*, this Court in *Chadd* held that section 1018 provided that a guilty plea to a capital offense required the consent of counsel.[23] (*Chadd*, *supra*, 28 Cal.3d at p. 746.) This Court reasoned that the Legislature wanted to ensure that a criminal defendant did not plead guilty without fully understanding the nature and consequences of his actions. (*Id.* at pp. 748-749.) This Court reasoned the Legislature enacted section 1018 requiring consent of counsel to be "a further independent safeguard against erroneous imposition of a death sentence." (*Id* at p. 750.) While acknowledging that a defendant has a personal right to present his defense, this Court rejected the notion that a defendant has a right to plead guilty, not to present a defense, or not to have a trial in a capital case on the ground that the Legislature has the power to condition the exercise of that personal choice in the public's interest. (*Id.* at pp. 747, 750-751.) The Court explained that the state's interest in reducing the danger of erroneously imposing a death sentence by subjecting the capital defendant's right to plead guilty to the consent of counsel outweighs the infringement on the right to self-representation. (*Id.* at p. 751.) Additionally, this Court reasoned that the scope of the right of a self-represented defendant could be limited because he could not do all the things that his attorney could do on

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[23] In *People v. Dent* (2003) 30 Cal.4th 213, 224, Justice Chin in his concurring opinion questioned whether sections 686, subdivision 2, 686.1, 859, 987, subdivision (b), are consistent with the United States Supreme Court's holding in *Faretta* that a criminal defendant has a right to self-representation. Similarly, this Court held in *People v. Johnson*, *supra*, 53 Cal.4th at page 526, that section 686.1 could not be given effect because it is inconsistent with the Sixth Amendment right to self-representation. Therefore, this Court's continued recognition of sections 686, subdivision 2, 686.1, 859, 987, subdivision (b), would unconstitutionally constrain a criminal defendant's exercise of his constitutional rights pursuant to *Faretta*. This is so because the United States Supreme Court spoke clearly: counsel should not be forced upon an unwilling defendant. (*Faretta*, *supra*, 422 U.S. at p. 818.)

his behalf, including pleading guilty. (*Id.* at p. 750; cf. *Florida v. Nixon*, *supra*, 543 U.S. at p. 187 [The United States Supreme court stated that a criminal defendant has the *ultimate authority* to decide whether to plead guilty].) However, this Court acknowledged in dicta that there might be cases where a capital defendant *would benefit from a guilty plea* versus cases where defendants desired to have the state assist them in committing suicide.[24] (*Chadd*, *supra*, 28 Cal.3d at p. 753 [emphasis added].)

Subsequent cases, however, have recognized that the state's interest in a reliable judgment does not justify infringement of a criminal defendant's right to self-representation, and that the right to plead guilty is a personal right that is not surrendered to an attorney. The right to self-representation, even to the accused's detriment, must be honored. (*Godinez v. Moran* (1993) 509 U.S. 389, 400 [113 S.Ct. 2680, 125 L.Ed.2d 321], citing *Faretta*, *supra*, 422 U.S. at p. 834.) And along with the right to self-representation is the right of a criminal defendant to exert actual control over his defense. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 178 [104 S.Ct. 944, 79 L.Ed.2d 122].) As Chief Justice Rehnquist stated,

> The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the *summum bonum*, a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.

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[24] In *People v. Alfaro* (2007) 41 Cal.4th 1277, 1299-1300, discussed below, this Court suggested that a criminal defendant's decision to plead guilty "as part of a strategy to obtain a life sentence at the penalty phase" might implicate a fundamental constitutional right of the defendant that would override the state's interests in reducing the risk of a mistaken judgment or preventing a defendant from committing suicide with the state's assistance.

(*Lenhard v. Wolff* (1979) 443 U.S. 1306, 1312-1313 [100 S.Ct. 3, 61 L.Ed.2d. 885] (*Lenhard I.*).)

A self-represented capital defendant has total control over his defense even if it ultimately leads to a judgment of death. (*People v. Taylor* (2009) 47 Cal.4th 850, 865; *People v. Joseph*, *supra*, 34 Cal.3d at p. 939.) A capital defendant has a fundamental right not to present a defense and to take the witness stand to confess his guilt and request the death penalty. (*People v. Brown, supra*, 59 Cal.4th at p. 112; *People v. Koontz* (2002) 27 Cal.4th 1041, 1074; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365; *People v. Clark* (1990) 50 Cal.3d 583, 617-618.) Indeed, the United States Supreme Court has held that a competent self-represented defendant's guilty plea and refusal to present any mitigating evidence at the penalty phase did not interfere with the state's interest in a reliable judgment. (See, e.g., *Lenhard v. Wolff* (1979) 444 U.S. 807 [100 S.Ct. 29, 62 L.Ed.2d 20] [The Court let stand a death judgment where a competent, self-represented defendant pleaded guilty and did not offer any mitigating evidence] (*Lenhard II.*).)

The state's interest in a reliable judgment may not trump a capital defendant's fundamental right to control his defense, including the right to present no defense. (*People v. Clark*, *supra*, 50 Cal.3d at pp. 617-618.) This Court has recognized that a criminal defendant's right to present a defense in the manner of his choosing is among one of the most sacred constitutional rights and "the state should keep to a necessary minimum its interference" with the exercise of that right. (*People v. Ramirez* (2006) 39 Cal.4th 398, 423, citing *People v. Ortiz* (1990) 51 Cal.3d 975, 983; *People v. Crovedi* (1966) 65 Cal.2d 199, 208.)

Moreover, this Court has held:

> Notwithstanding the state's significant interest in a reliable penalty determination, a determination best made by a fully

> informed sentencer, a defendant's fundamental constitutional right to control his defense governs. [Citation.] The defendant has the right to present no defense and to take the stand and both confess guilt and request imposition of the death penalty. [Citations.] It follows that the state's interest in ensuring a reliable penalty determination may not be urged as a basis for denying a capital defendant his fundamental right to control his defense by representing himself at all stages of the trial.

(*People v. Koontz*, *supra*, 27 Cal.4th at p. 1074, citing *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1364-1365, quotation and citations omitted; see e.g., *People v. Coleman* (Ill. 1995) 168 Ill.2d 509 [660 N.E.2d 919, 937-938]; *Bridges v. State* (Nev. 2000) 6 P.3d 1000, 1012; *State v. Reed* (S.C. 1998) 332 S.C. 35 [503 S.E.2d 747, 750].) As such, to interpret section 1018 as requiring consent of trial counsel before a capital defendant can plead guilty, where the defendant's wish to plead guilty is motivated by a desire to establish a defense of remorse or to demonstrate his acceptance of responsibility for the murder so that a lesser punishment might be imposed at the penalty phase, would violate appellant's fundamental right to control and present a defense—indeed, here, the best defense appellant had to avoid a death sentence at the penalty phase.

Further, post-*Chadd* cases recognize that a defendant may surrender *most* of his fundamental personal rights to his counsel's complete control of defense strategies and tactics; however, the fundamental and personal right to plead guilty *is not* one of the rights surrendered to his counsel. (*People v. Hinton* (2006) 37 Cal.4th 839, 873-875.) Indeed, the United States Supreme Court has held that a criminal defendant has the ultimate authority to make the fundamental decision whether to plead guilty. (*Florida v. Nixon*, *supra*, 543 U.S. at p. 187; *Jones v. Barnes*, *supra*, 463 U.S. at pp. 751, 753; see Model Rules of Professional Conduct Rule 1.2(a) (2002) ("In a criminal case, the lawyer shall abide by the client's decision . . . *as to the plea to be entered whether to waive jury trial and whether the client*

will testify,") emphasis added.) Where there is a conflict between counsel and defendant about whether to present a defense at a guilty phase of a capital trial, the defendant's wishes *must* prevail. (*In re Horton* (1991) 54 Cal.3d 82, 95, emphasis added; accord, *People v. Hinton*, *supra*, 37 Cal.4th at p. 874; *People v. Freeman* (2004) 8 Cal.4th 450; see *Cooke v. State* (Del. 2011) 977 A.2d 803, 841-842 [a criminal defendant has the ultimate authority to make the fundamental decision whether to plead guilty and it "would call into question the fundamental fairness of the trial if made by anyone other than the defendant;" therefore, counsel must both consult and obtain consent *from* the defendant on the recommended course of action, and counsel cannot waive that right without the defendant's "fully-informed and publicly-acknowledged consent,"] emphasis added.)

Moreover, this Court has stated on several occasions that the defendant's right to control his defense does not render his death judgment unreliable. An accused has a right to forego mitigating evidence. (*People v. Sanders* (1990) 51 Cal.3d 471, 526; see *People v. Deere* (1991) 53 Cal.3d 705, 716-717 (*Deere II*) [the death penalty is not constitutionally unreliable merely because a self-represented defendant chose not to present any mitigating evidence at the penalty phase]; *People v. Bloom* (1989) 48 Cal.3d 1194, 1228, & fn. 9 [the death penalty is not constitutionally unreliable because a capital defendant chose not to present any mitigating evidence]; see also *People v. Lang*, *supra*, 49 Cal.3d at pp. 1030-1031 [a self-represented capital defendant has a right not to present any mitigating evidence at the penalty trial, and a defense counsel should not be forced to present mitigating evidence over the defendant's objection because he has a duty of loyalty to the defendant]; accord *People v. Snow* (2003) 30 Cal.4th 43, 120.)

Even a defendant's desire for the death penalty and refusal to present any mitigating evidence at the penalty phase does not interfere with the

state's interest in a reliable judgment. (See, e.g., *People v. Mai* (2013) 57 Cal.4th 986, 1035-1036 [defendant's unwillingness to assist his counsel with the presentation of a defense was not substantial evidence of incompetency].) This is so because a self-represented defendant has the fundamental right to conduct the defense in the manner that he chooses, including forgoing mitigating evidence at the penalty phase. (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1221.) This Court has stated that nothing in *Faretta* permits the Legislature to infringe upon a pro se defendant's right to present his case based on the theory that the state's interest in a reliable judgment trumps the defendant's fundamental right to exercise control over his case. (*People v. Clark* (1992) 3 Cal.4th 41, 109; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228.) The Eighth Amendment reliability requirements are met where the death verdict is rendered by the trier of penalty who duly considers the mitigating evidence, if any is presented, under the proper instructions and guidelines pursuant to the constitution and death penalty statutes. (See *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228.)

Recently, in *People v. Taylor*, *supra*, 47 Cal.4th 850, this Court rejected a claim that the government's interest in ensuring a fair trial outweighed the defendant's right to self representation. (*Id.* at p. 865.) This Court reasoned,

> We have explained that the autonomy interest motivating the decision in *Faretta*—the principle that for the state to "force a lawyer on a defendant" would impinge on "'that respect for the individual which is the lifeblood of the law'" [citation]—applies at a capital penalty trial as well as in a trial of guilt. [Citation.] This is true even when self-representation at the penalty phase permits the defendant to preclude any investigation and presentation of mitigating evidence. [Citations.] A defendant convicted of a capital crime may legitimately choose a strategy aimed at obtaining a sentence of death rather than one of life imprisonment without the possibility of parole, for some individuals may rationally prefer the former to the latter. [Citation.] Moreover, a rule requiring reversal when a capital

> defendant chooses self-representation and presents no mitigating evidence could easily be misused by a knowledgeable defendant who wished to embed his trial with reversible error. [Citation.]
>
> Nor does the likelihood or actuality of a poor performance by a defendant acting in propria persona defeat the federal self-representation right. The *Faretta* court explicitly recognized the probability defendants will be ill-served by waiving counsel and relying on their own "unskilled efforts," but nonetheless held the defendant's choice "must be honored." [Citation.] "The high court, however, has adhered to the principles of *Faretta* even with the understanding that self-representation more often than not results in detriment to the defendant, if not outright unfairness. [Citations.] Under these circumstances, *we are not free to hold that the government's interest in ensuring the fairness and integrity of defendant's trial outweighed defendant's right to self-representation.*" [Citation.]

(*People v. Taylor*, *supra*, 47 Cal.4th at pp. 865-866, italics added.)

The same reasoning applies to the present case. As this Court has acknowledged, a capital defendant has an unconditional right to self-representation. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1365.) A criminal defendant's personal choices must be respected. (*People v. Bloom*, *supra*, 48 Cal.3d at pp. 1221-1222.) *A fortiori*, in exercising his fundamental rights to self-representation and presenting a defense, a capital defendant has an unconditional right to represent himself and decide whether to enter a guilty plea as part of a strategy to argue for a lesser punishment than death at the penalty phase, and this right outweighs the state's interest in ensuring fairness or a reliable penalty determination. Indeed, Justice Richardson pointed out in his dissent in *Chadd* the irony that a defendant has a constitutional right to testify and freely admit to his guilt and ask that the jury sentence him to death but, under section 1018's current construction, cannot plead guilty and save himself from the embarrassment of trial without his counsel's consent. (*People v. Chadd*, *supra*, 28 Cal.3d at p. 761 (dis. opn. of Richardson, J.).)

Requiring appellant to obtain consent of counsel under section 1018 is also inconsistent with an attorney's duty of loyalty to his client under the Sixth Amendment. Nothing in the Sixth or Eighth Amendments or the United Supreme Court's decision in *Faretta* permits the state to infringe on the defendant's right to enter a guilty plea and allows defense counsel to act against his client's wishes by vetoing his client's guilty plea. (See *People v. Lang*, *supra*, 49 Cal.3d at pp. 1030-1032 [an attorney has a duty of loyalty to his client, and it is inconsistent with the Sixth Amendment to impose the duty to present mitigating evidence over his client's objection which might cause some defendants to seek self-representation in order to retain control over their cases]; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228 [the United States Supreme Court has never suggested that the reliability of a death sentence justifies imposing an affirmative duty on a pro se capital defendant to present mitigating evidence or a defense].)

The purpose of section 1018 is to safeguard a defendant against an ill-advised guilty plea and the erroneous imposition of a death sentence. As set forth above, appellant had more than adequate legal advice from Mr. Allen, who was a well-respected and experienced defense attorney whom the trial court recognized as one of the best in Santa Barbara County. (8RT 1951.) Mr. Allen concurred with appellant's assessment of his case and decision to plead guilty. Under the circumstances unique to this case, there was no risk of an erroneous judgment of death in permitting appellant to plead guilty as a self-represented capital defendant. Thus, based on this Court's holding in *Koontz*, *a fortiori*, appellant's admission of guilt by entering a guilty plea was no different than appellant taking the witness stand before the jury, confessing his guilt, and presenting no defense. Requiring counsel's consent "is exceedingly strange, illogical, and inconsistent, particularly so because counsel's motives in refusing to give his consent may be varied." (*People v. Chadd*, *supra*, 28 Cal.3d at p. 762,

citation omitted (dis. opn. of Richardson, J.).) This is especially true here since Mr. Carty's stated reason for not consenting to appellant's guilty plea was that his ethical duty required him to present mitigating evidence over appellant's objection, which is incorrect, as previously noted.

2. *Chadd* and *Alfaro* Are Distinguishable, and Neither Address the Situation Presented Here

In *Chadd*, the defendant was charged with two counts of murder and other crimes. (*Chadd*, *supra*, 28 Cal.3d at p. 739.) The defendant sought to plead guilty, but his counsel refused to consent under section 1018 because the defendant's desire was to commit suicide with the assistance from the state. (*Id.* at p. 744.) The trial court found defendant to be mentally competent within the meaning of *Faretta* to act as his own attorney despite the fact that there had been no request by the defendant for self-representation. (*Id.* at p. 745 & fn. 3.) Defense counsel was never relieved of his duties, and indeed, he continued to act as defendant's counsel of record throughout the proceedings. (*Ibid.*) The defendant then represented himself, pled guilty, and admitted the charged enhancements and special circumstance allegations. (*Id.* at p. 745.)

On automatic appeal, this Court found the trial court erred in accepting the defendant's plea without counsel's consent, and reversed the judgment. (*Chadd*, *supra*, 28 Cal.3d at pp. 754-755.) The Court noted that the defendant never made an unequivocal request to discharge defense counsel and represent himself, and thus, he was not granted self-representation status; rather, defense counsel continued to act as counsel of record. (*Id.* at p. 746.) While recognizing that the decision on how to plead to a criminal charge was personal to the defendant, this Court reasoned that the Legislature had the power to regulate the manner in which that choice was exercised because the public interest in reducing the risk of erroneously imposing a death sentence and protecting the defendant against an ill-

advised guilty plea justified the "minor infringement of the right of self-representation" by requiring the consent of counsel to a guilty plea. (*Id.* at pp. 747-751, 753.) However, this Court did not address whether a criminal defendant who was granted self-representation status and acted as his own counsel throughout the proceedings could enter a guilty plea under section 1018. (*Id.* at p. 746.) Moreover, this Court specifically noted that the requirement of counsel's consent to a guilty plea acted as a "filter to separate capital cases in which the defendant *might reasonably gain some benefit by a guilty plea* from capital cases in which the defendant, as here, simply wants the state to help him commit suicide." (*Id.* at p. 753, italics added.)

