IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Orange
Honorable William R. Froeberg, Judge

MICHAEL J. HERSEK
State Public Defender

DOUGLAS WARD
Deputy State Public Defender
Cal. State Bar No. 133360

221 Main Street, Suite 1000
San Francisco, California 94105
Phone (415) 904-5600

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

TABLE OF AUTHORITIES — Page(s)

Statutes

Instructions

Constitutions

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INTRODUCTION

This case most likely would not be before this Court if the lower courts had permitted appellant to do what he clearly wanted to do: accept responsibility, plead guilty, and make a case for life at the penalty phase. Instead, he was forced to plead not guilty, induced to discharge counsel, and ended up at a penalty phase where an important part of his case for life, his acceptance of responsibility and remorse, was grossly distorted.

In this brief, appellant addresses certain contentions made by respondent, but does not reply to those which have been adequately addressed in the opening brief. The absence of a reply on any particular argument or allegation made by respondent and the failure to reassert any particular point made in appellant's opening brief do not constitute a concession, abandonment or waiver of the point by appellant, but indicates that the issue has been joined.

The numbered arguments herein are consistent with those contained in Appellant's Opening Brief ("AOB") and Respondent's Brief ("RB").

ARGUMENTS

1.
APPELLANT WAS DENIED HIS FUNDAMENTAL RIGHT TO CONTROL HIS DEFENSE BY ACCEPTING RESPONSIBILITY, PLEADING GUILTY, AND FOCUSING ON A CASE FOR LIFE AT THE PENALTY PHASE

Appellant decided to accept responsibility, plead guilty and make a case for life at the penalty phase. Defense counsel, however, would not consent to that plea, and counsel had the last word because Penal Code section 1018 [1] provides that a capitally-accused defendant cannot plead guilty without counsel's consent. At the plea proceeding, the court directed its plea inquiry to defense counsel, counsel entered a not guilty plea, and the court accepted counsel's plea.

Appellant did not give up. He discharged counsel, and twice tried to plead guilty. Two other courts still refused to accept his plea.

In his opening brief, appellant argued that his decision to accept responsibility, plead guilty, and make a case for life at the penalty phase implicated constitutionally-protected interests sufficient to override the consent-of-counsel requirement in section 1018. In addition, he argued that: the municipal court failed to follow the requirement that a plea be entered personally by the defendant in open court; two other courts failed to allow him to plead guilty after he discharged counsel; and, the failure to accept his guilty plea distorted important mitigating factors at the penalty phase, including acceptance of responsibility and remorse. (AOB 61-96.)

Respondent, while acknowledging most of the facts relevant to this claim, denies that appellant sought to plead guilty out of a desire to accept responsibility. It also contends that: the requirement that a plea be entered

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1. All further statutory references are to the Penal Code.

personally by the defendant in open court applies only to guilty pleas; even after appellant had discharged counsel, he could not plead guilty without the consent of counsel; and forcing appellant to plead not guilty had no effect at the penalty phase. (RB 17-38.)

A. The Parties Agree, for the Most Part, on the Relevant Facts

The following facts are supported by the record and, for the most part, acknowledged or undisputed by respondent:

1. Appellant was represented by counsel for several months before the plea proceeding. (RB 17-18.) He received counsel's advice regarding the plea, but decided to plead guilty, admit the special circumstance, and proceed to the penalty phase. Respondent does not dispute, and the record supports, these facts. (AOB 72-73.)

2. Appellant was competent to make his own plea decision. Respondent does not dispute, and the record supports, that fact. (AOB 72-73.)

3. A factual basis existed for a guilty plea. Respondent concedes this fact by arguing elsewhere that the evidence was overwhelming. (See RB 64.)

4. Appellant informed the municipal court before the plea proceeding that he intended to plead guilty and proceed to the penalty phase. At the subsequent plea hearing, the municipal court directed its plea inquiry to appellant's counsel, counsel entered a not guilty plea, and the court accepted counsel's plea. (RB 19-20.)

5. After discharging counsel, appellant twice attempted to plead guilty: on January 23, 1997; and again on January 27, 1997. (RB 22, 28.)

Respondent points out that appellant entered a *not guilty* plea when he appeared in superior court on February 24, 1997. (RB 23-24.) By that time, however, appellant had no other choice. He had already attempted to plead guilty three times, to no avail, and had been informed by the prosecutor that,

by law, no court could accept his guilty plea: "He wants to plead guilty to the charges. I told him by law he cannot plead guilty to a special circumstances allegation case. He understands that, but I told him no judge can accept your plea." (Municipal Court RT 160-161.) Appellant's entry of a not guilty plea in superior court was therefore forced, not voluntary.

B. The Municipal Court Erred in Failing to Allow Appellant to Enter His Guilty Plea and in Failing to Accept That Plea

1. Appellant's Facial Challenge to the Consent-of-Counsel Requirement Has Merit

The consent-of-counsel requirement in section 1018 was enacted in 1973, and upheld by this Court in two cases in the 1980s: *People v. Chadd* (1981) 28 Cal.3d 739, 746-753, where the defendant sought to plead guilty to further his desire to commit suicide; and *People v. Massie* (1985) 40 Cal.3d 620, 622-625, where the defendant's decision to plead guilty was made on the eve of trial and out of an emotional reaction to an adverse ruling. More recently, in *People v. Alfaro* (2007) 41 Cal.4th 1277, 1298-1302, this Court upheld the constitutionality of the consent-of-counsel requirement where the defendant sought to plead guilty to avoid the presentation of third-party-responsibility evidence.

In his opening brief, appellant argued that Justice Richardson's dissenting opinion in *Chadd* had it right: where the defendant is competent and there is no issue of state-assisted suicide or other improper motive, a capital defendant's decision to plead guilty is fundamental and his alone to make, and the state's interests are insufficient to override that fundamental right. Since *Chadd* was decided, this Court has embraced that view in many cases involving a capital defendant's right to control his defense and his fate. (AOB 69-71.) Respondent does not address Justice Richardson's opinion or the post-*Chadd* cases adopting his view.