In his concurrence and dissent, Justice Richardson pointed out that it was illogical to hold that a defendant has a constitutional right to testify and freely admit to his guilt, but cannot plead guilty and save himself from the embarrassment of trial without his counsel's consent. (*Chadd*, *supra*, 28 Cal.3d at p. 760.) Justice Richardson reasoned that since the right to self-representation was protected from state interference under *Faretta*, the right to plead guilty was likewise protected because the defendant was making a "personal, fundamental decision, which [was] his alone to make, to acknowledge his guilt of a criminal offense," and the Constitution guaranteed that choice to belong solely to the defendant. (*Ibid.*) Justice Richardson further stated, as noted above, that a rule permitting defense counsel to veto a criminal defendant's guilty plea when he had a constitutional right to take the stand and testify to his own guilt "is exceedingly strange, illogical, and inconsistent, particularly so because counsel's motives in refusing to give his consent may be varied." (*Id.* at p. 762, citation omitted.) In addition, Justice Richardson recognized that the right of a self-represented defendant to make his own personal and fundamental choice to plead guilty was protected under the federal

Constitution and rang hollow if the criminal defendant could not plead as he chose. (*Id.* at pp. 759-763; See *Faretta*, 422 U.S. at p. 834.)

More recently, in *Alfaro*, the defendant's counsel refused to consent to the defendant's guilty plea in a capital case because he believed that the defendant sought to plead guilty to shield an alleged coconspirator in order to protect herself and her family. (*Alfaro*, *supra*, 41 Cal.4th at pp. 1295-1296.) This Court, citing *Chadd*, held that section 1018's limitation on a defendant's right to plead guilty in a capital case served the purpose of reducing the danger of erroneously imposing a death sentence and justified minor infringement on the right of self-representation by requiring counsel's consent to a defendant's guilty plea. (*Id.* at pp. 1299-1300, citing *Chadd*, *supra*, 28 Cal.3d at pp. 750, 753.) The Court noted that the defendant did not make an unequivocal request to discharge her counsel and seek self-representation. (*Id.* at pp. 1295-1296, 1298-1299 & fn.4.) Since the defendant's desire to plead guilty was to prevent disclosure of an accomplice which could mitigate her culpability, the Court found that the legislative intent of section 1018 was particularly applicable because a guilty plea would have cast doubt on her plea and might lead to erroneous imposition of the death penalty. (*Id.* at p. 1301.)

However, in *Alfaro*, this Court specifically stated that because the defendant in *Chadd* did not ask to be relieved of counsel, "*we did not consider the Attorney General's contention that section 1018 permits a capital defendant to discharge his or her attorney, represent him or herself, and enter a guilty plea.*" (*People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1298-1299, fn. 4, italics added.) This Court went on to note, "Similarly, *because the defendant in the present case did not request that counsel be relieved and that she be allowed to represent herself, we need not and do not consider whether section 1018 may be so construed.*" (*Ibid.*, italics added.) In other words, this Court has never dealt with the specific situation

presented in this case—where a capital defendant requests that counsel be relieved so that he can be allowed to represent himself and plead guilty.

Moreover, in *Alfaro*, this Court expressly did not decide the issue of whether the holding in *Chadd* should be revisited or limited in cases where the defendant sought to plead guilty in order to establish a foundation for a "remorse" defense at the penalty phase:

> But we need not decide in this case whether Chadd would apply to a defendant's desire to enter a guilty plea as part of a strategy to obtain a life sentence at the penalty phase, because the record here does not indicate that defendant sought to plead guilty in furtherance of such a strategy. Instead, the record supports an inference that defendant decided to plead guilty in order to avoid testifying against "Beto," whom her counsel sought to implicate as an accomplice in the murder of Autumn Wallace.

(*Id.* at pp. 1299-1300, italics added.) In *Alfaro*, this Court further noted that "nothing in the record supports defendant's contention that her desire to plead guilty was motivated by a desire to establish a defense of remorse or to demonstrate her acceptance of responsibility for the murder so that a lesser punishment might be imposed at the penalty phase." (*Id.* at p. 1302.)

In the present case, in contrast to *Chadd* and *Alfaro*, appellant unequivocally requested that counsel be relieved and that he be allowed to represent himself for purposes of pleading guilty. (See, e.g., 1RT 27-33, 57-62 ["That's why I wanted to pursue the *Faretta* motion. If he's not going to support my decision to plea today, I don't see any reason of his continued involve[ment] in my case because he's just going to interfere with what I want to do."].) Moreover, unlike the situations in *Chadd* and *Alfaro*, appellant's desire was to plead guilty in order to accept responsibility as a strategy for arguing that the jury should impose a sentence of life without the possibility of parole instead of death at the penalty phase. (1RT 239-242, 244-248.) While the defendant in *Chadd* simply sought state-assisted suicide (see *People v. Chadd*, *supra*, 28 Cal.3d

at pp. 744-745) and the defendant in *Alfaro* was shielding a possible coconspirator (see *People v. Alfaro*, *supra*, 41 Cal.4th at p. 1300), appellant reviewed the records and evaluated the prosecution's evidence against him. Appellant assessed that the evidence against him was strong and a trier of fact would highly likely find him guilty of the charged offenses and find the special circumstance allegations true. He concluded that there was no reasonable defense. Appellant believed that his defense would be weak if the jury had to hear uncontested evidence against him and became irritated. He also believed that presenting mitigating evidence would allow the prosecution to admit otherwise inadmissible aggravating circumstances in rebuttal. His only chance for a life sentence was to accept responsibility and offer a remorse defense at the penalty trial. Mr. Allen agreed with appellant's assessment of the evidence and the unlikelihood of an acquittal. As stated by Mr. Allen, forcing appellant to undergo a full guilt trial before jurors who would have to spent a number of weeks learning and hearing uncontested evidence, and then wonder why they had to go through such a charade, would lessen appellant's opportunity to obtain a life sentence. (1RT 239-246.)

Moreover, unlike *Chadd*, where the defendant was suicidal and the trial court had to order psychological evaluations to determine his competency, here, there was no dispute that appellant was mentally competent. Appellant made a timely and unequivocal request for self-representation and requested the appointment of an advisory counsel to discuss the change of plea with him and also to consent to the guilty plea within the meaning of section 1018. The trial court conducted a *Faretta* inquiry, found appellant to have voluntarily, knowingly, and intelligently waived counsel, and granted appellant's *Faretta* motion. Appellant's appointed counsel was relieved and advisory counsel Mr. Allen was appointed. (1RT 29-33, 59, 62-63, 72-73, 96-99.) As the United States

Supreme Court has suggested, a capital defendant's competency is key to exercising a self-represented defendant's right to plead guilty and to find the death sentence was reliable. (See *Lenhard II.*, *supra*, 444 U.S. at p. 807 [letting stand a self-represented defendant's guilty plea and judgment of death where defendant was found competent and no mitigating evidence was presented at the penalty trial].)

Additionally, as previously noted, Chadd's attorney refused to consent because the defendant wanted to commit suicide with state assistance. (*People v. Chadd*, *supra*, 28 Cal.3d at p. 744.) In contrast, here, Mr. Carty refused to consent to the guilty plea because he erroneously believed that he had an obligation to present mitigating evidence and that he was obligated to override appellant's objection to the presentation of mitigating evidence. (1RT 64, 84-85.) However, appellant expressed that he wanted to avoid the death sentence and believed a guilty plea was the best strategy to have the jurors view him favorably. (1RT 243, 245, 239.) And, unlike *Chadd*, where appointed counsel was not relieved and continued to represent the defendant throughout the proceedings, Mr. Carty was relieved, appellant was granted self-representation, and a highly regarded advisory counsel with extensive capital litigation experience was appointed. Mr. Allen believed that appellant should retain control of his case as long as his decisions were rational and reasonable. (1RT 99, 239, 242-243; 8RT 1951.)

Tellingly, while appellant argues that his plea was invalid under section 1018 simply because he was representing himself when the trial court accepted his plea (AOB 42-48), he fails to mention that he chose to represent himself in order to plead guilty as part of a strategy to obtain a life sentence at the penalty phase, in stark contrast to the situation in *Alfaro*, where the record supported an inference that the defendant desired to plead guilty in order to avoid testifying against an accomplice whom her counsel

sought to implicate in the murder. (Compare *Alfaro*, *supra*, 41 Cal.4th at p. 1300.) Appellant also fails to acknowledge that in *Chadd*, the defendant did not make an unequivocal assertion of his right to represent himself and sought to "commit suicide" with the assistance of the State (see *People v. Chadd*, *supra*, 28 Cal.3d at pp. 744-745), whereas in the present case, appellant made an unequivocal assertion of his right to represent himself in order to plead guilty as part of a strategy to obtain a life sentence at the penalty phase. Moreover, appellant ignores that in *Chadd*, this Court noted that there may be capital cases, as here, in which "the defendant might reasonably *gain some benefit by a guilty plea.*" (*Id.* at p. 753, italics added.)

Furthermore, appellant fails to point out or even acknowledge that in *Alfaro*, this Court did *not* decide "whether *Chadd* would apply to a defendant's desire to enter a guilty plea as part of a strategy to obtain a life sentence at the penalty phase." (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1300.) Appellant does not even discuss whether, under such circumstances, his right to present a defense would be violated and why the state's interest in fairness or a reliable penalty determination should trump that right—it should not.

3. Appellant's Guilty Plea Does Not Render the Death Judgment Unreliable

> As this Court recognized in *Chadd*, the 1973 statutory revision adding to section 1018 the requirement of counsel's consent was part of a more extensive revision of California's death penalty legislation and thus was intended to serve as a "further independent safeguard against erroneous imposition of a death sentence." (*Chadd*, *supra*, 28 Cal.3d at p. 750.) In *Chadd*, we explained that "'[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.'" (*Chadd*, *supra*, 28 Cal.3d at p. 748, quoting *Boykin v. Alabama* (1969) 365 U.S. 238, 242 [23 L.Ed.2d 274, 89 S.Ct. 1709].) 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 its criminal proceedings. (*Chadd*, at pp. 750, 753.) 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.)

Based on the above statutory intent, appellant contends that his Sixth Amendment rights to a fair trial and confrontation, Eighth Amendment right to a reliable and non-arbitrary sentence, and Fourteenth Amendment right to due process were violated because he pled guilty with the consent of advisory counsel. (AOB 46-48.) Respondent disagrees, as the alleged section 1018 error does not even implicate any constitutional right.

At the outset, respondent notes that appellant does *not* contend that he was incompetent to represent himself or to plead guilty. He simply contends that his plea is invalid because section 1018 requires consent of counsel, not advisory counsel. Yet, a self-represented capital defendant's constitutional rights to a fair trial and assistance of counsel are adequately protected when he is assisted by an advisory counsel. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1040 [a pro se capital defendant's rights are adequately protected when he has a lawyer appointed as an advisory counsel to assist him]; accord, *People v. Moore* (2011) 51 Cal.4th 1104, 1126-1127.) Here, as shown above, the guilty plea was preceded by long discussions between appellant and advisory counsel about the evidence and the tactical decision to plead guilty. Moreover, appellant represented himself and pled guilty for the very purpose of establishing his acceptance of responsibility which in turn would enhance his penalty phase defense, a strategy his advisory counsel described as a "tactically intelligent one" which "plays a proper role in an intelligent penalty phase strategy." (2RT 281.) In other words, appellant's guilty plea was anything but "ill-

advised," inaccurate, or otherwise unfair. (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1300.)

Furthermore, appellant's guilty plea did not automatically ensure a death sentence. Appellant had a penalty phase trial by jury where advisory counsel cross-examined witnesses, lodged appropriate legal objections, and the jury was tasked with weighing the aggravating and mitigating factors in deciding the appropriate penalty. Appellant's Sixth, Eighth, and Fourteenth Amendments rights were adequately protected by the adversarial process and thus, the death sentence was reliable and not erroneously imposed. (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1300; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228.) Indeed, as previously noted, the Eighth Amendment reliability requirements are met where the death verdict is rendered by the trier of penalty who duly considers the mitigating evidence, if any is presented, under the proper instructions and guidelines pursuant to the constitution and death penalty statutes. (See *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228.)

In *Hamblen v. State* (Fla. 1988) 527 So.2d 800, the state permitted a self-represented capital defendant to enter a guilty plea, and the defendant later offered no mitigating evidence at the penalty trial. The Florida Supreme Court found that the defendant had a right to represent himself and was competent to do so. (*Id.* at p. 804.) The court also held that permitting a counsel to act contrary to the defendant's wishes violated the dictates of *Faretta*. (*Ibid.*) Similarly, the United Supreme Court allowed for a death sentence to stand in a case where the self-represented defendant pleaded guilty. (*Lenhard II.*, *supra*, 444 U.S. at p. 807; see *Lenhard II.*, *supra*, 443 U.S. at pp. 1312-1313 [Justice Rehnquist rejected the notion that a self-represented defendant abandoning his appeal could not be a rational decision].) As this Court acknowledged, the United States Supreme Court has never suggested that a heightened concern for reliability of the

determination of the death penalty in a particular case justified "forcing an unwilling defendant to accept representation or to present an affirmative penalty defense in a capital case." (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1228.) In other words, appellant's interpretation of section 1018 is not mandated by the federal Constitution but instead, is contrary to a capital defendant's constitutional rights.

The *Chadd* Court found section 1018's infringement on the right of self-representation permissible to ensure the reliability of the death sentence. (*Chadd*, *supra*, 28 Cal.3d at pp. 750-751.) Yet, the *Chadd* Court stated that the requirement of counsel's consent served as "a filter to separate capital cases in which the defendant might reasonably gain some benefit by a guilty plea from capital cases in which the defendant . . . simply wants the state to help him commit suicide." (*People v. Chadd*, *supra*, 28 Cal.3d at p. 753.) And this Court in *Alfaro* acknowledged the situation where a guilty plea at the guilt phase could be part of a reasonable and viable strategy for arguing for imposition of a lesser punishment at the penalty phase. (*People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1299-1300.) Here, even absent any "filtering," appellant clearly articulated a reasonable strategy for pleading guilty; he sought to use the fact that he pled guilty and acknowledged his guilt in order to argue that the jury should spare his life at the penalty phase. Therefore, appellant's guilty plea could not have rendered the death sentence "unreliable," and he did not simply want to commit suicide with the state's help, as the defendant in *Chadd* did.

The reliability of a death judgment is not dependent on the manner in which appellant is found guilty—whether by a guilty plea or a jury verdict; rather, it is the bifurcated penalty phase that ensures a reliable death judgment by requiring that the standards set forth in our Constitution and death penalty statute are met. (§§ 190.1, 190.3. 190.4, subd. (e), 1239, subd. (b); CALJIC No. 8.85; see *Hamblen v. State*, *supra*, 527 So.2d at

p. 804.) Section 190 provides that the penalty for first degree murder shall be death, life imprisonment without the possibility of parole, or 25 years to life. The penalty is not fixed upon a finding of guilt; instead, a separate proceeding must be held to determine whether appellant should be punished by death. (See §§ 190, 190.1, 190.3; CALJIC Nos. 8.85, 8.86, 8.88; 3CT 166-169, 1072.) The reliability of the death judgment here was fulfilled by the adversarial process during the penalty phase trial, where the penalty phase jury was instructed on how to weigh the aggravating and mitigating factors in deciding the appropriate penalty. Moreover, the jury's penalty verdict was subject to statutory review by the trial court (§ 190.4, subd. (e)) and automatic review by this Court (§ 1239, subd. (b)).

Indeed, the trial court conducted an extensive review of the record and considered the admission of guilt and appellant's personal history as mitigating evidence. (8RT 2020-2021.) Specifically, the court stated:

> I have also reviewed at length and reweighed the evidence as to the circumstance that might be regarded as mitigating, including a criminal history which reflected long periods spent in juvenile institutions and adult institutions and his predilection towards excessive use of alcohol and drugs from his days as a young teenager until the date of the offense, I've considered the fact that there was some evidence he was using methamphetamine in the period of time prior to the murder, I have also considered his admission of guilt in this case as a circumstance in mitigation, however, in my opinion, none of these circumstances appear to significantly extenuate the crime.
>
> [¶] . . . [¶]
>
> Having carefully weighed and considered the aggravating and mitigating circumstances set forth in Penal Code Section 190.3, I find the aggravating circumstances to overwhelmingly outweigh those in mitigation and, therefore, the automatic motion to modify the death verdict is denied.

(8RT 2024-2026.)

Here, appellant's Sixth Amendment rights to a fair trial and confrontation, Eighth Amendment right to a reliable and non-arbitrary sentence, and Fourteenth Amendment right to due process were adequately protected by a contested penalty phase trial before a jury where the prosecution's aggravating evidence was tested in an adversarial setting.

In sum, the state's interest in reducing erroneous death judgments and retaining the accuracy and fairness of the criminal proceedings is not served by denying a pro per defendant the right to enter a guilty plea on his own behalf in order to demonstrate his acceptance of responsibility for the murder which is a mitigating circumstance that might support a lesser punishment at the penalty phase. Appellant was not denied his right to a fair trial under the Sixth Amendment; rather, a reversal of the death judgment and compelling appellant to accept appointed counsel to satisfy section 1018 would violate his Sixth Amendment rights to self-representation and to present a defense. Accordingly, section 1018 should be interpreted to allow a capital defendant to represent himself and to plead guilty where the plea is part of a strategy to obtain a life sentence at the penalty phase. Appellant's guilty plea was valid under section 1018, and the death judgment is reliable.

C. Even Assuming This Court Does Not Interpret Section 1018 As Respondent Suggests, Appellant's Guilty Plea with Consent of Advisory Counsel Acting in an "Enhanced Role" Satisfies the Intent and Purpose behind Section 1018

Assuming this Court does not interpret section 1018 as respondent suggests, and even assuming a self-represented capital defendant may not plead guilty without consent of counsel, there was no error herein. Appellant's guilty plea with the consent of an advisory counsel acting in an "enhanced role" as de facto counsel for purposes of appellant's guilty plea satisfied the intent and purpose behind section 1018.

Generally, a defendant is not entitled to a "hybrid" representation. (*People v. Moore*, *supra*, 51 Cal.4th at p. 1119.) A defendant has a right to be represented by counsel or right to self-representation, but these are mutually exclusive rights. (*Id.* at pp. 1119-1120.) Nevertheless, there are three usual scenarios of a hybrid representation: (1) a standby counsel who takes no active role in the defense, but attends all proceedings and is familiar with the case in the event that the defendant gives up his right to self-representation; (2) an advisory counsel who actively assists the defendant in the preparation of the defense case by performing tasks and providing advice pursuant to the defendant's requests, but does not participate on behalf of the defense in court proceedings; and (3) a co-counsel who shares responsibilities with the defendant and participates in both the preparation and the presentation of the defense to the degree acceptable by the defendant, attorney, and the trial court. (*People v. Stewart* (2004) 33 Cal.4th 425, 518.)

While there is no constitutional right to hybrid representation, this Court has long-recognized that the trial court retains the discretion to permit the defendant and the advisory counsel to share responsibilities in the interest of justice. (*People v. Moore*, *supra*, 51 Cal.4th at p. 1120; see *McKaskle v. Wiggins*, *supra*, 465 U.S. at pp. 182-183 [A self-represented defendant may give expressed approval to advisory counsel's participation. When a pro se defendant expressly approves any substantial participation by counsel, "subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced."].) In any event, a self-represented capital defendant's constitutional rights to a fair trial and due process are adequately protected when he is assisted by an advisory counsel. (See *People v. Jenkins, supra*, 22 Cal.4th at p. 1040 [a pro se capital defendant's rights are adequately protected when he has a

lawyer appointed as an advisory counsel to assist him]; accord, *People v. Moore*, *supra*, 51 Cal.4th at pp. 1126-1127.)

In the present case, after appellant was found to be competent to represent himself and knowingly and intelligently waived his right to counsel, the trial court appointed Joseph Allen as advisory counsel. The trial court—without objection—exercised its discretion in setting the scope of Mr. Allen's duties to include examining the evidence, discussing a possible guilty plea with appellant, and consenting to appellant's guilty plea within the meaning of section 1018. (1RT 96-100, 143.) Appellant does not dispute that Mr. Allen acted within the scope of his appointment in consenting to the guilty plea. Mr. Allen was an experienced capital attorney and highly regarded as "the most experienced criminal attorney in Santa Barbara." (8RT 1951.) Mr. Allen's experience in criminal maters involved litigating more than 65 murder cases, eight cases of which he was the prosecutor, 15 cases which were potentially capital cases, three capital penalty jury trials, and one capital appeal in this Court. (1RT 243.) In fact, Mr. Carty had consulted Mr. Allen because of his experience about the ethical obligations of counsel in this situation. (1RT 239.)

After being appointed advisory counsel, Mr. Allen and appellant had extensive discussions about appellant's desire to plead guilty and thoroughly reviewed the prosecution's evidence. Ultimately, Mr. Allen agreed that appellant's strategy of accepting responsibility by entering a guilty plea was the best defense strategy based on the facts of the case. (1RT 241.) Mr. Allen stated:

> And obviously if that acceptance of responsibility is something less than completely free and unconditional it loses its moral strength as an argument to the jury, to the sentencing jury; the more unconditional it is the stronger the moral argument in favor of giving [appellant] a break on the sentence because of his willingness to completely accept responsibility for what he did.

> So, my analysis of the ethical situation from an attorney's point of view is that if your client is attempting to do this sort of thing out of some motive that either makes no sense or is contrary to the client's best interests then you have an ethical obligation not to cooperate, but if what the client is trying to do is coherent with the evidence in the case, and here it is.

(1RT 242.)

Mr. Allen assessed and evaluated the evidence against appellant and concluded that the evidence was "extremely strong" and that the likelihood of conviction was "extremely high." In fact, Mr. Allen opined that "[a] great many police investigators would have to have heart attacks between now and the trial date for the situation to change" and there was "no real likelihood of [appellant's] acquittal." (1RT 242-243.) In other words, Mr. Allen concluded that there was no reasonable defense and a plea of guilty was the best defense strategy for obtaining a life sentence at the penalty phase trial; therefore, it would serve no purpose to make the jury sit through a pointless trial. Mr. Allen also concluded that appellant's acceptance of responsibility without any promises by the prosecution strengthened his credibility and appeal for leniency. (*Id.*)

Mr. Allen also researched the issue on the interplay between *Faretta* and section 1018 and filed a memorandum brief in support of appellant's right to enter a guilty plea to a capital murder charge while representing himself. (2CT 581-591.) The trial court noted that although the role and responsibilities of an advisory counsel were limited, it had the discretion to expand them at the request of a pro per defendant, and that based on the motion by Mr. Allen and his participation in the proceedings, it appeared that appellant wanted Mr. Allen to have a more active role in assisting him. But the trial court wanted to be clear "in terms of the role that Mr. Allen is assuming in terms of duties and responsibilities at this stage of the

proceedings because [it] want[ed] to *make sure that we comply with the spirit of Penal Code section 1018.*" (2RT 280, italics added.)

Mr. Allen affirmed that he accepted the duties and responsibilities of counsel for appellant within the meaning of section 1018, and characterized his representation as being one of counsel and not advisory counsel in terms of the duties and functions he had performed for appellant and the assistance he had provided him, all within the spirit of section 1018. Mr. Allen also understood that his representation would be examined by an appellate court in terms of effective assistance of counsel as if he were appointed counsel. Appellant acknowledged that he accepted Mr. Allen's "greatly expanded" role, and in fact, had "encouraged him to do that." The trial court then stated that although it would "label" Mr. Allen advisory counsel, "in terms of the greatly expanded role that you've assumed in discharging responsibilities as functional equivalent of counsel for [appellant]." (2RT 280-283.)

Appellant then pled guilty with Mr. Allen's consent. (2RT 299-313.) Prior to the taking of the plea, Mr. Allen again acknowledged that he was effectively proceeding as counsel for appellant, and that he had treated his role of advisory counsel as if he were appointed counsel. (See 2RT 280-281, 304-305.) Accordingly, in the present case, it is clear that although Mr. Allen was "advisory" counsel for appellant, Mr. Allen acted and discharged his duties as if he were in fact appointed counsel for appellant for purposes of section 1018. All of the parties acknowledged this below, and the trial court specifically found that Mr. Allen had assumed a "greatly expanded role" and was "discharging [his] responsibilities as functional equivalent of counsel for [appellant]" "with particular reference to the spirit of Penal Code Section 1018." (2RT 280-283.)

Because the trial court expanded Mr. Allen's role as advisory counsel and deemed him the functional equivalent of, or de facto, counsel for purposes of taking the guilty plea, the intent and purpose behind section 1018—consent of counsel to appellant's guilty plea—was met under the unique circumstances of the present case.

Although appellant contends generally that the distinction between counsel and advisory counsel is "well established and legally significant" (AOB 45), he conveniently ignores that the trial court exercised its discretion to greatly expand Mr. Allen's role and that Mr. Allen acted as, and the parties and trial court understood him to be, the functional equivalent of appellant's counsel for purposes of appellant's guilty plea. As appellant himself admits, section 1018 is designed to ensure that capital defendants are bound by their counsel's independent professional judgment. (AOB 45, citing *People v. Chadd*, *supra*, 28 Cal.3d at pp. 749-750.) Yet that intent and spirit was satisfied here: Mr. Allen acted as appellant's counsel, researched the issue, had extensive discussions with appellant, and evaluated the evidence before concluding that appellant's desire to plead guilty in order to accept responsibility and then argue for a life sentence at the penalty phase was a sound trial strategy prior to consenting to appellant's guilty plea. In other words, Mr. Allen performed the "filtering" function mentioned in *Chadd* and determined that appellant might reasonably gain some benefit by pleading guilty. (See *People v. Chadd*, *supra*, 28 Cal.3d at p. 753.)

Mr. Allen was an "'uncommon' exception to the general rule mentioned in *Chadd*" that an attorney will not consent to his client's guilty plea; Mr. Allen's consent was based upon the prosecution's overwhelming evidence against appellant and his belief that the best tactic was to forego a "pointless guilt phase trial" in the hopes that appellant's cooperative attitude and remorse would lead to mercy at the penalty phase. (See *People*

v. Massie (1985) 40 Cal.3d 620, 627; see, e.g., *Florida v. Nixon*, *supra*, 543 U.S. at pp. 190-192 [defense counsel considered both guilt and penalty phases to determine how to best proceed and was not ineffective for focusing on the penalty phase and not engaging in a "useless charade;" instead, counsel conceded guilt as the best strategy to avert a death penalty.].) Thus, under the circumstances of the present case, Mr. Allen's consent as advisory counsel in an enhanced role satisfied the requirements of section 1018, and appellant's guilty plea was valid. (See *People v. Massie*, *supra*, 40 Cal.3d at p. 625 [a defendant who wants to plead guilty in a capital case must be represented by counsel who exercises his independent judgment in deciding whether to consent], citing *Chadd*, *supra*, 28 Cal.3d at pp. 747-750.)

D. Any Error Was Harmless under the Circumstances

Assuming this Court finds appellant's guilty plea with advisory counsel's consent somehow violated section 1018, the error was harmless.

In *People v. Crayton* (2002) 28 Cal.4th 346, the defendant was advised of his right to counsel at his arraignment in municipal court but waived his right and chose to represent himself. (*Id.* at pp. 352-353.) Later, when the defendant was arraigned on a felony information in superior court following a felony preliminary hearing based on the same charges, the superior court did not readvise the defendant of his right to counsel or seek to obtain a new waiver of that right. (*Id.* at p. 357.) Appellant represented himself throughout the trial and was convicted of most of the charged offenses. (*Id.* at p. 359.) This Court subsequently granted appellant's petition for review and limited the briefing and argument to the issue of "whether the trial court erred in failing to obtain an express waiver of the right to counsel in superior court when defendant expressly waived the right to counsel in municipal court and, if so, what prejudicial standard applies." (*Ibid.*)

Since prior decisions by this Court held that under section 987,[25] the superior court is required to advise a defendant of his right to counsel 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 (*id.* at p. 361, citing *People v. Crandell* (1988) 46 Cal.3d 833, 858, fn. 5, and *People v. McKenzie* (1983) 34 Cal.3d 616, 635), the People conceded that the superior court erred in failing to readvise the defendant of his right to counsel and in failing to obtain a new waiver of that right when he was arraigned on the felony information in superior court.

However, this Court concluded that the error was *not* of a federal constitutional magnitude, since federal authority holds that once a defendant gives a valid waiver, it continues through the duration of the proceedings unless it is withdrawn or is limited to a particular phase of the case. (*Id.* at p. 362.) Instead, since the error involved the violation of only a state statute—section 987, this Court concluded that the error in failing to follow the *statutory* command of section 987 was subject to the harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Id.* at p. 364.) This Court went on to hold that the error was harmless because there was no reasonable probability that the defendant was unaware of his right to be represented by appointed counsel at trial or that he would have accepted the

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[25] Section 987, subdivision (a) provides:

> In a noncapital case, if the defendant appears for arraignment without counsel, he or she shall be informed by the court that it is his or her right to have counsel before being arraigned, and shall be asked if he or she desires the assistance of counsel. If he or she desires and is unable to employ counsel the court shall assign counsel to defend him or her.

appointment of counsel had the court made the statutorily required inquiry at his superior court arraignment. (*Id.* at pp. 364-365.)

Similarly, here, as argued above, nothing in the federal Constitution or Sixth Amendment jurisprudence requires a capital defendant in pro per to be represented by and have the consent of counsel prior to pleading guilty; this requirement is entirely a creature of state statute, i.e., section 1018.[26] That being the case, any error in failing to comply with section 1018 should also be subject to *Watson* harmless error analysis.

Here, there is no reasonable probability that appellant would not have pled guilty and insisted on going to trial absent any alleged violation of section 1018. As previously explained, appellant's clearly stated intent at all times was to plead guilty and accept responsibility for his actions. Moreover, he had the full representation of an attorney, Mr. Allen, for the specific purposes of examining the evidence against him and exploring the possible tactical or strategic advantages to be gained by pleading guilty. Appellant and Mr. Allen were aware and agreed that the evidence of appellant's guilt was overwhelming, that he had no valid guilt phase defense, and that if appellant pleaded guilty, the jury might view his acceptance of responsibility as mitigating enough to spare him the death penalty. Even though Mr. Allen was technically an advisory counsel, he was deemed de facto counsel for purposes of consenting to appellant's guilty plea, and therefore, appellant received the same representation as if Mr. Allen had been appointed as counsel for the plea hearing. In other words, appellant would have pleaded guilty with Mr. Allen's consent,

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[26] This assertion assumes this Court declines to adopt respondent's position that section 1018 does not apply to a self-represented capital defendant under the instant circumstances.

regardless of whether Mr. Allen was appointed as counsel or advisory counsel prior to the plea.

Accordingly, there is no reasonable probability that any error in failing to comply with section 1018 would have affected appellant's decision to plead guilty, or that, had he been forced instead to undergo a guilt phase trial, that he would have presented a defense or would have been acquitted.

II. THE TRIAL COURT PROPERLY FOUND MANIFEST NEED TO PLACE RESTRAINTS ON APPELLANT AND DID NOT VIOLATE HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, TO PRESENT A DEFENSE, AND TO A RELIABLE SENTENCE

Appellant contends that the restraints imposed on him were excessive and visible throughout the trial, which violated his constitutional rights to due process, participate in his own defense, a fair trial, a reliable sentencing determination, and his state constitutional rights. (AOB 49-75.) He concedes that "some physical restraints might have been appropriate" (AOB 65), but complains that the restraints used were excessive, painful, and restrictive (AOB 64-69). Respondent disagrees. The record shows the trial court properly found manifest need to restrain appellant in the manner he was at the penalty phase, and that the restraints were the least restrictive alternative under these circumstances to ensure courtroom security. Therefore, no due process or other constitutional violations occurred. In the alternative, any error was harmless.

A. Relevant Background

At an October 18, 2005 pretrial hearing, advisory counsel informed the trial court that appellant appeared in court with his hands shackled and chose to wear his jail uniform. Advisory counsel was not concerned about the foot shackles because they were not visible; however, he did not want the shackles on appellant's wrists and the chains to be visible to the jury.

Advisory counsel wanted appellant to be able to write and pass notes to him without creating noise or a distraction. (2RT 401-402.) The court was aware of the applicable United States and California Supreme Court holdings on restraints and that a record needed to be made if appellant were to be restrained during the penalty trial. The court noted that appellant might need the use of his hands to write notes to his advisory counsel. (2RT 401-403.)