Further, since *Chadd* was decided, the mandatory *presence-of-counsel*

requirement found in, among other statutes, section 1018, has been held to violate the right to self-representation. (AOB 79-80.) Respondent fails to shoulder the burden of demonstrating why the presence-of-counsel requirement in section 1018 is unconstitutional while the consent-of-counsel requirement is not.

Yet, even if this Court upholds *Chadd*'s conclusion that the consent-of-counsel requirement is constitutional on its face, appellant still prevails because, as he argues next, he had a fundamental, constitutional interest sufficient to override that requirement.

2. Appellant's Decision to Plead Guilty Arose Out of a Desire to Accept Responsibility and Proceed to the Penalty Phase

In *People v. Alfaro*, *supra*, 41 Cal.4th 1277, this Court upheld the constitutionality of the consent-of-counsel requirement in section 1018, while at the same time recognizing that the requirement might be overridden when the decision to plead guilty implicates a constitutionally-protected fundamental interest: for instance, as part of a strategy to obtain a life sentence at the penalty phase. (*Id.* at pp. 1299-1300.) Appellant has argued that his case fits squarely within that recognition. (AOB 71-74.)

Respondent does not claim that *Alfaro*'s recognition is inconsistent with *Chadd* or legally unsound. Instead, it contends that the record here is "devoid of facts" showing that appellant sought to plead guilty to accept responsibility and make a case for life at penalty. (RB 27.) That contention must have been difficult to pen in light of the following statements made by appellant:

> I'm pleading guilty, sir. I mean, the only thing is, we have to go for a penalty phase.

(Municipal Court RT 23; RB 19.)

> The guilt of my crime has been weighing heavily on me with a remorseful heart. I would like to offer a change of plea and enter a plea of guilty to murder in the first degree and admit the special

> circumstance[s] and waive all appellate rights at this time.

(Municipal Court RT 159; RB 27.)

> [A] clear and distinct part of my testimony and evidence is the fact of my remorse and confession. It would appear to a trier of fact that I am playing a game by pleading not guilty yet introducing evidence of my confessions of guilt. Just because my attorneys have refused to join my plea pursuant to 1018 does not alter the truth. The truth is that I have attempted to plead guilty and accept responsibility for the 187.

(6 RT 909 see also 3 RT 406-407.) Respondent's contention that the record is "devoid of facts" showing that appellant sought to accept responsibility and make a case for life at penalty is baseless.

If appellant's attempts to plead guilty were *not* intended to accept responsibility and make a case for life at the penalty phase, why then did he thrice attempt to plead guilty? Respondent has two answers: appellant did not want certain information coming out at trial; and he was unhappy with restrictions on his in propria persona status. Each of these post hoc rationalizations is without merit.

Respondent's first contention -- that appellant sought to plead guilty because he did not want certain information coming out at trial (RB 27, 30) -- refers to the in-camera hearing where appellant informed the municipal court that he did not want certain information to come out *at the penalty phase.* However, a desire to keep out penalty-phase information could not logically prompt appellant to plead guilty because, in either case, there was going to be a penalty phase. The contention is flawed.

Respondent's second contention -- that appellant sought to plead guilty because he was unhappy with restrictions on his in propria persona status (RB 27) -- is equally without merit. Appellant initially attempted to plead guilty *before* he discharged counsel; that attempt had nothing to do with restrictions on his in propria persona status. The expressions of unhappiness to which

respondent refers occurred at the January 23 hearing. But even while expressing that unhappiness, appellant made clear that he wanted to plead guilty and have counsel reappointed. (Jan. 23, 1997 RT 21-24, 35-36.) When those requests were not granted, he appeared in another court on January 27, and stated:

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

(Municipal Court RT 159; RB 27.) He made no mention of unhappiness with restrictions on his in propria persona status.

Finally, respondent complains that if appellant had been allowed to plead guilty, "there is no doubt that [he] would be arguing the court erred in doing so . . . ." (RB 29.) That argument, known as "tu quoque," is particularly ironic given that respondent is guilty of the very charge it makes: in *Chadd*, the People argued cogently that section 1018 was unconstitutional. (*People v. Chadd, supra*, 28 Cal.3d at pp. 747-751.)

This Court need not overrule *Chadd* to protect the fundamental interests at stake here. It need only adopt the recognition it made three years ago in *People v. Alfaro*: where, as here, all other requirements for a valid guilty plea are met, a capital defendant's decision to accept responsibility, plead guilty, and make a case for life at the penalty phase implicates constitutionally-protected fundamental interests sufficient to override the consent of counsel requirement in section 1018.

3. Respondent Mistakenly Contends that Only Guilty Pleas Must be Entered Personally by the Accused in Open Court

California law requires a lower court to address its plea inquiry to the defendant, and requires that every plea be entered by the defendant personally and in open court. (§§ 988, 1017 & 1018.) The reason for these requirements is to ensure that the plea entered is the defendant's "own" plea. (*In re Martinez*

(1959) 52 Cal.2d 808, 815.) Here, that assuredly did not occur. The municipal addressed its plea inquiry to defense counsel, counsel entered a not guilty plea, and the court accepted counsel's plea. (AOB 74-75)

Respondent argues that these plea requirements apply solely to *guilty pleas*, and that "section 1018 makes no reference to the manner in which a capital defendant's plea of not guilty may be entered." (RB 32, quoting *People v. Miller* (1934) 140 Cal.App. 241, 244.) It is mistaken. Section 1018 provides that "*every plea* shall be entered or withdrawn *by the defendant himself* or herself in open court." (Emphasis added.) Section 988 states that an arraignment consists of "*asking the defendant*" whether he pleads guilty or not guilty. (Emphasis added.) Respondent's mistake may stem from the fact that the 1934 case upon which it relies involved the 1872 version of section 1018, which was indeed limited to guilty pleas. (*People v. Miller, supra*, 140 Cal.App. at pp. 243-244.) Since at least 1949, however, section 1018 has applied to *all* pleas. (E.g., *In re Martinez, supra*, 52 Cal.2d at p. 813, fn. 3.) [2]

Nor did appellant's entry of a not guilty plea in superior court "moot" the error, as respondent claims. (RB 32.) As argued above, by that time, appellant had thrice attempted without success to plead guilty, and had been informed by the prosecutor that, by law, no court could accept a guilty plea. His entry of a not guilty plea in superior court in superior court was forced upon him, not freely chosen.