On October 28, 2005, the Santa Barbara County Sheriff's Department filed a motion in support of using a lockbox to handcuff appellant's hands to a waist chain, and to have his legs attached to leg shackles during the penalty phase.[27] The motion described appellant's threatening and non-conforming behavior in jail, and attached declarations from corrections officers describing those incidents. (3CT 850-855.) In her declaration, Corrections Officer Wendy Shannon indicated that on October 12, 2004, appellant and other inmates were handcuffed with their arms behind their backs while waiting in the hallway for transport to court. Appellant slipped his left hand out of his handcuffs, held an inmate down with his left hand, and repeatedly punched the inmate with his right hand. (3CT 855.) As to a second incident that occurred on April 25, 2005, Correctional Officer Douglas Todaro declared that appellant had barricaded himself in his cell. Correctional officers used chemical spray, pepper balls, and two shots from a 50,000 volt Taser to control appellant. Appellant told Officer Todaro, "I will keep fighting you, until I kill you all or until you kill me." (3CT 856.) In a third incident that occurred on May 21, 2005, Correctional Officer Trevor Carpenter moved appellant from his cell to the shower. As Officer Carpenter was removing appellant's handcuffs,

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[27] On October 25, 2005, appellant indicated that he wanted advisory counsel to respond to the County Counsel's motion. (2RT 416.)

appellant reached into the waistband of his pants, pulled out a razor, and attempted to slash Officer Carpenter. Later, appellant turned over a razor and two razor blades that had been broken out of the razor handles and wrapped in tape. (3CT 857.)

Inmate disciplinary reports attached to the motion described the following: (1) on December 7, 2004, appellant was in the Santa Barbara courthouse and used handcuffs to scrape paint off the cell door and wall; (2) on April 5, 2005, while being moved within the courthouse's holding facility, appellant attempted to attack another inmate in the corridor, which caused the court to delay custody hearings; (3) on April 25, 2005, appellant barricaded himself and tried to strike an officer during an extraction where a chemical agent was used, pepper balls were fired, and a Taser was used twice; and (4) on May 20, 2005, appellant manufactured an edged weapon made from a razor and used it to attack Officers Smith, Williamson, and Carpenter.[28] (3CT 859-862.)

On November 3, 2005, a hearing regarding the use of restraints was held. Appellant's advisory counsel requested that both of appellant's hands be unrestrained during the trial so that he could take and make notes to advisory counsel without disturbing the jury or asking for a recess. Advisory counsel reasoned that it would be difficult for appellant to sit for a six-hour court day with his left hand shackled to his stomach. Advisory counsel did not believe that appellant would be a danger in court because his feet were shackled together and he could not go anywhere. Advisory

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[28] As a result of appellant's threatening and non-conforming behavior while in custody, appellant was charged with and later, on July 29, 2005, pled guilty to assault upon a custodial officer (§ 241.1), custodial possession of a weapon (§ 4502, subd. (a)), criminal threats to custodial staff (§ 422), and assaulting peace officer/custodial staff (§ 243, subd. (c)(1)). (2RT 321-326; 3CT 869-878.)

counsel noted that appellant had been polite and well-behaved in the courtroom. (2RT 464-466.)

The court asked appellant to raise his hands to show his restraints. The court observed that the restraint was a lock box and that appellant's fingers and hands were free. Appellant wore a waist chain and leg shackles. The court asked appellant to raise his arms and then rest them on the table. The court observed that appellant would not be able to write with the lock box on his wrist. (2RT 467-468.)

Deputy county counsel informed the court that the Sheriff's Department was amenable to modifying its original request for restraints. He proposed shackling appellant's legs together, restraining the non-writing hand to a waist belt, which would permit appellant's writing hand to be free, and placing additional deputies nearby. These security measures would provide adequate courtroom security. (2RT 468-469.) Although the deputy county counsel was concerned about permitting appellant to use a sharp object to write with, he indicated that a "golf" pencil might mitigate that concern because it would not be an effective stabbing weapon. Advisory counsel suggested using a felt tip "Flair pen," but the courtroom bailiff noted that it was a sharp object. Before taking a break from the proceedings, the court indicated that it was inclined not to permit appellant to have any hand free based on the incidents described in the motion. The court stated that appellant could adequately represent himself with the assistance of advisory counsel and that frequent breaks could be taken to accommodate appellant. (2RT 469-470.)

When the proceedings resumed, advisory counsel stated that the proposed modified restraint system placing a regular handcuff on appellant's left wrist and fixing the other end of the handcuff to the waist chain was a better alternative to a lock box and permitted appellant to rest his hand on notepaper so that he could write with his free hand. Appellant

disagreed that he needed to be restrained. (2RT 487-488.) Deputy county counsel clarified that the presence of additional sheriff's deputies near appellant, shackling appellant's legs, and handcuffing his non-writing hand to a waist belt while permitting a free hand to write could provide adequate security. Deputy county counsel warned, however, that without both legs shackled and the writing hand handcuffed, it would be extremely dangerous for appellant to have his non-writing hand free. Deputy county counsel reminded the court that appellant had escaped from his handcuffs and committed an assault, attempted to slash corrections officers with a concealed razor blade when his handcuffs were removed, threatened to kill or be killed by sheriff's deputies, and was brought under control in one incident only after receiving two 50,000 volt stuns. The deputy county counsel asked the court to consider the video of appellant being stunned by officers to gain control over him and the declarations submitted with the motion in determining whether appellant should be restrained. (2RT 488-490.)

In addition, the court took testimony from Sergeant Timothy Morgan about the April 25, 2005 incident, where appellant barricaded himself inside his cell and had to be extracted. Appellant was alone in his cell and blocked the view into his cell, which prevented correctional officers from conducting a security check. Before the forcible cell extraction, several different sergeants spoke to appellant to try to get him to comply with their orders. The video of the cell extraction was played for the judge. (2RT 491-495.)

The video depicted a pepper ball gun being fired and the deployment of a 50,000-volt Taser. Eventually, it took chemical spray, shots from the pepper ball gun, and two stuns from the 50,000-volt Taser to bring appellant under control. (2RT 495-496.) After appellant was extracted from his cell and placed in a safety cell, he repeatedly asked Sergeant

Morgan and other deputies to remove their gas masks and identify themselves, and threatened to use a knife to slash them. Additionally, declarations by two correctional officers involved in the extraction were attached to the written motion. In one declaration, Officer Carpenter declared that appellant said, "I'm glad it's you that fucked with me, because I always wanted to slice you up." Officers Todaro declared that appellant said, "I will keep fighting you until I kill you all or until you kill me." (2RT 496-498.)

After testimony was taken, deputy county counsel stated that, in light of the location of the jury box, appellant's chair could not conceal the shackles. Additionally, appellant's decision to wear his jail uniform instead of civilian clothes complicated any effort to conceal the restraints. Deputy county counsel requested that the jury be instructed with CALJIC No. 1.04, the cautionary instruction about restraints. (2RT 499-500.)

Appellant's advisory counsel noted that the videotaped incident occurred in April, and appellant had no problems behaving in court. Appellant was upset and said things to the officers, but he did not hurt anyone. He was gassed with pepper balls and shocked by a Taser. The officers physically put him down on the ground to restrain him. (2RT 500-501.)

The court noted that this Court in *People v. Duran* (1976) 16 Cal.3d 282 (*Duran*) and the United States Supreme Court in *Deck v. Missouri* (2005) 544 U.S. 622 [125 S.Ct. 2007, 161 L.Ed.2d 953] (*Deck*), held that a finding of manifest need for the use of restraints was required. Both cases were concerned about the visibility of the shackles and its impact on the jury as it heard evidence on whether death should be imposed. The court noted that the jury would know that appellant was in shackles because the restraints would be visible to them. (2RT 502-503.)

The court found that there was an exceedingly compelling manifest and special need for shackling appellant. The court cited incidents involving appellant while in custody, including: attacking fellow inmates and corrections officers; threatening to kill corrections officers; and creating, manufacturing, or finding a razor blade and attempting to slash officers with it. The court did not find justification for permitting appellant to have a small pencil. It expressed concern about putting anything in appellant's hand that could be fashioned into a weapon because appellant had shown a willingness to use a weapon. The court reasoned that the courtroom was small, with two tables where the attorneys and appellant sat, the bailiffs were close by, the court reporter was eight feet away from appellant, the clerk was ten feet away from appellant, and a number of people were in close proximity to appellant. The court suggested that appellant communicate with advisory counsel by whispering, that frequent breaks be taken during the proceedings to accommodate appellant, that appellant be brought into the courtroom 10 minutes before the jury entered the courtroom, and that the proceedings adjourn 10 minutes early so appellant could communicate with his advisory counsel. (2RT 503-505, 513.)

Deputy county counsel explained that a lock box was more secure than handcuffs because appellant had previously slipped out of his handcuffs. The court approved the use of a lock box to restrain appellant because he had escaped from handcuffs and assaulted another inmate and because there were a lot of people in the courtroom who were in close proximity to appellant. The court suggested that if appellant became tired or uncomfortable, it would take breaks and place him in a cell. (2RT 506-507.)

Alternatively, appellant requested to be restrained by an electric belt. However, the Sheriff's Department cited this Court's ruling in *People v.*

Mar (2002) 28 Cal.4th 1201, and indicated that it did not have an electronic belt. The Sheriff's Department preferred using a passive restraint where there would not be a lag between the time when a defendant leapt out of his chair and the application of the security device. (2RT 507-511.)

The court further expressed concern for advisory counsel's safety because he was in very close proximity to appellant. While advisory counsel did not fear appellant, the court had the responsibility to ensure that advisory counsel was not harmed. Due to security concerns, the court granted the Sheriff's Department's motion to use physical restraints and did not permit appellant to have his hands free for the purpose of writing. Accordingly, the court ordered both appellant's hands be handcuffed within a lock box, and that he be placed in waist chains and leg shackles. (2RT 505, 510-511, 513.)

During the afternoon session of November 21, 2005, advisory counsel expressed that appellant was representing himself and needed to take notes of testimony provided by witnesses. Appellant showed the court that he was wearing a lock box with his hands pointed in opposite directions. He proposed having the lock box placed on him in a manner that would allow his hands to point in the same direction so that he could place both hands out in front of him, hold a piece of paper in one hand, and write with the other hand. In addition, advisory counsel found soft felt tip pens for appellant to write with. Advisory counsel suggested that appellant's leg chain be fastened to counsel table to immobilize him. Appellant asked for his restraints to be more comfortable because he had muscle cramps from being placed in a stiff position, especially in his neck. (3RT 747-749, 752, 754.)

Deputy county counsel noted that appellant had the ability to reach up and grab a cup of drinking water with one hand under the current lock box restraint system. Deputy county counsel proposed taping the note pad

to the table so appellant could take notes and write to his advisory counsel. Appellant's advisory counsel agreed to the arrangement, but requested that appellant be permitted to use a golf pencil. (3RT 750.)

The court acknowledged that appellant was representing himself and needed to take notes. However, the court reasoned that courtroom security was a priority, and the lock box ensured security. The court found the violent acts committed by appellant both in and out of jail were bases for not permitting anything sharp to be placed in appellant's hands. The court suggested that the lock box be adjusted to place appellant's hands in a different position. The court also noted that it did not observe appellant to be in discomfort or pain that rose to the level of a violation of his due process or legal rights. The court proposed to take two 10 minute breaks during both the morning and afternoon sessions to relieve pressure on appellant's arms. (3RT 752-755.) In addition, the court did not like the idea of a golf pencil because the pencils could be very sharp and gripped in a way to cause significant damage or injury. The court suggested that the defense investigator sit next to appellant, where he could direct the investigator to write notes to advisory counsel. (3RT 751-752.)

As to advisory counsel's suggestion to chain appellant to counsel's table, the court was concerned that the jury could see appellant being chained to a table. The court noted that it was common to see people who had been convicted of a capital offense to be in restraints, and appellant had chosen to wear jail clothing; thus, the jury already knew that appellant was in custody and had been convicted of first degree murder with special circumstances. The court stated that handcuffs on appellant's hands and a chain around his legs would not cause the sort of prejudice as chaining him to the table might cause. The court observed that appellant had some freedom of movement where he could raise both arms at once, move his

feet back together, and place his knees together and separate them. (3RT 755-756.)

On November 28, 2005, advisory counsel requested that appellant not be placed in the lock box while in the holding cell. The court denied the request because it would be a security risk, but permitted the sheriff's deputies to make that determination. The jail deputies informed the court that they often did not have the key to remove the lock box, and that it took three deputies to place and remove the lock box. Sometimes, there would not be enough deputies to assist with the removal of the lock box. (8RT 903-904.)

On November 30, 2005, Deputy Jesse Ybarra informed the court that appellant was out of control in the courthouse holding facility. The court canceled voir dire and sent the prospective jurors home. (4RT 1007-1008, 1010.)

On December 1, 2005, the court admonished appellant for his behavior outside the courtroom, which disrupted the jury selection and inconvenienced prospective jurors who appeared for voir dire. The court warned that if it occurred again, it would revoke appellant's pro per privileges and appoint advisory counsel as counsel. (5RT 1188-1189.) In response, appellant requested to be excluded from the courtroom during voir dire and be freed from his restraints because they caused him some discomfort. Advisory counsel suggested giving appellant a day off from the proceedings; advisory counsel and the defense investigator would take notes for use during preemptory challenges. (5RT 1191-1192.) The court found the restraints to be necessary and that it would be problematic for appellant not to be present because he was representing himself. (5RT 1192-1194.) Alternatively, the defense investigator suggested that appellant could wear a long-sleeved thermal shirt with a thick wristband to alleviate any discomfort. Defense investigator stated that appellant's ankles

were hurting because of the chains around his ankles. The court permitted appellant to wear the thermal shirt and the wristband unless the sheriff's department explained that they would impact security. (5RT 1194-1196.)

On December 5, 2005, the court held a hearing to address appellant's disruptive behavior in the courthouse holding cell that occurred on November 30, 2005, and led to the disruption of jury selection. The court took testimony from Senior Deputy Ybarra about the incident. (5RT 1200-1201.)

Senior Deputy Ybarra testified that on November 30, 2005, he was in the courthouse holding facility assisting other corrections officers with moving appellant to the courtroom. Officer Morales was placing the restraints on appellant, who became extremely agitated and stated that the lock box was too tight. Appellant was uncooperative, very aggressive, belligerent, and made threats against Deputy Ybarra and Officer Morales. Deputy Ybarra attempted to calm appellant down before they could transport him to the courtroom. Appellant replied that he wanted to "fuck someone up." Appellant demanded to be transported back to the county jail. He moved toward Deputy Ybarra and Officer Morales in an aggressive manner and said, "I'm going to fuck you up." Appellant was transported back to the county jail for his safety and the safety of others. (5RT 1201-1203.)

Further, Deputy Ybarra read Officer Morales' incident report in its entirety into the record. Officer Morales stated that appellant complained that the restraints were too tight. Officer Morales loosened the chain by one link. Appellant continued to complain and said, "I was trying to be cool with you, but now I'm going to swing on you, punk ass bitch, every time I get a chance and anytime someone tries to put these chains on me. I'm going to fight any fucker that comes near me." He also said to Deputy Ybarra, "I'll fuck you up, too, just wait." He continued to say, "Fuck you,

I'm going to fuck you up, fuck this bullshit." As appellant was being escorted out of the holding facility, Deputy Ybarra asked appellant if he would be all right in the courtroom, to which appellant responded, "No, fuck the Court, I'm tired of this bullshit." Upon hearing appellant's response, Deputy Ybarra told him to return to his holding facility and wait in his cell. As appellant walked into his cell, he suddenly turned around and charged at Deputy Ybarra and Officer Morales. They caught appellant and pushed him into the cell. Appellant began to laugh and continued to make threats against the officers. He said he would "fuck [them] up if he saw [them] on the street or the next time he saw [them]." He continued to challenge the officers to remove his handcuffs so he could "fuck [them] up." He was removed from the holding facility because he was a threat to staff. When appellant was removed from his cell to be transported back to the county jail, he tried to walk away. (5RT 1204-1206; 4CT 944-946.)

In addition, the court admitted into the record a declaration from Corrections Sergeant Dennis Avila regarding the second cell extraction that occurred on November 26, 2005, where pepper-ball and two applications of the 50,000-volt Taser were used to bring appellant under control. (5RT 1206.) In his declaration, Sergeant Avila stated that appellant threatened, "I'm going to cut somebody. This is personal now." (4CT 941-943.)

The court told appellant that it would revoke his pro per status if further disruptions like the November 30th incident occurred again. (5RT 1206-1207.) As to the restraints, the court asked the sheriff's department to address its prior order permitting appellant to wear a long-sleeved shirt and/or wristband underneath the lock box. The court noted that it appeared that an alternative arrangement had been made. Initially, deputy county counsel warned that appellant previously slipped out of handcuffs and assaulted another inmate. In the event the court determined that the lock box was not appropriate, the Sheriff's Department proposed a less secure

alternative to the lock box. Each of appellant's wrists would be placed in separate handcuffs, with the other side of the handcuffs attached to the waist chain. A third handcuff would be placed on both wrists and through the eyebolt on the waist chain. While this three-handcuff system was less secure than the lock box, it offered appellant more range of motion. For example, when appellant inhaled, he would be able to raise the waist chain up some inches and have some arc with each hand. An additional deputy in the courtroom would be added as an additional security measure. Appellant appeared in court under this new system of restraints comprised of three handcuffs. (5RT 1209-1211.)

The court expressed its concern about the possibility of violence occurring in the courtroom. (5RT 1211-1212.) Deputy county counsel stated that the handcuffs system was less secure than a lock box, but opined that the presence of a deputy standing near appellant should provide adequate courtroom security. The court agreed to permit appellant to be restrained with the three-handcuff system and warned appellant that further acting out, threats, violence, fighting, whether in the courthouse or at the jail, would result in the use of the lock box. (5RT 1212.)

Prior to the presentation of the evidence, the jury was advised that appellant had pled guilty to first degree murder and admitted to special circumstances, which made him eligible for the death penalty. (6RT 1570, 1573-1576.) The jury was also advised that the penalty for first degree murder under these circumstances was either death or life imprisonment without the possibility of parole. The jury was further advised that it had the responsibility to determine which of these two penalties should be imposed on appellant based on the evidence and aggravating and mitigating factors presented during the penalty phase trial. (6RT 1576-1578, 1580-1581.) In addition, the court advised the jury:

Okay. Ladies and gentlemen, while we're setting that up, I want to just offer an explanation regarding the relationship between [appellant] and Mr. Allen, because you may have some questions about it.

As I think we indicated very early on, [appellant] is representing himself. He requested the assistance of advisory counsel. Outside the presence of the jury, we've worked out the relationship between [appellant] and Mr. Allen, and whenever Mr. Allen is speaking, it's with the authorization, express authorization of [appellant].

So that's something that they've worked out between themselves and the Court, correct?

[¶]

[¶]

[APPELLANT]: Yes.

(7RT 1699.)

After the parties discussed the jury instructions, the court asked appellant to reaffirm that he authorized Mr. Allen to speak on his behalf during the penalty phase trial.

THE COURT: That brings up a point that I think I probably addressed a number of times. Which is, [appellant] whenever Mr. Allen speaks he speaks with your authorization, is that correct?

[APPELLANT]: Yes.

THE COURT: And if he were speaking without your authorization you would speak up and say so?

[APPELLANT]: Yeah, I would consult with [Mr. Allen] and give him the opportunity to correct a misunderstanding.

THE COURT: Okay. And let me just state for the record my observations in terms of how you two have worked together during the course of these proceedings, which is, you've worked together very closely, I have not seen any disagreement whatsoever between the two of you, you've conferred privately

whispering back and forth to each other from time to time during the course of these proceedings. You've done the same, [appellant], with Miss McLaren through the course of these proceedings. And it's obvious to the Court that you're working together as a team in presenting this defense.

[APPELLANT]: Yes.

THE COURT: Okay.

MR. ALLEN: Yes, Your Honor, that's true.

(8RT 1923-1924.)

Before jury deliberations, the trial court instructed the jury not to be influenced by appellant's physical restraints: "The fact that physical restraints have been placed on [appellant], Joshua Miracle, must not be considered by you for any purpose. You must not speculate as to why restraints have been used in determining the issues in this case. Disregard this matter entirely." (4CT 1080; 8RT 1958.)

B. Legal Principles

Generally, the trial court has broad power to maintain courtroom security and orderly proceedings. (*People v. Lomax* (2010) 49 Cal.4th 530, 558, citation and quotation marks omitted; accord, *People v. Bryant, Smith, and Wheeler* (2014) 60 Cal.4th 335, 389; *People v. Stevens* (2009) 47 Cal.4th 625, 632.) However, physical restraints may distract or embarrass a defendant, which may affect his ability to participate in his defense. (*People v Stevens*, *supra*, 47 Cal.4th at p. 633.) Consequently, imposing physical restraints on a criminal defendant is prohibited unless a trial court determines that there is a manifest need for such restraints. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 559; *People v. Stevens*, *supra*, 47 Cal.4th at p. 633; *Duran*, *supra*, 16 Cal.3d at pp. 290-291.) Indeed, the United States Supreme Court has stated that the federal Constitution forbids the use of visible shackles unless it is "'justified by a state interest'—such as the

interest in courtroom security—specific to the defendant on trial." (*Deck*, *supra*, at 544 U.S. at pp. 624, 628, 633, citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569 [106 S.Ct. 1340, 89 L.Ed.2d 525].)

"Manifest need" for physical restraints exists upon a showing of violence or a threat of violence or other nonconforming conduct. (*People v. Combs* (2004) 34 Cal.4th 821, 837, citing *People v. Anderson* (2001) 25 Cal.4th 543, 595; *People v. Hill* (1998) 17 Cal.4th 800, 841; *People v. Cox* (1991) 53 Cal.3d 618, 651; *Duran*, *supra*, 16 Cal.3d at p. 292, fn. 11.) The justified use of restraints is not limited to situations involving courtroom disruption or attempted escape. (*People v. Hawkins* (1995) 10 Cal.4th 920, 944.) The nonconforming or objectionable behavior may occur outside the courtroom, and evidence of that behavior must be presented on the record so that the trial court can make its determination of whether there is a manifest need for the physical restraints. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 561.) The record must show that the court made its determination based on the facts, not rumor and innuendo. (*People v. Stevens*, *supra*, 47 Cal.4th at p. 633.) However, no formal hearing is mandated to fulfill the required findings under *Duran*, but the need for restraints must appear as a matter of record. (*People v. Cox*, *supra*, at pp. 649-652; *Duran*, *supra*, at pp. 291.)

In exercising its discretion to impose restraints, the trial court may consider such factors as security, risk of escape, likely disruption of the proceedings, or other nonconforming behavior. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 559; *People v. Jenkins, supra*, 22 Cal.4th at p. 995; *Deck*, *supra*, 544 U.S. at p. 629.) Evidence showing "that the defendant has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court" satisfies a manifest need for restraints. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1031.) "Given the potential consequences on both sides of

the scale, the range of factors the court may consider in assessing and weighing the risks should be broad." (*People v. Bryant, Smith, and Wheeler*, *supra*, 60 Cal.4th at p. 390.)

A defendant's prior violent criminal record or the fact that he or she is a capital defendant cannot alone justify physical restraints. (*People v. Cunningham* (2001) 25 Cal.4th 926, 987.) A defendant proceeding in propria persona can be restrained for security reasons. (*People v. Butler* (2009) 47 Cal.4th 814, 826, fn. 5; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1042-1043.)

The decision of a trial court to restrain a defendant will be reviewed for an abuse of discretion on a case-by-case basis. (*People v. Combs*, *supra*, 34 Cal.4th at p. 837; *People v. Mar*, *supra*, 28 Cal.4th at p. 1218; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 987; *People v. Medina* (1995) 11 Cal.4th 694, 731; *People v. Pride* (1992) 3 Cal.4th 195, 231-232.) It is an abuse of discretion to impose physical restraints on a criminal defendant without a record of violence or threat of violence, risk of escape, or other non-conforming conduct. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 559; *Duran*, *supra*, 16 Cal.3d at pp. 289, 291; see *People v. Harrington* (1871) 42 Cal. 165, 168-169 [requiring a showing of "evident necessity" for the use of physical restraints].)

C. The Record Supports the Trial Court's Finding That There Was Manifest Need to Place Restraints on Appellant Due to His Conduct in Custody and the Holding Area, and the Restraints Were Not Unduly Restrictive, Painful, Or Excessive under the Circumstances

Appellant concedes that he engaged in threatening and assaultive behavior outside the courtroom and that some physical restraints might have been appropriate. (AOB 49, 65.) His specific complaint is that the restraints used were restrictive, painful, or excessive. (AOB 64-69.) Yet

under the circumstances of this case, the trial court properly exercised its discretion in finding that there was manifest need to restrain appellant in the manner he was during the penalty phase.

No less than five hearings were held about the use of restraints before the penalty phase jury was empanelled. At two of the hearings, formal testimony was taken from two witnesses who testified about appellant's violent behavior. The court expressly stated case-specific facts upon which it based its decision. (2RT 401-403, 464-513; 3RT 747-756; 5RT 1188-1196, 1200-1212; 3CT 850-862; 4CT 941-943.) The court's finding was based on appellant's violent behavior while in the county jail and the courthouse holding facility, appellant's threats against jail deputies, his possession of concealed weapons, and his escape out of his handcuffs and assault of other inmates. (3CT 850-862; 4CT 941-946; 2RT 488-498; 4RT 1007-1008; 5RT 1201-1206.) Specifically, Sergeant Morgan testified that appellant threated to use a knife to slash him and Officers Carpenter and Todaro. (2RT 496-498.) Appellant also concealed a razor in his waistband and pulled it out when Officer Carpenter removed the handcuffs so appellant could take a shower. Appellant threatened to slash Officer Carpenter with a razor. Later, appellant turned over a razor and two razor blades. (3CT 857.)

Moreover, appellant's unprovoked and violent attack on the jail deputies in a courtroom holding cell interrupted a court proceeding in the present case and caused the prospective jurors to be sent home. (5RT 1201-1203.) This attack also justified the imposition of restraints in order to prevent violent outbursts in the courtroom, which threatened the security of courtroom personnel and the public. (*People v. Lomax*, *supra*, 49 Cal.4th at pp. 561-562.) In *Lomax*, the defendant was taken from the courtroom to the courthouse holding cell. He refused to enter the cell because his belongings were in a different cell. The deputy told the defendant that he did not have

the key to the other cell. The deputy needed to place the defendant into the cell and then get the key for the cell, where the defendant's holdings were located. By then, the defendant's handcuffs were removed. The defendant struck the deputy on the head four or five times. Subsequently, the trial court ordered a stun belt be placed on the defendant. (*Id.* at pp. 559-560.) The defendant challenged the use of the stun belt because he feared that it would shock him even though he was behaving properly. He also complained about having a heart condition and said the belt was dangerous for him. (*Id.* at pp. 560-561.)

This Court found that the trial court did not abuse its discretion in imposing the stun belt on the defendant. This Court stated, "defendant's unprovoked violent attack on the deputy clearly justified the imposition of restraints to prevent a recurrence of such behavior in the courtroom." (*Id.* at p. 562.) This Court found that the record clearly showed sufficient evidence of nonconforming behavior outside of the courtroom, including defendant's violent outburst in a holding cell, his unprovoked attack on the corrections officer, and the trial court's repeated expressed concern for protecting jurors and court staff justified the use of restraints to prevent such behavior in the courtroom. (*Ibid.*)

As in *Lomax*, here, the trial court held a hearing where, inter alia, facts surrounding appellant's violent outburst in the holding cell was presented. Appellant was taken out of the holding cell to be transported to the courtroom. He was belligerent and aggressive toward the deputies, and he told them, "I'm going to fuck you up." As he was escorted back to the holding cell, he suddenly turned around and charged at the deputies. Later, when he was taken out of the holding cell to be transported back to the jail, he attempted to walk away from the corrections officers. (5RT 1201-1206; 4CT 944-946.) The court cancelled voir dire and sent the prospective jurors home upon learning that appellant engaged in violent behavior in the

courthouse's holding cell. The court expressed concerns about the safety of the courtroom personnel and defense counsel. (5RT 1201-1203.)

Based on appellant's record of aggressive and violent behavior that included threats against jail deputies, possession of weapons in custody, an assault on another inmate, and escape from handcuffs, the trial court properly found that there was a manifest need for the use of restraints to protect courtroom staff, attorneys, and members of the public who sat near appellant. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 562; *People v. Wallace* (2008) 44 Cal.4th 1032, 1050 [trial court did not abuse its discretion in restraining defendant where he had been cited for many rules violations, including five jailhouse fights and possession of illegal razors]; *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1031.)

Despite appellant's claim that the restraints interfered with his ability to participate in his own defense because they prevented him from taking notes (AOB 49, 65-66), there is no evidence that the restraints impaired or prejudiced appellant's right to testify or participate in his defense. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584.) Appellant had already pled guilty, and at the penalty phase, did not present any opening argument, call any witnesses, testify, or present any affirmative evidence in mitigation. Nothing in the record suggests that appellant did not testify because of the restraints. Indeed, *appellant told the court he never intended to exercise his right to testify or make a statement to the jury.* (8RT 1948-1949.) Appellant even stated at one point, "I feel that if I'm willing to kill, I should also be willing to die; also, I didn't show any mercy, so I'm not going to ask for mercy." (2RT 419-421.) Thus, there was no evidence that the restraints "confuse[d] and embarrass[ed] [his] mental faculties" and "materially impair[ed] and prejudicially affect[ed] his statutory privilege of becoming a competent witness and testifying in his own behalf." (*People v.*

Harrington, supra, 42 Cal. at p. 168; accord, *Duran*, *supra*, 16 Cal.3d at pp. 290-291.)

Appellant authorized his advisory counsel to present a defense and conduct the examination of witnesses. (7RT 1699; 8RT 1923-1924.) During pretrial hearings and trial, Mr. Allen made legal arguments on appellant's behalf and cross-examined witnesses. Miss McLarent sat next to appellant, took notes for him, and passed notes to advisory counsel on his behalf. (3RT 751-752; 8RT 1923-1924.) And while appellant contends that his restraints prevented him from taking notes or "communicating silently in writing" with his advisory counsel (AOB 66), the record demonstrates that the trial court did its best to accommodate appellant and ensure that he was comfortable and could fully participate in his defense.

For example, the court ordered appellant to be brought into the courtroom 10 minutes before the jurors came in, and adjourned the proceedings 10 minutes early for him to confer with advisory counsel and his defense investigator. (2RT 504-505.) Indeed, throughout voir dire and the penalty phase trial, the court made the following accommodations where appellant could confer with his defense team: on November 9, 2005, the court was in session for 54 minutes (3CT 893-894); on November 14, 2005, both morning and afternoon jury selection sessions were an hour long, and the court was in recess for over three hours between the morning and afternoon sessions (3CT 895-898); on November 16, 2005, the court was in session for one and one-half hour (3CT 899-4CT 901); on November 28, 2005, the court took regular 10 minute breaks during morning and afternoon sessions (4CT 916-918); on December 1, 2005, the court took regular breaks during morning and afternoon sessions (4CT 923-925); on December 5, 2005, the court took frequent breaks and a two-hour lunch recess (4CT 926-929); on December 6, 2005, the court held only an afternoon session and ordered frequent breaks (4CT 947-949); on

December 7, 2005, court held one-hour sessions both in the morning and the afternoon (4CT 952-954); on December 8, 2005, the court held only an afternoon session with two breaks (4CT 1007-1009); on December 9, 2005, the court took hourly breaks and adjourned sometime after 2:50 p.m. (4CT 1010-1014); on December 15, 2005, the court was in session in the morning with two breaks (4CT 1015-1018); on December 16, 2005, the court was in session for an hour (4CT 1057-1059); and on December 19, 2005, the court was in session for nearly two hours with one 20-minute break (4CT 1062-1065). During voir dire, advisory counsel requested and was granted a recess to discuss a matter with appellant. (5RT 1281.) The court also ordered appellant to be brought into the courtroom 30 minutes before the start of the proceeding so that advisory counsel and appellant could discuss jury instructions. The court also ordered a recess to give appellant and advisory counsel an opportunity to discuss appellant's disagreement with the wording of a jury instruction. (8RT 1934, 1945, 1952.)

In addition, appellant actively participated in his defense by regularly communicating with Mr. Allen and Miss McLarent throughout the proceedings. At one point, the following exchange occurred:

> THE COURT: That brings up a point that I think I probably addressed a number of times. Which is, [appellant], whenever Mr. Allen speaks he speaks with your authorization, is that correct?
>
> [APPELLANT]: Yes.
>
> THE COURT: And if he were speaking without your authorization you would speak and say so?
>
> [APPELLANT]: *Yeah, I would consult with [Mr. Allen] and give him the opportunity to correct a misunderstanding.*
>
> THE COURT: Okay. And let me just state for the record my observations in terms of *how you two have worked together during the course of these proceedings, which is, you've worked together very closely, I have not seen any disagreement*

whatsoever between the two of you, you've conferred privately whispering back and forth to each other from time to time during the course of these proceedings. You've done the same, [appellant], with Miss McLaren through the course of these proceedings. And it's obvious to the Court that you're working together as a team in presenting this defense.

[APPELLANT]: Yes.

THE COURT: Okay.

MR. ALLEN: Yes, Your Honor, that's true.

(8RT 1923-1924.) As such, the record clearly demonstrates that the court accommodated appellant by providing frequent breaks for appellant to be comfortable and confer with his defense team.

While appellant speculates that the manner in which he was restrained might have caused his privileged communications with his advisory counsel or investigator to be overheard (AOB 66), the record shows that appellant and his defense team "conferred privately whispering back and forth to each other." (8RT 1924.) The trial court was also diligent in protecting any privileged communication between appellant and his defense team. For instance, on one occasion, advisory counsel's voice was audible for the court to hear during a conference between appellant and advisory counsel. The court immediately admonished advisory counsel to lower his voice. (7RT 1816-1817.)