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2. The parties disagree over whether appellant objected to counsel's entry of a not guilty plea, or rather to counsel's waiver of the reading of the complaint. (Cf. RB 20; AOB 74-75 & fn. 27.) The dispute makes little difference, however, because the record shows that the municipal court did not follow the statutory plea requirements.

C. Where, as Here, a Capital Defendant Exercises His Right to Discharge Counsel, Section 1018 Cannot Lawfully Require the Consent of Counsel as a Condition for the Acceptance of a Guilty Plea

Section 1018 provides that a guilty plea in a capital case can only be accepted if counsel is present and consents to the plea. If a defendant elects self-representation, and then seeks to plead guilty, the statute still appears to require the consent of counsel. The historical reasons for this anomaly are explained in appellant's opening brief. (AOB 68-69 & fn. 24.) But in the end, the statute withholds from a self-represented defendant a right that is granted to represented defendants, the right to plead guilty as part of a strategy to obtain a life sentence at the penalty phase, and thereby violated, inter alia, appellant's rights under *Faretta v. California* (1975) 422 U.S. 806, and his rights to equal protection. (AOB 77-85.)

Respondent points out that this Court in *Chadd* rejected the state's argument that section 1018 could be read to permit a defendant to discharge his attorney and plead guilty. (RB 33-34.) Appellant, however, has not challenged that portion of *Chadd.* The language of the statute is clear. But it is also constitutionally anomalous: a defendant who exercises his right to proceed without counsel cannot plead guilty unless he has the consent of counsel.

Respondent also quotes a portion of *Chadd* which purported decided the *Faretta* issue in its favor: "*Faretta* does not purport to guarantee a defendant acting in propria persona the right to do any and all things his attorney could have done . . . ." (RB 34, quoting *People v. Chadd*, *supra*, 28 Cal.3d at p. 750.) In *People v. Alfaro*, 41 Cal.4th 1277, however, this Court made clear that *Chadd* "did not consider the Attorney General's contention that section 1018 permits a capital defendant to discharge his or her attorney, represent himself or herself, and enter a guilty plea." (*Id.* at p. 1299, fn. 4.)

Further, the *Alfaro* Court noted, but did not decide, the issue of whether a capital defendant may discharge counsel and have a guilty plea accepted as part of a strategy to obtain a life sentence at the penalty phase. (*Ibid.*) That issue is squarely presented in this case: appellant discharged counsel and attempted to plead guilty at two subsequent proceedings.

Respondent quotes from the high court's opinion in *Edwards v. Indiana* (2008) 554 U.S. 164, 177: "[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." (RB 34.) In *Edwards*, the defendant was not allowed to waive counsel because he lacked the mental capacity to conduct his own defense. In that "exceptional context," the high court concluded, a state may deny the right to self-representation. (*Ibid.*) Appellant, on the other hand, was allowed to act as his own lawyer. Thus, presumably, the lower courts not only concluded that he was competent to do so, but also that his interests in doing so outweighed the government's interest in ensuring the integrity and efficiency of the trial.

In appellant's opening brief, he addressed the government's legitimate interests in capital case guilty pleas. (AOB 83-85.) Assuming that the requirements for a valid guilty plea are met, when a defendant is allowed to accept responsibility, plead guilty, and make a case for life at penalty, the government's legitimate interest in the integrity of the penalty determination is furthered; when he is not allowed to do so, that interest is frustrated. Respondent simply does not explain how permitting a competent capital defendant to discharge counsel and have a guilty plea accepted as part of a strategy to obtain a life sentence at the penalty phase imperils the government's interest in the integrity and efficiency of the trial.

Finally, respondent contends that "this Court has concluded that capital defendants and noncapital defendants are not similarly situated,

consistently holding that the death penalty law does not violate equal protection by denying capital defendants various procedural rights given to noncapital defendants." (RB 34-35.) That is true, but in this case the consent-of-counsel requirement in section 1018 does not deny a right to capital defendants that it grants to noncapital defendants. Rather, it denies a right to certain capital defendants -- the right to plead guilty -- that it grants to other capital defendants. Appellant is within the similarly situated groups affected by the consent-of-counsel requirement in section 1018. (AOB 82.)

D. At the Penalty Phase, the Failure to Permit Appellant to Plead Guilty Distorted His Case for Life

Respondent does not deny that an unconditional guilty plea in a capital case demonstrates a number of significant mitigating factors, including acceptance of responsibility and remorse. Nor does it deny that a not guilty plea in the face of what it refers to as "overwhelming" contrary evidence of guilt will undermine those mitigating factors and adversely affect the defendant's case for life. (AOB 87-91.)

Instead, respondent faults appellant's questioning of certain witnesses, particularly at the guilt phase, as inconsistent with an acceptance of responsibility. (RB 31.) But the questioning of guilt-phase witnesses to ensure that the jury has the full facts is not inconsistent with an acceptance of responsibility or remorse. At the penalty phase, appellant cross-examined a store clerk regarding her victim impact testimony; that cross-examination was legitimate. (See AOB 46 & fn. 42.)

Respondent also contends that appellant was able to testify that he had attempted to plead guilty and accept responsibility, [3] but failed to argue to the

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3. Appellant testified as follows:

I'd like to apologize. From the day that this has happened, I have

Footnote continued on next page . . .

jury "about the import of his attempts to plead guilty and/or accept responsibility." (RB 37.) The latter contention is not true. In his closing argument, appellant stated:

> I haven't blamed anybody else for it, and I've taken responsibility for it, and you can consider that in making your determination of whether I should get the death penalty or life without the possibility of parole.

(16 RT 3205.) Thus, appellant did attempt to argue "the import of his attempts to" accept responsibility and plead guilty.

However, as he argued in his opening brief, appellant's testimony and closing argument conflicted with the trial court's statements to the jurors that appellant had entered a not guilty plea, a statement in the jury questionnaire that appellant had entered a not guilty plea, and the very fact of a guilt phase itself. Respondent makes no mention of that conflict. Nor does it address appellant's arguments that: (1) unlike a plea conditioned on the receipt of a benefit, an unconditional guilty plea is an unequivocal demonstration of acceptance of responsibility; (2) the source and timing of an acceptance of responsibility are important; and, (3) where the evidence of acceptance of responsibility comes from the convicted defendant's own testimony at the penalty phase, jurors are likely to discount or disbelieve such testimony. In this case, the consent-of-counsel requirement distorted the requirement that sentencing jurors be able to give full and meaningful effect to the mitigation

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

(16 RT 3069.)

and the case for life. (AOB 92-94.)

E. The Appropriate Remedy Is to Reverse the Judgment and Return the Proceedings to the Point at Which the Error Occurred

Appellant has argued that this Court should reverse the entire judgment and return the proceedings to the point at which the municipal court first erred: the initial plea proceeding. Alternatively, the death judgment must be reversed due to the adverse effects of the error at the penalty phase. (AOB 76-77, 87-88, 95-96.) Respondent's brief does not reveal a position on the issue.

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2.

APPELLANT WAS DENIED HIS RIGHT TO COUNSEL BECAUSE HIS WAIVER OF COUNSEL IN THE MUNICIPAL COURT WAS INVALID; EVEN IF THAT WAIVER WERE VALID, THE LOWER COURTS ERRED IN FAILING TO GRANT HIS SUBSEQUENT REQUESTS TO HAVE COUNSEL REAPPOINTED

Appellant's waiver of counsel in the municipal court was invalid for two reasons: first, because he was induced to do so by the court's failure to address the conflict between appellant and counsel over the latter's decision to plead guilty; and second, because the court did not inform appellant of the anomalous fact that, even if he discharged counsel, he could not plead guilty without counsel's consent. In addition, appellant's two requests to have counsel reappointed, each made well before trial, should have been granted. (AOB 97-115.)

Respondent contends that the municipal court addressed the conflict, and that appellant's requests for the reappointment of counsel were not unequivocal. (RB 38-50.)

A. The Municipal Court Failed to Address the Conflict Between Appellant and Counsel Over Appellant's Decision to Plead Guilty

A defendant's waiver of counsel is not valid where it is induced by a lower court's failure to address and resolve a serious conflict between the defendant and his or her counsel. (See AOB 100-101.) Here, at the in-camera proceeding, appellant informed the municipal court that he had decided to plead guilty: "I want to waive prelim. I want to go -- I'm pleading guilty, sir. I mean, the only thing is, we have to go for a penalty phase." He also informed the court that his decision had caused a conflict with counsel because they wanted more time to investigate: "They want time to investigate and to check all avenues and all that . . . ." (Municipal Court RT 23.)

Respondent contends that the municipal court addressed the conflict at length (RB 42-43), but it has the confused the two conflicts that were brought

up during the hearing. The conflict with counsel over the penalty phase presentation was briefly discussed. But the conflict at issue here -- appellant's decision to plead guilty -- was not discussed because the court cut appellant off and did not pursue the matter. (See AOB 64-65.)

Respondent contends that appellant "did not once state that his attorneys would not consent to his desire to plead guilty." (RB 43.) That claim is inconsistent with its contention that the conflict was addressed at length. It is also belied by the statements made by appellant at page 23 of the Municipal Court Reporter's transcript. In any event, respondent cannot seriously maintain that the municipal court was unaware of the conflict: appellant informed the court that he was pleading guilty; and moments later, counsel entered a not guilty plea. (Municipal Court RT 23, 28.)

One week after those events -- not four months, as respondent states (RB 43) -- appellant moved to discharge counsel.

Respondent suggests that appellant moved to discharge counsel because he wanted to control his defense. (RB 43.) But at the in camera hearing the week before, appellant stated that he wanted to keep counsel because, in his words, "going pro per [is] tantamount to just executing me." (Municipal Court RT 23-24.) It was the municipal court's failure to inquire into the conflict and counsel's refusal to consent to his guilty plea that resulted in appellant's motion to discharge counsel. (See AOB 98.)

Respondent observes that appellant made no mention at the *Faretta* hearing of a desire to plead guilty, or of a conflict with his attorneys over that desire. There was no reason to. The court was aware of the conflict with counsel over the guilty plea; the issue had been decided the week before; and, at the brief *Faretta* colloquy, the municipal court asked no questions on those

subjects. [4]

Respondent also contends that appellant "made no mention of representing himself as a means of entering a guilty plea that counsel would not otherwise consent to." (RB 44.) Again, the municipal court asked no questions on that subject. More importantly, appellant's attempts to plead guilty after he discharged counsel confirm that he was of that belief. (See §, C, *post.*)

B. The Municipal Court Failed to Inform Appellant That He Could Not Plead Guilty Even if He Were to Discharge Counsel

Appellant's waiver of counsel was also invalid because the municipal court failed to inform him of the anomalous fact that, even if he discharged counsel, he could not plead guilty under section 1018 without counsel's consent. The court was presumptively aware of the law. Appellant's attempts to plead guilty after discharging counsel indicate that he was not aware of that rule. (AOB 101-102.)