Further, appellant addressed the court throughout the penalty trial, but never personally expressed any pain or discomfort or requested a recess due to the restraints. During the penalty trial, the court asked appellant if he had any objection to an exhibit which summarized appellant's prior conduct. Appellant answered no and indicated that he had discussed the matter with advisory counsel. (8RT 1823.) The court asked appellant if he understood the court's schedule, to which he answered yes. He also answered the court when asked if he planned to present any mitigating

evidence. (8RT 1863.) The court also asked appellant if he had any discussion with advisory counsel concerning the prosecutor's comments about various photographs, whether he had agreed to stipulate to the witness giving a summary about the photographs, and whether he had agreed not to have the victim in a prior case testify. Appellant answered the court's questions. (8RT 1873, 1875, 1913-1914.) During the discussion about jury instructions, appellant addressed the court and stated that he was uncomfortable with one of the jury instructions. Appellant discussed his objection to the jury instruction with advisory counsel and told the court that he preferred the prosecutor's proposed language. (8RT 1934.) After the prosecution submitted its case, appellant expressed his disagreement with advisory counsel's statement regarding his objection to the prosecutor's closing argument, and the court permitted appellant and advisory counsel to have an off-the-record discussion. (8RT 2007.) Throughout these exchanges with the court, appellant never expressed pain or discomfort or requested a recess, although he had the opportunity to do so, and the trial court observed that appellant did not display any pain or discomfort. (3RT 752-755.)

Moreover, neither advisory counsel nor Miss McLarent brought to the court's attention that appellant was in pain or discomfort throughout the penalty phase trial. They also did not express that appellant was in any discomfort or that the restraints prevented any discussion about the preparation or presentation of the defense case. Here, the court placed appellant in the least restrictive restraints that balanced the need for security for the public and court personnel in the courtroom against any alleged discomfort appellant might have. Importantly, appellant appeared in the least restrictive restraints— the three-handcuff system—before the empanelled jurors, who ultimately heard and evaluated the evidence and determined his sentence.

Further, the court instructed the jury about the restraints as part of post-trial instructions. The instruction instructed the jury not to consider the restraints in determining the penalty and not to speculate about the reasons for the restraints, which the jury presumably followed, and appellant offers no evidence to the contrary. (4CT 1080; 5RT 1958; *People v. Sanchez* (2001) 26 Cal.4th 834, 852; *People v. Delgado* (1993) 5 Cal.4th 312, 331[jurors are presumed to understand and follow the court's instructions.].) In any event, the purpose of instructing the jurors about the restraints, which was to prevent the jurors from inferring from the restraints that appellant was a violent person and thereby committed the charged offense, was absent because, as previously noted, appellant already pled guilty. This instruction was sufficient to prevent any potential prejudice at the penalty phase. (See *People v. Medina* (1990) 51 Cal.3d 870, 898 ["the risk of substantial prejudice to a shackled defendant is diminished once his guilt has been determined"].)

Appellant contends that he was not a flight or escape risk and the trial court failed to use the least restrictive means to restrain him. Specifically, he argues that the trial court should have restrained one hand and permitted his writing hand to be free of handcuffs. (AOB 65.) However, at trial, appellant requested *more* restrictive (and arguably more prejudicial) restraints which required that he be chained to the counsel table.[29] (3RT 755-756.) Yet, the trial court allowed appellant to be placed in a less restrictive three-handcuff system from the last day of voir dire and throughout the penalty phase trial despite his previous success in slipping out of his handcuffs and assaulting another inmate. (5RT 1212.) Under the less restrictive three-handcuff system, appellant had a greater degree of

[29] Additionally, appellant chose to wear a jail uniform, which made concealment of any restraints difficult.

motion where he could make an arc and lift his waist chain up above his waist.[30] (5RT 1212.)

Appellant further asserts that the trial court erred because it failed to follow the Sheriff's Department's recommendation to have one hand free from handcuffs. (AOB 65.) Yet ironically, appellant also asserts that the trial court should not have deferred to law enforcement to make a determination of manifest need. (See AOB 66-67.) Clearly, the court carried out its independent judicial function and made a finding of manifest need to restrain appellant based on the evidence of appellant's violent and threatening behavior both in the jail and the courthouse's holding cell. (*Duran*, *supra*, 6 Cal.3d at p. 293, fn. 12.) In any event, as previously noted, the trial court ultimately agreed to the less restrictive three-handcuff system *recommended by the Sheriff's Department.*

Appellant argues that the trial court erred in keeping him restrained during breaks in the courthouse holding cell and abdicated its decision-making authority to law enforcement. (AOB 66-67.) Appellant is mistaken; this Court has held that it is permissible to transport a prisoner in handcuffs to court and retain those restraints on the prisoner until he enters the courtroom. (*Duran*, *supra*, 16 Cal.3d at p. 289.) While the court cannot abdicate its discretion to law enforcement regarding *in-courtroom restraints* (see *People v. Stevens*, *supra*, 47 Cal.4th at p. 625, 642), the jail deputies can make determinations on restraints *outside the courtroom* to maintain security (Cf. *People v. Roberts* (1992) 2 Cal.4th 271, 307 [the trial court could not compel prison authorities "to alter the special rules that perforce exist in a prison setting."]). The principles behind prohibiting physical

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[30] Even under the lock box system, appellant's movement was not entirely prohibited. He was able to reach for a cup of water on the counsel table and take a drink with one hand. (3RT 750.)

restraints in the courtroom—distracting or embarrassing a defendant before the jury—do not carry over to outside the courtroom, since law enforcement has plenary power to provide courthouse security.

Appellant's reliance on *People v. Stevens*, *supra*, 47 Cal.4th at pages 625, 642 (AOB 66-67) is misplaced. In *Stevens*, this Court held that the trial court could not defer to law enforcement in deciding whether there was a need for restraints in the courtroom. In contrast, here, the trial court deferred to law enforcement regarding security *outside* the courtroom while appellant was placed in the holding cell, which was within the purview of law enforcement to ensure security in the courthouse. Nothing in *Stevens* suggests that law enforcement cannot make a security determination based on appellant's history of acting aggressively and belligerently against custody officers outside the courtroom. Indeed, the prohibition of physical restraints in the courtroom without a showing of manifest need by the trial court was intended to avoid prejudice in the minds of jurors. (*People v. Tuilaepa, supra,* 4 Cal.4th at p. 583.)

Moreover, restraining appellant in the holding cell to prevent a recurrence of his aggressive and violent behavior was permissible. Appellant engaged in several incidents of nonconforming behavior while in the courthouse's holding facility: (1) he used his handcuffs to scrape paint off the cell door and wall; (2) he attempted to attack another inmate in the corridor of cells while being moved within the courthouse's holding facility, which caused the court to delay custody hearings; and (3) he lunged at the correctional officers while in the courtroom holding cell. (3CT 859-860; 5RT 1201-1206.) The trial court did not abuse its discretion in finding it necessary to impose restraints on appellant while he was placed in the courthouse's holding cell, or in permitting law enforcement to determine whether restraints were necessary while appellant was placed in the holding cell during recess.

Contrary to appellant's assertion that restraining him based on "unexamined logistical and staffing concerns" affected his right to participate effectively in his own defense (AOB 66-67), restraints are permissible when there is a shortage of security, the defendant has already been found guilty, and there is a manifest need for restraints. (See, e.g., *People v. Slaughter* (2002) 27 Cal.4th 1187, 1213-1214 [it was not prejudicial to require defendant to wear leg restraints under his pants, where no manifest need was demonstrated and the restraints were used because the court was "'shorthanded on security'" and defendant was found guilty, because the restraints were not noticeable and defendant was not dissuaded from testifying because of the restraints].) In any event, it was not an abuse of discretion for the trial court to conclude that appellant should not be freed of restraints during breaks based on his conduct while in custody and violent outbursts, as well as the fact that a deputy explained that the deputies did not always have a key for the lock box, and that they needed three deputies to take appellant's restraints off and put them back on again. (4RT 904.) Moreover, on the last day of voir dire and throughout the penalty phase trial, appellant was restrained by the less restrictive three-handcuff system, which provided even greater range of motion where he could make an arc and lift his waist chain up above his waist. (5RT 1212.)

Although appellant complains that he was placed in a "stiff position" during pretrial proceedings (AOB 67-68), the record shows that he could move his arms and feet apart and then back together and had a range of motion, including the ability to reach for water while his hands were in a lock box. (3RT 750, 755-756.) Appellant stated that standing up would relieve the stiffness in his neck. The court agreed to order frequent breaks in order to accommodate appellant. (3RT 754-755.) And, as previously noted, the three-handcuff system provided an even greater range of motion. (5RT 1212.) Therefore, appellant had the ability and ample opportunities

to stand up and move his body during the numerous breaks in the courtroom proceedings.

Contrary to appellant's characterization that he had "marginally more freedom of movement" under the triple handcuff system (AOB 68), appellant demonstrated to the court that he was able to lift his arms and form a large arc and to lift his waist chain up. (5RT 1209-1211.) Even with the more restrictive lock box on his wrists, appellant was also able to reach for a cup of water on the table where he sat. (3RT 750.) And, as previously noted, the trial court ordered frequent breaks so that appellant could stand up and move around. Additionally, appellant had the assistance of the defense investigator who took and made notes on his behalf such that his right to present a defense was not impaired. Thus, appellant's right to a fair trial and present a defense was not hindered by the imposition of restraints.

Appellant further complains that "[t]he pain from the lock box was such that" he considered waiving his presence. (AOB 68.) However, the record shows that appellant's complaint was not about the discomfort with the lock box as he now claims; rather, he told Deputy Ibarra that the *waist chain* was too tight. Advisory counsel asked Deputy Ybarra during cross-examination if appellant's complaint was about the tightness of the waist chain. Deputy Ybarra testified that appellant did not specify at the time of the complaint that it was the waist chain that caused pain. Later, appellant told Deputy Ybarra that it was the waist chain and *not* the lock box that caused him pain. Subsequently, Deputy Ybarra and appellant agreed to communicate better to avoid future confrontation. (7RT 1771-1773.) In any event, the trial court ultimately agreed to a less restrictive three-handcuff system in lieu of the lock box on the recommendation of the Sheriff's Department.

Simply put, the court properly found a manifest need to place appellant in the three-handcuff system of restraints during the penalty phase based on his violent behavior and nonconforming conduct outside the courtroom. (*People v. Oliver and Lewis*, *supra*, 39 Cal.4th at pp. 1031-1032 [a showing of manifest need is satisfied by evidence that "defendant has threatened jail deputies, possessed weapons while in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court"]; *see*, *e.g.*, *People v. Combs*, *supra*, 34 Cal.4th at p. 837 [defendant had possession of two shanks while in jail, threatened jail deputies, and engaged in nonconforming conduct].) The trial court held five hearings, heard from two witnesses about appellant's violent behavior, and received into evidence videos, declarations, and disciplinary reports documenting appellant's non-conforming behavior while in custody, which included assaults on other inmates, threatening jail deputies, possession of concealed weapons, and the fact that he barricaded himself on two occasions, which resulted in forced extractions during which appellant was prepared to battle the deputies. (7RT 1774-1779, 1781-1782, 1787-1787, 1790-1796, 1799-1812.)

Based on the evidence presented, the court made case specific findings to impose physical restraints during the penalty trial to ensure courtroom security for court personnel and the public. Given the particularized findings of fact regarding manifest need made specific to appellant, the visibility of the restraints did not establish any constitutional violation. (*People v. Bryant, Smith, and Wheeler*, *supra*, 60 Cal.4th at p. 392.) Nor did the use of restraints diminish the "'dignity and decorum of the judicial process'" as appellant suggests (AOB 69) because the trial court made "case specific" findings that reflected the particular concerns for "special security needs or escape risks, related to [appellant] on trial." (*Deck v. Missouri*, *supra*, 544 U.S. at pp. 633-634.)

The trial court was entitled to order that appellant be restrained in the manner that he was based on his inability to control his violent impulses and did not have to wait until such a violent outburst occurred in the courtroom before ordering restraints. (*People v. Pride, supra*, 3 Cal.4th at p. 233.) Accordingly, appellant has failed to demonstrate that the trial court abused its discretion, and its decision to restrain him in the three-handcuff system "was so erroneous that it '[fell] outside the bounds of reason.'" (*People v. Bryant, Smith and Wheeler, supra*, 60 Cal.4th at p. 390.)

D. Any Alleged Error Was Harmless

Appellant contends that the "excessive shackling" by the use of handcuffs alone establishes prejudice. (AOB 69-70.) Yet, this Court has never held that "excessive shackling" alone establishes prejudice. While appellant seeks to rely on *Deck* (AOB 69) in urging this Court to apply the standard in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], the United States Supreme Court applied the *Chapman* standard only "where a court *without justification,* orders the defendant to wear shackles that will be seen by the jury." In those cases, "the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" (*Deck, supra*, 544 U.S. at p. 635, italics added, citing *Chapman v. California, supra*, 386 U.S. at p. 24.)

Here, however, as detailed above in subpart D, *ante*, there *was* adequate justification to support the use of restraints on appellant. That being the case, appellant must demonstrate prejudice, and the *Chapman* harmless error standard does not apply. (See *People v. Hernandez* (2011) 51 Cal.4th 733, 745 [noting that unjustified imposition of visible physical restraints violates due process and therefore, a defendant need not demonstrate actual prejudice and the People must show beyond a

reasonable doubt that the error did not contribute to the verdict], 734 [when a challenged practice is not so inherently prejudicial as to pose an unacceptable treat to a defendant's right to a fair trial, the defendant must demonstrate actual prejudice, which is consistent with the burden under *People v. Watson, supra,* 46 Cal.2d at p. 837, of establishing a reasonable probability that the error affected the result of the trial].) In the present case, appellant has failed to demonstrate prejudice, and, in any event, any error in restraining appellant was harmless under any standard and did not contribute to his penalty verdict.

Appellant cites the federal court decisions of *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, and *Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439, in support of his contention that the fact that the lock box was visible during voir dire to 11 of the empanelled jurors and one alternate juror, that the triple handcuffs were visible to the 12 sitting jurors, and that an additional deputy was also visible near him, establishes prejudice.[31] (AOB 70.) However, "Decisions of the lower federal courts interpreting federal law, although persuasive, are not binding on state courts." (*People v. Zapien* (1993) 4 Cal.4th 929, 989.) In any event, both *Rhoden* and *Elledge* are inapposite, as both were cases in which the defendants were ordered shackled *without a proper determination of the need for them.* (See *Rhoden v. Rowland, supra,* 172 F.3d at p. 637 ["Due process was denied

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[31] Notwithstanding the fact that appellant did not object to the presence of the additional deputy, this Court has held that a security officer's presence near a testifying defendant is not inherently prejudicial provided it is justified by a showing of manifest need. (*People v. Hernandez, supra,* 51 Cal.4th at p. 742, citing *People v. Stevens, supra,* 47 Cal.4th at p. 638.) For the reasons previously stated in subpart (D), ante, there was clearly manifest need for having an additional deputy stationed near appellant, and since the deputy was present and apparently stationary throughout the penalty trial, it is unlikely the jury viewed the deputy's presence as anything more than standard courtroom procedure.

when the trial court ordered Rhoden shackled without a proper determination of the need for shackles"]; *Elledge v. Dugger*, *supra*, 823 F.2d at p. 1452 ["The . . . problem with the shackling decision is that the State at no time made any showing that the shackling was necessary to further an essential state interest].) In contrast, here, several lengthy hearings were held prior to the trial court determining that shackling was necessary and appropriate for courtroom security and safety. Moreover, the jury was instructed that shackles or restraints were to have no bearing on their determination of the sentence; this instruction was presumably followed. (*People v. Mar*, *supra*, 28 Cal.4th at 1217.) Consequently, appellant has failed to demonstrate that the jury's penalty verdict was influenced in any way by the visibility of his restraints or the presence of sheriff deputies. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 596; *People v. Cox*, *supra*, 53 Cal.3d at pp. 652-653; *People v. Allen* (1986) 42 Cal.3d 122, 1264.)

Although appellant claims that the eight questions posed by the jury (see 4CT 1113-1115) showed that a death sentence was not a foregone conclusion (AOB 71-73), he himself acknowledges that the jury returned its verdict of death *before* the court could answer those questions. The jury's willingness to render a death sentence without first waiting to receive an answer to those questions shows not only that the evidence was not close (compare *People v. Mar*, *supra*, 28 Cal.4th at p. 1225 [finding prejudice under *Watson* because of the relative closeness of the evidence, the defendant's demeanor while testifying, and the likelihood that the stun belt affected his demeanor while testifying]), but that the jury obviously did not consider the answers to those questions important in determining the appropriate penalty. Appellant is simply speculating that the jury's questions somehow show prejudice or "that a death sentence was not a foregone conclusion." (AOB 72.)