Respondent contends that the information in question is mere "technical legal knowledge" that is irrelevant to a court's assessment of whether the accused's waiver of counsel is knowing, intelligent and voluntary. (RB 44, quoting *Faretta v. California* (1975) 422 U.S. 806, 836.) That contention cannot be sustained. *Faretta* advisements must take account of "the risks and complexities of *the particular case.*" (*People v. Riggs* (2008) 44 Cal.4th 248, 276,

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4. The court simply observed that:

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

(Municipal Court RT 34.)

emphasis added, internal quotation marks omitted.) The risk involved here is that a capital defendant who decides to plead guilty but cannot gain counsel's consent may waive his right to counsel in the mistaken belief that his guilty plea could then be accepted. That risk involves the right to the guiding hand of counsel in a capital case. In light of that risk, the failure to inform appellant that his guilty plea could not be accepted without the consent of counsel even if he discharged counsel resulted in a waiver of his right to counsel that was not knowing, intelligent, and voluntary.

C. Appellant's Pretrial Requests to Have Counsel Reappointed Were Not Equivocal and Should Have Been Granted

The right to counsel, once waived, may be reasserted at any time. When the right is reasserted before trial, particularly in a capital case, it should be granted, absent deliberate manipulation. (AOB 108-109 & fn. 35.)

Appellant twice attempted to have counsel reappointed: on January 23 and January 27. His requests were timely, as they were made before the preliminary hearing; and there was no possibility of disruption and no suggestion of manipulation.

Respondent does not dispute these facts. Instead, it contends that appellant's requests for the reappointment of counsel were not unequivocal. (RB 45-48.) The record, however, show no equivocation, as that term is commonly understood. At the July 23 hearing, appellant stated:

> I'd like the Court to take my waiver of rights and schedule me on calendar for Department 5 Superior Court arraignment for schedule for trial for the penalty phase for February 5th and appoint the Public Defender's Office. I've already talked to [Deputy Public Defender] Bob Goss . . . . [Deputy Public Defender] Debra [*sic*] Barnum is willing to take the case on as soon as I plead guilty to the criminal aspect and set for Superior Court arraignment to set for trial for the penalty phase.

(Jan. 23, 1997 RT 21-22.) Moments later, he stated:

> I've spoken with counsel. And like I said, I would drop my pro

> per status and accept the Public Defender's Office to represent me as far as the penalty phase is concerned. And if the Court would take my waiver, I'm making a knowing and knowledgement [*sic*] -- intelligent waiver.

(Jan. 23, 1997 RT 23-24.) Appellant also made the following statement in the same vein:

> [T]he fifth [item on my list] was, you know, waiving my right to represent myself, that I have a right to under the Sixth Amendment, and allowing the Public Defender's Office to retake the case. [¶] I've spoken with Bob Goss, who is a supervisor at the Public Defender's Office who was representing me prior to me going pro per, and he said that the public defender's office -- him, is willing to retake the case under these circumstances.

(Jan. 23, 1997 RT 35-36.) The minute order for the hearing unequivocally states that appellant requested that "the Public Defender be appointed to represent" him. (987.9 July 14 Supp. CT 49.)

Four days later, on January 27, 1997, appellant appeared in a second court. That court should have known that appellant was moving to have counsel reappointed and to plead guilty because the judge who presided over the January 23 hearing directed his clerk to inform the second court of those facts. (987.9 July 14 Supp. CT 49.) In the second court, appellant displayed no equivocation as he stated his desire to plead guilty. But, before he could ask to have counsel reappointed, the prosecutor informed him off and on the record that he could not plead guilty, and suggested that advisory counsel (then denominated as co-counsel) would offer the best possible representation, presumably as compared with the Orange County Public Defender Office. (See AOB 106-108; cf. RB 46-47.) The court, although aware of appellant's requests to plead guilty and have counsel reappointed, did not address them. Instead, it agreed with the prosecutor that appellant could not unilaterally waive the preliminary hearing, and told appellant to come back in a week and decide whether he wanted to waive the preliminary hearing.

(Municipal Court RT 160-162.)

Respondent contends that appellant "should have made an express request to revoke his waiver and pressed for a final ruling." (RB 48, quoting *People v. Lawrence* (2009) 46 Cal.4th 186, 194.) In *Lawrence*, on the first day of trial, the defendant stated that he was having trouble with cross-examination; this Court concluded that the statement was not an equivocal request to for the reappointment of counsel. Here, unlike *Lawrence*, appellant made two express requests to have counsel reappointed; his requests were neither ambiguous nor equivocal; and his requests occurred months before trial. Nor was there a failure to press for a so-called final ruling: the refusal to grant his request for counsel was a final ruling. Further, courts are supposed to protect the defendant's right to counsel, not ignore it. The right does not require repeated requests by the accused, particularly in a capital case, to secure its benefits. One clear request is sufficient; appellant made two.

Respondent claims that appellant's requests were "wholly contingent on his being permitted to plead guilty, and only for the penalty phase." (RB 48.) Yet, the lower courts did not inquire whether appellant's requests to have counsel reappointed were contingent upon acceptance of his guilty plea. The record shows only that he sought to do both. He had a right to do both.

Respondent also mentions that appellant did not renew his request, at least for some time, after the January 27 hearing. (RB 48.) But the violation of appellant's right to counsel was complete when his requests to have counsel reappointed were not granted. The proceedings that occurred thereafter did not "moot" the error. [5]

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5. With regard to the appellant's section 987 claim (the superior court failed to advise him at the arraignment of his right to counsel), respondent contends that Mr. Freeman appeared as co-counsel at the arraignment and stated that appellant would "waive reading and waive advisement." (RB 48-

Footnote continued on next page . . .

D. Reversal of the Entire Judgment Is Required

The absence of a valid waiver of counsel and the failure to grant appellant's requests for the reappointment of counsel require reversal of the entire judgment. (See AOB 111-116.)