To the extent appellant claims that he suffered prejudice because the prosecutor improperly argued future dangerousness (AOB 73-75), he is mistaken. Appellant forfeited the claim because he did not object. (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 481.) In any event, the prosecutor's argument on appellant's future dangerousness, which was properly based on his in-custody behavior and conduct (see 8RT 1990, 1997-1998), was entirely appropriate. (See *People v. Smith* (2015) 61 Cal.4th 18, 59 [inferences of future dangerousness drawn from a defendant's past violent conduct in custody can properly be presented at penalty phase],60 [noting that "[t]he evidence of defendant's violence in jail and his persistence in making escape attempts was dramatic and compelling"]; *People v. Thomas* (2012) 53 Cal.4th 771, 822 [prosecutorial argument regarding defendant's future dangerousness is permissible when based on evidence of defendant's conduct rather than expert opinion].) Here, the prosecutor's argument that people who might come in contact with appellant while he is incarcerated—nurses, doctors, correctional officers—could be in danger was based on the evidence of appellant's violent and assaultive behavior while in the jail and the courthouse's holding cell that was presented to the jury. Thus, the prosecutor's argument regarding appellant's future dangerousness in prison, which the prosecutor did not characterize as an aggravating factor, was properly based on the evidence.

Moreover, given the fact that *no* mitigating evidence was presented at the penalty phase at appellant's request, the circumstances of the crimes and aggravating factors overwhelmingly weighed in favor of the jury's verdict. First, Lopez identified appellant as the assailant who stabbed him without provocation in the upper back and neck, slashed him a few times, and punched him above the eye where he suffered a cut over it. (6RT 1598-1606; 7RT 1612-1613, 1615, 1617-1618.) Second, relating to the capital murder, Robert testified that he overheard appellant telling

codefendant Ibarra that he needed to take care of the "rats," i.e., gang members who cooperated with law enforcement. (7RT 1645-1646.) Robert saw appellant with a butcher knife with a taped handle and a different knife earlier in the day. (7RT 1657-1658, 1683-1685, 1711.) Appellant had Robert lure Silva to Robert's apartment, where appellant lay in wait. Appellant demonstrated a willingness to commit murder when he held the butcher knife up against Robert's neck and threatened him if he did not call Silva. After Silva entered the apartment, codefendant Ibarra grabbed him and appellant rushed over to assist codefendant Ibarra in asserting control over Silva. (7RT 1669-1671, 1677-1678, 1681.) Silva was later found with 48 stab wounds to his body. (8RT 1874-1875.) Further, Investigator Nalls was present in the courtroom when appellant admitted that he killed Silva. Appellant noted that he did not show mercy toward Silva and did not expect mercy on himself. (8RT 1837-1839.) Indeed, appellant did not testify, present any mitigation evidence, or offer a closing argument to plead his case or rebut the prosecutor. Therefore, this is not a case where there was "ample room" to question appellant's "individual, as well as relative, culpability of capital murder," as appellant contends (AOB 70).

Furthermore, the jury was well aware that appellant had engaged in several violent incidents while in custody. On two occasions, he barricaded himself in his cell and prepared for battle against corrections officers who had to forcibly extract him from his cell. He also threatened to kill the corrections officers. (7RT 1787-1796, 1799-1812.) Additionally, on two occasions, he attacked other inmates without provocation. In one incident, appellant was not restrained while waiting in a hallway to be placed back in his cell. He bolted toward another inmate while the inmate was walking by and started to punch the inmate in the face. (7RT 1774-1779.) Further, he threatened the corrections officers when they attempted to transport him

from the courthouse's holding cell to the courtroom and then lunged at the corrections officers when they tried to place him back inside the holding cell. (7RT 17167-1771.) Certainly, the jury was entitled to know that appellant was very violent and dangerous to others, and the use of restraints was hardly shocking or prejudicial in light of appellant's criminal history. Given the circumstances of the crimes, appellant's violent behavior while in custody, and his admission to the capital murder and lack of mercy toward Silva, any error in restraining appellant in the manner he was during the penalty phase was clearly harmless under any standard. This claim fails.

III. APPELLANT'S CONSTITUTIONAL CHALLENGES TO CALIFORNIA'S DEATH PENALTY STATUTE AND PATTERN JURY INSTRUCTIONS ARE MERITLESS

Appellant raises several constitutional challenges to California's death penalty statute and pattern jury instructions. (AOB 76-91.) Appellant concedes that this Court has consistently ruled that the death penalty statute and pattern jury instructions do not violate the state and federal Constitutions. (AOB 76.) Respondent respectfully requests this Court to reaffirm its previous decisions upholding the constitutionality of California's death penalty statute and related jury instructions. (*People v. Johnson* (2015) 60 Cal.4th 966, 997; *People v. Livingston* (2012) 53 Cal.4th 1145, 1179-1180.)

A. Section 190.2 Is Not Overly Broad

Appellant contends that section 190.2 is unconstitutionally overbroad because it fails to narrow the class of murderers eligible for the death penalty. (AOB 76-77.) This Court has consistently held that section 190.2 adequately narrows the class of murderers eligible for the death penalty, and is not overbroad, under the Fifth, Eighth, and Fourteenth Amendments. (*People v. Johnson*, *supra*, 60 Cal.4th at p. 997; *People v.*

Sattiewhite, supra, 59 Cal.4th at p. 489; *People v. Hoyos* (2007) 41 Cal.4th 872, 926, overruled on another ground by *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643; see also *People v. Curl* (2009) 46 Cal.4th 339, 362; *People v. Salcido* (2008) 44 Cal.4th 93, 166; *People v. Demetrulias* (2006) 39 Cal.4th 1, 43; *People v. Harris* (2005) 37 Cal.4th 310, 365.) Appellant has not advanced any persuasive arguments why this Court to reject its prior holdings.

B. Section 190.3, Factor (a) Does Not Violate the State and Federal Constitutions

Appellant contends that section 190.3, factor (a) is overly broad and permits arbitrary and capricious imposition of the death penalty. (AOB 77-79.) This Court has repeatedly held that section 190.3, factor (a) "does not permit arbitrary and capricious imposition of the death penalty." (*People v. Livingston, supra,* 53 Cal.4th at pp. 1179-1180; accord, *People v. Johnson, supra,* 60 Cal.4th at p. 997.) This Court has found that factor (a) "does not foster arbitrary and capricious penalty determinations" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1248), and rejected the argument that section 190.3 or CALJIC No. 8.85 "are unconstitutionally vague, arbitrary, or render the sentencing process unconstitutionally unreliable under the Eighth and Fourteenth Amendments . . . ." (*People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Kipp* (1998) 18 Cal.4th 349, 381).

Because section 190.3, factor (a) requires the jury to consider the circumstances of a defendant's capital murder for the purpose of making an individualized determination whether to impose death or life without possibility of parole penalty, it is not a violation of the Eight Amendment when a defendant is already determined to be in a narrow class of death-eligible murderers. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 478-479; accord, *People v. Johnson, supra,* 60 Cal.4th at p. 997; *People v. Livingston, supra,* 53 Cal.4th at pp. 1179-1180; *People v. Thomas* (2011)

52 Cal.4th 336, 365; *People v. Lee* (2011) 51 Cal.4th 620, 653.) Appellant has not advanced any persuasive arguments to the contrary.

C. California's Death Penalty Statute and Pattern Jury Instructions Are Not Constitutionally Defective for Failing to Require the State to Bear the Burden of Proving Beyond a Reasonable Doubt That Aggravating Circumstances Exist Or the Aggravating Circumstances Outweigh the Mitigating Circumstances, and Failing to Require a Unanimous Jury Finding

Appellant contends that the California death penalty statute and its pattern jury instructions are unconstitutional for failing to set forth a burden of proof and require jury unanimity. (AOB 79-83.) Appellant concedes that this Court has repeatedly held that neither the death penalty statute nor its pattern jury instructions are unconstitutional. (AOB 80, 82.) Appellant fails to offer any persuasive argument for this Court to review its prior decisions.

1. The Fact That the Penalty Need Not Be Determined beyond a Reasonable Doubt Does Not Violate the State and Federal Constitutions

Appellant contends that any determination on the existence of aggravating circumstances or that aggravating circumstances outweigh the mitigating circumstances made by a jury must be found beyond a reasonable doubt before imposing the death penalty. (AOB 79-81.) He concedes that this Court has held to the contrary. (AOB 80-81.) Nevertheless, he argues that the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] cast doubt on this Court's prior holdings. (AOB 79-80.) Yet, appellant concedes that this Court has previously held

that the imposition of the death penalty does not constitute an increased sentence. (AOB 80.) Appellant fails to set forth any persuasive arguments for this Court to revisit its prior holdings. (*People v. Farley* (2009) 46 Cal.4th 1053, 1133; accord, *People v. Livingston*, *supra*, 53 Cal.4th at p. 1180.)

This Court has held that the prosecution is not required to prove beyond a reasonable doubt the existence of any aggravating circumstances or that the aggravating circumstances outweigh the mitigating circumstances. (*People v. Weaver* (2012) 53 Cal.4th 1056, 1092; *People v. Lee, supra*, 51 Cal.4th at p. 651.) The recent decisions made by the United States Supreme Court "interpreting the Sixth Amendment's jury trial guarantee do not alter these conclusions." (*People v. Weaver*, *supra*, 53 Cal.4th at p. 1092, citations and quotation marks omitted; *People v. Lee*, *supra*, 51 Cal.4th at pp. 651-652.) Further, this Court has rejected this claim:

> Finally, section 190.3 and the pattern instructions are not constitutionally defective for failing to assign the state the burden of proving beyond a reasonable doubt that an aggravating factor exists, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty. As defendant acknowledges, we have repeatedly rejected these arguments. [Citation.] The recent decisions of the United States Supreme Court interpreting the Sixth Amendment's jury trial guarantee [*Cunningham v. California* (2007) 549 U.S. 270; *United States v. Booker* (2005) 543 U.S. 220; *Blakely v. Washington* (2004) 542 U.S. 296; *Ring v. Arizona* (2002) 536 U.S. 584; *Apprendi v. New Jersey* (2000) 530 U.S. 466] do not compel a different result. [Citation.]

(*People v. Bramit*, *supra*, 46 Cal.4th at pp. 1249-1250 & fn. 22.)

2. CALJIC Nos. 8.85 and 8.88 Are Not Constitutionally Defective for Failing to Assign the State a Burden of Proof

Appellant contends that CALJIC Nos. 8.85 and 8.88[32] fail to inform the jurors that the state bears some burden of proof, and the jurors were no

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[32] CALJIC No. 8.85 instructs:

> 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 be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offenses the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.
>
> (i) The age of the defendant at the time of the crime.

(continued...)

(...continued)

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(4CT 1067-1068; 6RT 1577-1579.)

CALJIC No. 8.88 instructs:

It will be your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on the defendant.

After having heard all of the evidence, and after 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.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with

(continued...)

instructed on the presumption of life at the penalty phase. (AOB 81-82.) This Court has repeatedly rejected this claim. (*People v. Johnson*, *supra*, 60 Cal.4th at p. 997; *People v. Livingston*, *supra*, 53 Cal.4th at p. 1180.)

The trial court is not required under the federal Constitution or Evidence Code section 520 to instruct the jury that the prosecution has the burden of proof with regard to the aggravating circumstances or appropriateness of the death penalty; neither party bears the burden of proof. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1429.) "'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.'" (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 926, quoting *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1066.) This Court has long considered that "[u]nlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden of proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; accord, *People v. Johnson*, *supra*, 60 Cal.4th at p. 997; *People v. Carpenter* (1997) 15 Cal.4th 312, 417; see *People v. Burgener* (2003) 29 Cal.4th 833, 884 885; *People v. Anderson, supra*, 25 Cal.4th at p. 601; *People v. Daniels* (1991) 52 Cal.3d 815, 890.) The Court has also repeatedly rejected any claims that focus on a burden of proof in the penalty phase. (*People v. Welch* (1999) 20 Cal.4th 701, 767 768; *People v. Ochoa* (1998) 19 Cal.4th 353, 479; *People v. Snow,*

(...continued)

the mitigating circumstances that it warrants death instead of life without parole.

(4CT 1072; 6RT 1580-1581.)

supra, 30 Cal.4th at p. 126; *People v. Box* (2000) 23 Cal.4th 1153, 1216; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 417-418; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Holt* (1997) 15 Cal.4th 619, 683 684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].)

Further, as set forth in Argument III, subdivision (D)(7), *post*, this Court has held that an instruction on the presumption of life is not required. (*People v. Johnson*, *supra*, 60 Cal.4th at p. 997; *People v. Gonzales* (2011) 51 Cal.4th 894, 958.)

3. The Constitution Does Not Compel a Jury's Unanimous Finding on Aggravating Circumstances

Appellant contends that his constitutional rights were violated because the jury was not required to make unanimous findings on aggravating circumstances. (AOB 82-83.) Appellant concedes that this Court has held that the jury is not constitutionally required to reach unanimous agreement on aggravating factors. (AOB 82; citing *People v. Taylor* (1990) 52 Cal.3d 719, 749; *People v. Prieto* (2003) 30 Cal.4th 226.) This Court has previously rejected this claim.

Unanimous agreement beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances is not required at the penalty phase trial. (*People v. Johnson*, *supra*, 60 Cal.4th p. 997; *People v. Livingston*, *supra*, 53 Cal.4th at p. 1180; *People v. Bacon* (2010) 50 Cal.4th 1082, 1129; *People v. Burney* (2009) 47 Cal.4th 203, 268; *People v. Alcala* (1992) 4 Cal.4th 742, 809.) This Court has consistently held that there is no requirement under state or federal law that the jury unanimously agree on the aggravating circumstances, find all aggravating factors beyond a reasonable doubt, or find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors that support the death penalty, since

aggravating circumstances are not elements of an offense. (*People v. Gonzales*, *supra*, 51 Cal.4th at p. 956; *People v. Jennings* (2010) 50 Cal.4th 616, 689; *People v. Jackson* (2009) 45 Cal.4th 662, 701.) And that California affords noncapital defendants certain procedural protections not afforded capital defendants during the penalty phase does not deny capital defendants equal protection under the Fourteenth Amendment. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1252-1253; *People v. Jones* (2012) 54 Cal.4th 1, 87; *People v. Bivert* (2011) 52 Cal.4th 96, 124.)

D. California's Death Penalty Statute and CALJIC Instructions on Mitigating and Aggravating Circumstances Are Constitutional

Appellant contends that CALJIC Nos. 8.85 and 8.88 are unconstitutional for: (1) failing to instruct the jurors whether death is the appropriate penalty; (2) using impermissibly restrictive adjectives in the list of potential mitigating circumstances; (3) giving instructions which caused the penalty determination to turn on an impermissibly vague and ambiguous standard; (4) instructing the jury on inapplicable sentencing factors; (5) failing to instruct the jury that statutory mitigation circumstances were relevant solely as potential mitigation; (6) failing to inform the jury that if it found that mitigation outweighed aggravation, it was required to return a life sentence; and (7) failing to instruct the jury on the presumption that life without the possibility of parole was the appropriate penalty. (AOB 84-89.) This Court has repeatedly rejected these claims. (*People v. Johnson*, *supra*, 60 Cal.4th at p. 997; *People v. Livingston*, *supra*, 53 Cal.4th at p. 1180.)

1. CALJIC No. 8.88 Properly Instructs the Jury on the Penalty

Appellant contends that CALJIC No. 8.88 fails to make clear that the ultimate question in the penalty phase is whether the death penalty is

appropriate. (AOB 84.) Appellant's claim is forfeited because he did not request clarifying or amplifying language of this standard instruction. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1347-1348.) Even if this claim is not forfeited, this Court has previously held that the use of the word "warrant" instead of "appropriate" did not render the instruction invalid. (*People v. Johnson*, *supra*, 60 Cal.4th at p. 997; *People v. Moon*, *supra*, 37 Cal.4th at pp. 42-43.)

2. The Use of Adjectives in the List of Potential Mitigating Circumstances Is Constitutional

Appellant contends that the use of the words "extreme" and "substantial" in CALJIC No. 8.85 impeded the jurors' consideration of mitigating factors and violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 84.) He concedes this Court has previously rejected this claim (*ibid*), yet fails to offer any persuasive reasons for this Court to revisit its prior decisions in *People v. Bunyard* (2009) 45 Cal.4th 836, 861, and *People v. Moon*, *supra*, 37 Cal.4th at pages 41-42.

3. CALJIC No. 8.88 Is Not Unconstitutionally Vague

Appellant contends that the phrase "so substantial' in CALJIC No. 8.88 is unconstitutionally vague and ambiguous and violates the Eighth and Fourteenth Amendments. (AOB 85.) Appellant's claim is forfeited because he failed to request clarifying or amplifying language of this standard instruction. (*People v. Castaneda*, *supra*, 51 Cal.4th at pp. 1347-1348.) In any event, this Court has previously rejected this claim. (*People v. Johnson*, *supra*, 60 Cal.4th at p. 997; *People v. Moon*, *supra*, 37 Cal.4th at pp. 42-43.)

4. The Trial Court Properly Instructed the Jury with CALJIC No. 8.85

Appellant contends that the trial court erred by failing to delete factors from CALJIC No. 8.85 that were inapplicable to him and were

likely to have confused the jurors. (AOB 85-86.) Appellant concedes that this Court has previously rejected this claim. (AOB 86.) Appellant's claim is forfeited because he failed to request clarifying or amplifying language of this standard instruction. (*People v. Castaneda*, *supra*, 51 Cal.4th at pp. 1347-1348.) In any event, this Court has consistently held that there is no constitutional requirement for the trial court to delete inapplicable sentencing factors from the instructions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1047-1028; *People v. Moon*, *supra*, 37 Cal.4th at pp. 41-42.)

5. The Trial Court Properly Instructed the Jury with the Sentencing Factors

Appellant contends that the trial court erred in giving the standard CALJIC No. 8.85 instruction without advising the jurors that several factors were relevant solely as possible mitigating circumstances. (AOB 86-87.) Appellant concedes that this Court has upheld CALJIC No. 8.85. (AOB 86.) This Court has consistently held that the trial court is not constitutionally required to instruct the jury that certain sentencing factors can only be mitigating circumstances. (*People v. Elliott* (2012) 53 Cal.4th 535, 594; *People v. Taylor, supra,* 47 Cal.4th at p. 899; *People v. Brasure* (2008) 42 Cal.4th 1037 1069.)

6. The Trial Court Was Not Required to Instruct the Jury That It Had to Impose Life without Possibility of Parole If Mitigation Outweighed Aggravation

Appellant contends that CALJIC No. 8.88 is inconsistent with section 190.3 because it fails to instruct the jury that it is required to return a sentence of life without possibility of parole if it finds that mitigating circumstances outweighs aggravating circumstances. (AOB 87-88.) Appellant concedes that this Court has previously rejected this claim. (AOB 87.)

CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without possibility of parole." (*People v. Rogers* (2009) 46 Cal.4th 1136, 1179; *People v. Moon*, *supra*, 37 Cal.4th at p. 42.) Conversely, failure to instruct the jury that it "shall" impose life without possibility of parole if mitigating evidence outweighs aggravating evidence does not create a presumption favoring death. (*People v. Medina, supra*, 11 Cal.4th at p. 781; *People v. Wader* (1993) 5 Cal.4th 610, 662.)

As appellant recognizes, in *People v. Duncan* (1991) 53 Cal.3d 955, 978, this Court noted that CALJIC No. 8.88 "clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating circumstances. There was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty)." (See AOB 87.) This Court has consistently reaffirmed this decision in *People v. Whallon* (2013) 56 Cal.4th 1, 89; *People v. Stitely* (2005) 35 Cal.4th 514, 574, and *People v. Hughes* (2002) 27 Cal.4th 287, 405.

7. The Trial Court Was Not Required to Inform the Jury about the Presumption of Life

Appellant contends the trial court erred by failing to instruct the jury that the law favors life and presumes a sentence of life imprisonment without possibility of parole. (AOB 88-89.) Appellant offers no persuasive argument for this Court to revisit its prior decisions.

CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury there is a presumption of life." (*People v. Moon*, *supra*, 37 Cal.4th at p. 43, citing *People v. Maury* (2003) 30 Cal.4th 342, 440; accord, *People v. Johnson*, *supra*, 60 Cal.4th at p. 997.) There is no requirement that the jury

be instructed on a presumption of life in the penalty phase of a capital trial. (*People v. Gonzales*, *supra*, 51 Cal.4th at p. 958; *People v. Lomax*, *supra*, 49 Cal.4th at p. 595.) As this Court has explained, "[N]either death nor life is presumptively appropriate or inappropriate under any set of circumstances, but in all cases the determination of the appropriate penalty remains a question for each individual juror." (*People v. Samayoa* (1997) 15 Cal.4th 795, 853.)

E. The Jury Is Not Constitutionally Required to Make Written Findings

Appellant contends that the failure to require the jury to make written specific findings deprived him of his rights under the Sixth, Eighth, and Fourteen Amendments, and his right to a meaningful appellate review. (AOB 89.) Appellant concedes that this Court has repeatedly rejected this claim, and offers no persuasive argument for this Court to revisit its prior holdings.

This Court has consistently held that the Eighth and Fourteenth Amendments do not require the jury to make written findings regarding aggravating factors. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1364; *People v. Gonzales*, *supra*, 51 Cal.4th at p. 957; *People v. Riggs* (2008) 44 Cal.4th 248, 329; *People v. Hoyos*, *supra*, 41 Cal.4th at p. 926; *People v. Harris*, *supra*, 37 Cal.4th at p. 488; *People v. Cornwell* (2005) 37 Cal.4th 50, 105; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.) The failure to require written findings regarding which aggravating factors were found and considered does not violate defendant's constitutional right to a meaningful appellate review. (*People v. Jones* (2013) 57 Cal.4th 899, 981; *People v. McKinzie*, *supra*, 54 Cal.4th at p. 1364.) Pursuant to section 190.4, subdivision (e), a trial judge must ultimately justify the imposition of a death sentence and enter the findings on the Clerk's minutes; thus, meaningful appellate review of each sentence is made possible, even in the

absence of written findings by the jury. (*People v. Diaz* (1992) 3 Cal.4th 495, 576, fn. 35.) Accordingly, appellant's claim must be rejected.

F. Intercase Proportionality Is Not Constitutionally Required

Appellant contends that the failure to require a comparative intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 89-90.) This Court has previously held to the contrary. (*People v. Livingston, supra*, 53 Cal.4th at p. 1180; *People v. Hajek and Vo, supra*, 58 Cal.4th at p. 1230; *People v. Farley, supra*, 46 Cal.4th at p. 1134.)

G. California's Death Penalty Statute Does Not Violate the Equal Protection Clause

Appellant contends that California's death penalty statute violates the equal protection clause because it offers more procedural protections for non-capital felony defendants than capital defendants. (AOB 90.) As stated above, this Court has consistently found that California's death penalty statute does not violate the equal protection clause because it treated non-capital defendants and capital defendants procedurally differently. (*People v. Hajek and Vo, supra*, 58 Cal.4th at pp. 1252-1253; *People v. Livingston, supra*, 53 Cal.4th at p. 1180.)

H. California's Imposition of the Death Penalty Does Not Violate International Law

Appellant contends that this Court should revisit the constitutionality of California's death penalty because the international community has overwhelmingly rejected the death penalty, and because of the United States Supreme Court's decision to cite international law to support its opinion prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles. (AOB 91, citing *Roper v. Simmons* (2005) 543 U.S. 551, 554 [125 S.Ct. 1183, 161 L.Ed.2d 1].) This

Court has repeatedly held that California's death penalty does not violate international law or the Eighth and Fourteenth Amendments to the federal Constitution. (*People v. Johnson*, *supra*, 60 Cal.4th at p. 997; *People v. Livingston*, *supra*, 53 Cal.4th at p. 1180.)

The death penalty as applied in California is not rendered unconstitutional through operation of international law and treaties. (*People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Mills* (2010) 48 Cal.4th 158, 215.) Nor do international norms require the application of the death penalty to only the most extraordinary crimes. (*People v. Blacksher* (2011) 52 Cal.4th 769, 849.) As this Court noted, the western European nations that no longer have capital punishment abolished it long before the United States Supreme Court upheld capital punishment against an Eighth Amendment challenge. And the recent United States Supreme Court's decision not to impose the death penalty on defendants who committed their crimes after their 15th birthday but before their 18th birthday does not compel this Court to find capital punishment unconstitutional per se because "no national consensus has emerged against the imposition of capital punishment in general." (*People v. Moon*, *supra*, 37 Cal.4th at p. 48, citing *Roper v. Simmons*, *supra*, 543 U.S. at p. 567.) Ultimately, California's death penalty does not violate international law, as international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 104; *People v. Lewis* (2008) 43 Cal.4th 415, 539; *People v. Hoyos*, *supra*, 41 Cal.4th at p. 925.)

IV. APPELLANT'S CLAIM OF CUMULATIVE ERROR MUST BE REJECTED

Appellant contends that the cumulative effect of the alleged errors requires reversal. (AOB 92-93.) This claim is meritless. As argued *supra*, the trial court did not commit any error. Therefore, there was no error to

accumulate. Moreover, assuming arguendo that multiple errors occurred, appellant fails to explain how, under the circumstances of this case, such errors, though individually harmless, are collectively prejudicial. This Court should therefore reject his conclusory assertion of cumulative error.

Appellant was entitled to a fair trial, but not a perfect one. (*People v. Welch*, *supra*, 20 Cal.4th at p. 775.) When a defendant invokes the cumulative-prejudice doctrine, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Where none of the claimed errors actually resulted in prejudicial error, there is no prejudice to cumulate. (*People v. Beeler* (1995) 9 Cal.4th 953, 994.) Even assuming appellant's claims constitute error, taken individually or together, these errors do not require reversal of appellant's conviction. (*People v. Slaughter, supra,* 27 Cal.4th at p. 1223; *People v. Cooper* (1991) 53 Cal.3d 771, 830 ["little error to accumulate"].)

Under this reasoning, appellant's contention should be rejected. Appellant entered a guilty plea as a pro per defendant, acting as his own counsel as well as with the consent of his advisory counsel, who also expressed his consent as if he were appellant's appointed counsel. (See Argument I., *ante*.) In addition, appellant does not dispute that there was a manifest need to restrain him and that the least restrictive restraints were used. The trial court found a manifest need to impose restraints based on appellant's nonconforming behavior, and appellant failed to demonstrate that the restraints affected his right to testify and present a defense. Indeed, appellant stated that he did not intend to present any mitigating evidence, testify on his own behalf, and that he did not deserve any mercy from the jury as he did not show mercy to Silva. (Argument II., *ante*.) Moreover, this Court has consistently upheld the constitutionality of California's death penalty statute and pattern jury instructions. Accordingly, there were no errors to accumulate. This claim fails.

V. APPELLANT FORFEITED HIS CLAIM RELATING TO THE IMPOSITION OF THE VICTIM RESTITUTION FINE AND RESTITUTION FINE AMOUNTS; IN ANY EVENT, THE TRIAL COURT PROPERLY IMPOSED RESTITUTION FINES

Appellant contends that the trial court erred in ordering him to pay restitution to several victim restitution funds, totaling approximately $3,400, and imposing restitution fines in the amount of $10,000 each pursuant to sections 1202.4, and 1202.45, as well as $2,400 each pursuant to sections 1202.4, and 1202.45 in the companion case (case number 1202051). (AOB 94-98.) Specifically, appellant asserts that the trial court failed to consider his inability to pay since he is a death row inmate who cannot work. (AOB 95.) This claim is forfeited because appellant failed to object at sentencing. "By 'failing to object on the basis of his [ability] to pay,' defendant forfeits both his claim of factual error and the dependent claim challenging 'the adequacy of the record on that point.' [Citations.]" (*People v. McCullough* (2013) 56 Cal.4th 589, 597.) In any event, this claim is meritless because no abuse of discretion occurred.

In *People v. Gamache* (2010) 48 Cal.4th 347, the defendant, who was sentenced to death, raised the same issue appellant does here—that the trial court erred in imposing a $10,000 restitution fine without taking into consideration that he had no ability to pay and was being sent to death row. (*Id.* at p. 409.) The Court held that the defendant forfeited his claim because he did not object at his sentencing hearing and held that in any event, the defendant pointed to no evidence in the record showing his inability to pay other than his impending incarceration. (*Ibid.*; *People v. Brasure*, *supra*, 42 Cal.4th at p. 1075.) This Court observed that the trial court was not obligated to make findings concerning the defendant's ability to pay, and thus, the trial court did not abuse its discretion when it imposed the restitution fine. (*People v. Gamache*, *supra*, 48 Cal.4th at p. 409.)

Like the defendant in *Gamache*, appellant failed to object to the restitution fine at the time of his sentencing, and thus, he forfeited any claim that the restitution fines were unwarranted by the evidence. (*People v. Gamache*, *supra*, 48 Cal.4th at p. 409; *People v. Brasure*, *supra*, 42 Cal.4th at p. 1075.) Nevertheless, appellant asserts that the trial court should have evaluated his ability to pay and that he lacked earning potential as a death row inmate. He further asserts that he is indigent because counsel (Mr. Carty) was appointed to represent him and later, an advisory counsel (Mr. Allen) was appointed, and that he is on death row. (AOB 97.) However, section 1202.4, subdivision (b) states: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (§ 1202.4, subd. (b).) Where the defendant is convicted of a felony, the fine shall be set, at the discretion of the trial court, at between $200 and $10,000, commensurate with the seriousness of the offense. (§ 1202.4, subd. (b)(1).) An appellant's inability to pay the fine is not a compelling and extraordinary reason not to impose the fine, but it shall be considered in setting the fine above the minimum of $200. (§ 1202.4, subds. (c) & (d).) Section 1202.4 presumes a defendant has the ability to pay the fine. (*People v. Romero* (1996) 43 Cal.App.4th 440, 448-449.) "A defendant shall bear the burden of demonstrating his or her inability to pay." (§ 1202.4, subd. (d).)

Here, it cannot be reasonably inferred that a finding that appellant was indigent for purposes of determining whether section 987.9 funds should be expended for counsel and expert witnesses so that appellant could have a full and complete defense was also a finding that appellant had no ability to pay restitution. In any event, section 1202.4, subdivision (g), clearly states, "The court shall order full restitution unless it finds

compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution order, nor shall inability to pay be a consideration in determining the amount of a restitution order." Thus, the trial court properly imposed the restitution fines. (*People v. Gamache*, *supra*, 48 Cal.4th at p. 409.) Like the defendant in *Gamache*, appellant has pointed to no evidence in the record showing his inability to pay other than his status as a condemned prisoner on death row with no prospect for earning potential.

Further, appellant's status as a death row inmate does not prohibit him from earning money while on death row. Nothing in section 2933.2 prohibits appellant from earning money. Section 2933.2 only prohibits defendants who are convicted of murder from accruing worktime credit pursuant to section 4019. While death row inmates may have the lowest priority for work assignments, it does not necessarily mean that appellant will be denied all opportunity to earn some money. Accordingly, the trial court properly exercised its discretion in imposing the victim restitution fine and the restitution fines pursuant to sections 1202.4 and 1202.45.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the judgment of conviction and sentence of death.

Dated: September 11, 2015 Respectfully submitted,

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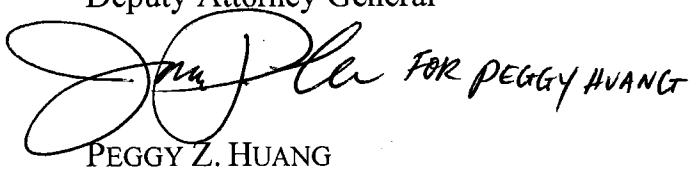

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 41,573 words.

Dated: September 11, 2015

KAMALA D. HARRIS
Attorney General of California

FOR PEGGY HUANG

PEGGY Z. HUANG
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DECLARATION OF SERVICE

Case Name: **People v. Joshua Martin Miracle** No.: **S140894**

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.

On September 14, 2015, I caused one electronic copy of the **RESPONDENT'S BRIEF (CAPITAL CASE)** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On September 14, 2015, I served the attached **RESPONDENT'S BRIEF (CAPITAL CASE)** by transmitting a true copy via electronic mail to:

Andrea G. Asaro
Deputy State Public Defender
Asaro@ospd.ca.gov
(Attorney for Appellant)

Hilary Dozer
Assistant District Attorney
(courtesy copy)

On September 14, 2015, I served the attached **RESPONDENT'S BRIEF (CAPITAL CASE)** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

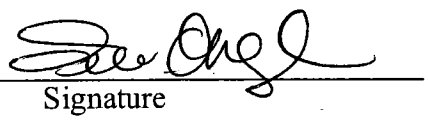
Clerk of the Court
Santa Barbara County Superior Court
Anacapa Division
for delivery to:
The Honorable Brian E. Hill, Judge
1100 Anacapa Street, Department 2
Santa Barbara, CA 93101

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3647
(2 copies)

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

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 September 14, 2015, at Los Angeles, California.

Irene Rangel
Declarant



Signature

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