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49.) However, three weeks later, the *prosecutor* stated that there had been no waiver of counsel taken at the arraignment. (1 RT 86.) The prosecutor was correct. (AOB 109-111.)

3.
THE TRIAL COURT PREJUDICIALLY ERRED IN PERMITTING THE PROSECUTION TO INTRODUCE STATEMENTS ELICITED FROM APPELLANT DURING CUSTODIAL INTERROGATION IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

Appellant was interrogated on two occasions: first, on June 14, 1996, immediately after his arrest; and second, on August 12, 1996, while he was represented by counsel. With regard to the second interrogation, the issues are joined. With regard to the first interrogation, appellant has argued there was no valid waiver of counsel before or during the questioning, that his subsequent request to call his attorney constituted an invocation of his right to consult with counsel, and that law enforcement failed to honor his invocation of the right to terminate questioning. (AOB 116-144.)

Respondent contends that appellant impliedly waived his rights during the June 14 interrogation, and did not unequivocally invoke his right to consult with counsel during that interrogation. (RB 50-65).

A. The Record Does Not Establish a Valid Waiver of the Right to Counsel, Either Express or Implied

The trial court concluded that appellant "specifically waived his right to have an attorney present before and during questioning as set forth on page 5 of the transcript." (2 CT 491.) On appeal, appellant showed that the court was wrong: there is no express waiver of the right to counsel on that page or anywhere in the record. (AOB 125-126.) [6]

It is telling that respondent does not defend the trial court's express-

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6. Respondent contends that "since the trial court's finding of waiver is supported by substantial evidence, its ruling should be upheld." (RB 57.) However, the court's finding that appellant specifically waived his rights is not supported by substantial evidence. Moreover, a reviewing court determines independently whether the challenged statements were legally obtained. (See *People v. Gamache* (2010) 48 Cal.4th 347, 385.)

waiver conclusion. Instead, it argues that an express waiver is not required (RB 56), and contends that appellant made an *implied* waiver:

> Frederickson elected to discuss the robbery and murder immediately after he was admonished of and had indicated he understood his *Miranda* rights. By his actions, Frederickson made it clear that he wanted to waive his constitutional rights and discuss the incident with the investigators.

(RB 57.)

To establish an implied waiver, the prosecution must show that a waiver can be clearly inferred from the actions and words of the person interrogated. (*People v. Whitson* (1998) 17 Cal.4th 229, 246-250; see AOB 126-127.) Here, respondent is correct that after appellant was admonished, he stated that he understood those rights and began to answer questions. But it is not correct that appellant "made it clear that he wanted to waive his constitutional rights." (RB 57.) Shortly after the admonishments, appellant asked when he could call his lawyer. When told that he could call his lawyer "after we're done in our facility," appellant asked to terminate the questioning: "Can we finish tomorrow?" (1 CT 315-316.) [7]

Appellant's requests distinguish this case from the implied-waiver cases upon which respondent relies. (RB 56-57.) In *People v. Whitson*, *supra*, 17 Cal.4th 229, the defendant never sought to consult with an attorney or indicated that he wished to terminate the questioning. This Court relied upon those facts -- together with the fact that the defendant was admonished, understood his rights and discussed the crime -- in concluding that he impliedly waived his rights. (*Id.* at pp. 249-250.) The two other cases respondent cites -- *People v. Sully* (1991) 53 Cal.3d 1195, 1233, and *People v. Davis* (1981) 29 Cal.3d 814, 823-826 (RB 56-57) -- are to the same effect: as in

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7. The exchange is set forth more fully in section B, *post*.

Whitson, the defendants in those cases did not seek to consult with an attorney or express a desire to terminate questioning. Two implied-waiver cases of more recent vintage are also in accord. (See *People v. Hawthorne* (2009) 46 Cal.4th 67, 88 ["At no time did defendant request the presence of counsel or attempt to terminate the detectives' questioning"]; *People v. Smith* (2007) 40 Cal.4th 483, 503 ["Defendant never requested an attorney or indicated that he wished to end the interview"].)

Here, appellant's requests not only fail to demonstrate a basis from which waiver may be clearly inferred, they are contrary to such an inference. Accordingly, the record does not establish a valid waiver of the right to counsel, either express or implied.

B. Appellant's Expressed Desire to Consult with Counsel and to Terminate Questioning Was Ignored by Law Enforcement

The parties recognize that if a person is subjected to custodial interrogation and wants to invoke the right to counsel, s/he must make some statement that can reasonably be construed as an expression of that desire. If the reference to counsel is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the person might be invoking the right to counsel, then law enforcement is not required to cease questioning. (AOB 127-128; RB 57-58; *United States v. Davis* (1994) 512 U.S. 452, 459.)

Shortly into the June 14 questioning, appellant asked about consulting with his attorney:

> Hey, when am I going to get a chance to call my lawyer. It's getting late and he's probably going to go to bed pretty soon.

The officer could have replied: "Now" or "You can call your lawyer at any time." Instead, he stated: "Your lawyer? Well you can call your lawyer after we're done in our facility." Appellant persisted: "Oh, okay. So what do we got to do in our facility." The officer replied, "Well we're conducting this

interview." Appellant then asked to terminate the questioning:

Can we finish tomorrow?

The officer could have replied: "Yes" or "your can terminate questioning at any time. But he said: "Um, we can continue talking tomorrow however we're not going to continue the interview." Appellant said, "Okay." (1 CT 315-316.)

Appellant has argued that this exchange shows that he invoked his right to consult with counsel and his right to terminate questioning, and that those invocations were not honored by law enforcement. (AOB 129-133.)

Respondent appears to confine its response to appellant's right to counsel claim. (RB 57-59.) However, appellant also argued that he invoked his right to terminate questioning when he asked, "Can we finish tomorrow?" That request was unambiguous, was inconsistent "with a present willingness to discuss the case freely and completely," and was not honored by law enforcement. (AOB 133-135.)

Respondent also attempts to confine appellant's claim to his "lone statement about when he would have a chance to call his lawyer[.]" (RB 58.) It cannot do so. The record shows that appellant made a number of requests during an exchange with the officer; not a lone statement. A reviewing court must consider the whole exchange in addressing the federal constitutional claim. (E.g., *United States v. Davis*, *supra*, 512 U.S. at pp. 444-446; *People v. Jablonski* (2006) 37 Cal.4th 774, 814 [involving a voluntariness claim].)

Respondent is also mistaken when it contends that appellant "gave no indication that he desired representation at any point during the interview." (RB 58.) Appellant asked when he could call his lawyer. When told that he could do so "after we're done in our facility," he asked "Can we finish tomorrow?" (1 CT 315-316.) He would not have asked to finish tomorrow unless he had a then-present desire to call his lawyer. For this reason, the trial

court was incorrect when it concluded that appellant was "desirous of speeding up the interview so he can call his lawyer when the interview was over." (2 CT 491.) Asking to "finish tomorrow" is not a desire to accelerate the questioning; it is a desire to stop the questioning (in this case, so that appellant could consult with his lawyer). [8]

Further, the record suggests that the officer understood appellant's requests as an invocation of his rights. When appellant asked whether they could finish tomorrow, the officer responded, "Um, we can continue talking tomorrow however we're not going to continue the interview." In other words, the officer was aware that if appellant were allowed to consult with his attorney, the questioning could not lawfully continue. The record also shows that the officer gave misleading and inaccurate responses to appellant's requests. (AOB 131-133.)

Respondent contends that appellant's requests were "more ambiguous and equivocal than statements deemed ambiguous and equivocal in other" custodial interrogation cases. (RB 58-59.) Of the ten cases it cites, however, four involved whether the suspect exercised his right to remain silent. Respondent does not explain how or why the facts in those cases are similar (or not) to this case, or why such cases are relevant to a request to consult with counsel. In any event, none of respondent's right-to-remain-silent cases is relevant to appellant's claims. [9]

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8. Neither the trial court nor respondent attaches any significance to appellant's reply of "Okay" during the exchange with the interrogating officer. Rightly so: that nonsubstantive response merely "implie[s] that the defendant understood what he heard . . . ." (*People v. Stitely* (2005) 35 Cal.4th 514, 536.)

9. In *People v. Stitely*, *supra*, 35 Cal.4th 514, the statement "I think it's about time for me to stop talking" was made out of frustration and the defendant agreed on appeal that it was ambiguous. (*Id.* at pp. 534-535.) In *People v. Jennings* (1988) 46 Cal.3d 963, the defendant made a number of statements to

Footnote continued on next page . . .

The six remaining cases cited by respondent address whether the right to counsel was invoked during custodial interrogation, but none involved the requests made by appellant: "When can I call my lawyer," and "Can we finish tomorrow?" Appellant briefly discusses each of those cases, as language and context are important in custodial interrogation claims.

In *People v. Thompson* (1990) 50 Cal.3d 134, the defendant said: "I was told by the Public Defender . . . not to talk at all. . . . I don't even think I should be talking now [.]" (*Id.* at p. 160, ellipses in original.) This Court concluded that the statement was simply an explanation of why he was willing to proceed without counsel and was "not even an equivocal assertion of the right to counsel." (*Id.* at pp. 165-166.) Here, appellant was not giving an explanation, but making requests. Further, law enforcement in *Thompson* twice offered to terminate the discussion, but the defendant refused. In this case, the officer did not offer to terminate the questioning and it continued. Further, the officer gave misleading and inaccurate responses to appellant's requests. (AOB 131-133.)

In *People v. Roquemore* (2005) 131 Cal.App.4th 11, the court of appeal concluded that the defendant's statement -- "Can I call a lawyer or my mom to

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the effect of "that's it, I shut up"; however, they too were made out of momentary frustration and anger. (*Id.* at pp. 977-978.) Here, there is no evidence that appellant's requests were made out of frustration or anger, or for any reason other than to consult with his lawyer.

In *People v. Silva* (1988) 45 Cal.3d 604, although the defendant said "I don't know. I really don't want to talk about that," the trial court concluded from listening to the audiotape that there was no intimation of a desire to terminate the interrogation. (Id. at pp. 629-630.) In *People v. Ashmus* (1991) 54 Cal.3d 932, the defendant's statement "I ain't saying no more," when viewed in context, was evidently intended to alter the course of the questioning, not stop it. (*Id.* at pp. 968-970.) Here, there is no evidence that appellant desired to alter the course of questioning; and there was more than an intimation of a desire to stop the interrogation.

talk to you?" (*id.* at p. 19) -- when considered in light of other statements, merely indicated that he was confused, not that he was invoking his right to counsel (*id.* at pp. 23-25.). Appellant's questions (when can I call my lawyer" and "Can we finish tomorrow") evinced no confusion about his desire to consult his counsel.

In *People v. Scaffidi* (1992) 11 Cal.App.4th 145, the defendant stated that he wanted to confess and asked, "There wouldn't be [an attorney] running around here now, would there? . . . . I just don't know what to do." The court of appeal concluded that these statements indicated indecision as to whether he wanted to assert his right to counsel, and noted that law enforcement tried to determine whether he really wanted to assert that right. (*Id.* at pp. 153-155.) Here, appellant already had a lawyer, his requests were not indecisive or confusing, and law enforcement did not try to determine whether appellant was asserting his right to counsel.

In *People v. Crittenden* (1994) 9 Cal.4th 83, the defendant, who had been disruptive, was admonished of his rights and immediately asked, "Did you say I could have a lawyer?" The officer told him, "yes, if he wanted one." The defendant did not respond. (*Id.* at pp. 123-124.) This Court agreed with the trial court's conclusion that the defendant simply wished to ascertain whether he had heard the officer correctly, and did not constitute an invocation of his right to counsel. (*Id.* at pp. 128-131.) Here, appellant's question -- when can I call my lawyer -- indicates that he heard the admonishments correctly. Nor did the officer in this case give an immediate (or any) repetition of the admonishments.

In *People v. Johnson* (1993) 6 Cal.4th 1, [10] the defendant stated: "Maybe I

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10. *Johnson* was disapproved on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879.

ought to talk to a lawyer, you might be bluffing, you might not have enough to charge murder." (*Id.* at p. 24.) This Court found this issue to be somewhat troubling, but concluded that the right to counsel had not been invoked because the reference to an attorney was tentative, law enforcement immediately attempt to clarify the defendant's remark, and he refused to respond. (*Id.* at pp. 28-30.) Here, there were no equivocal words such as "maybe." Appellant made two clear and simple requests. And again, law enforcement made no effort to clarify those requests, and in fact gave misleading and inaccurate responses to the requests.

Finally, in *People v. Clark* (1993) 5 Cal.4th 950, [11] the defendant expressed some confusion and asked, "what can an attorney do for me?" (*Id.* at p. 990.) This Court concluded that the question was rhetorical. Moreover, Clark repeatedly explained that he did not feel that a lawyer could assist him since he was guilty. (*Id.* at pp. 990-992.) Appellant's questions, by contrast, were not rhetorical; they were not statements in the guise of questions. Rather, they were direct requests to consult with his lawyer and to terminate questioning.

The one constant in the cases cited by respondent is that none of those defendants asked the questions or made the request that appellant made here. Cases involving language similar to appellant's are discussed in appellant's opening brief. (AOB 129-130.) They are not addressed in respondent's brief.

In sum, the record shows that a reasonable police officer would have understood that appellant sought to consult with counsel and to terminate questioning. His invocation of those rights was not honored.

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11. *Clark* was disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22

C. The Wholesale Use of Appellant's Illegally Obtained Confession Contributed Substantially to the Verdict and Was Not Harmless

Respondent recognizes that it must prove beyond a reasonable doubt that the error was harmless. (RB 64.) In this context, the state must prove that the error did not contribute to the verdicts. (AOB 140-141.)

To meet this standard in any case where a confession is unlawfully admitted should be a formidable challenge. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 296.) To meet it here is nigh impossible because the error resulted in the admission of a confession that consisted of numerous and highly-damaging statements that related to the charged crime and special circumstance. And, those statements figured pervasively in every aspect of the prosecution's case, at guilt and at penalty. (AOB 141-144.)

Respondent does not address the pervasive and damaging effects that resulted from the error. Instead, it contends that the evidence was overwhelming that appellant killed the victim during an attempted robbery. (RB 64-65.)

Although it is true that appellant conceded that he killed the victim, the parties contested whether the killing constituted felony murder and whether the sole special circumstance was true. Further, the trial court's instructions on those issues erroneously directed a finding and nullified appellant's defense. (See Args. 7 & 8, *post.*) Respondent cannot deny that the ill-gotten confession contributed, and contributed substantially, to the guilt verdict, the special circumstance finding, and the death verdict. Accordingly, the judgment must be reversed.

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4.
THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO SUPPRESS EVIDENCE REGARDING THE SEARCH AND THE SEIZURE OF ITEMS FROM APPELLANT'S HOME

Appellant was arrested on a public street after an unnamed informant identified him as the perpetrator. Shortly thereafter, Corporal Reese searched appellant's camper (located on his grandparents' property) and seized a pistol that was under a blanket. The pistol was the putative instrument of the crime.

On the first day of trial, as Reese began testifying, appellant objected that the search was conducted without a warrant, and moved to strike the testimony and suppress the evidence obtained from the search. He argued that the motion was timely and that the search violated the Fourth Amendment. At trial, the prosecutor argued that the motion was untimely, and that a warrant was not required because appellant was on parole at the time of the search. The trial court denied the motion. (AOB 145-157.)

On appeal, respondent agrees with the two arguments made by the prosecutor below, and adds a third (inevitable discovery). (RB 66-70.) Each is without merit.

A. The Suppression Motion Was Timely

Under section 1538.5, subdivision (h), a suppression motion first raised at trial is untimely if the defendant knew or should have known of the grounds for the motion before trial. The issue here is whether appellant should have known before trial that Reese seized the pistol without a warrant. (AOB 149-152.)

In answering that question, the trial court focused on whether any of the discovery provided to appellant mentioned a warrant in connection with Reese's warrantless search. The prosecutor informed the court that Reese's report, which appellant stipulated having received during discovery, made no mention of a warrant. The court asked whether there was "any discovery at all

that would indicate that the gun was taken during the . . . execution of the search warrant?" The prosecutor replied in the negative. The prosecutor also informed the court that the "return" to the search warrant, which was executed one week after the warrantless search, did not state that Reese's search was made by warrant. (AOB 145-148; RB 67.) Appellant denied having seen the return. [12]

Based on the prosecutor's statements, the trial court concluded that appellant should have known that Reese seized the pistol without a warrant:

> If there's nothing in any of the discovery to indicate that the weapon was taken during a search pursuant to a warrant, I'm somewhat confused as to how you would not be aware that it was taken by Corporal Reese during his search of the camper.

(8 RT 1396.) In other words, since the discovery did not mention a warrant when discussing Reese's search, appellant should have known that the search was warrantless. [13]

The trial court's conclusion cannot be sustained. The fact that the discovery (some of which appellant may not have received) did not mention a warrant when discussing Reese's search is not a sufficient basis for concluding that appellant should have known that Reese's search was conducted without one. The absence of the word "warrant" in a report relating to a search supports two reasonable but different inferences: either the officer had a

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12. At the hearing, the prosecutor did not have a copy of the return, but was given one by an officer. Appellant denied having seen the return, and asked the prosecutor whether he was contending that it "was part of the discovery?" The prosecutor replied, "I frankly do not know where that page is or was." (8 RT 1395.)

13. Contrary to respondent's contention, the trial court did not conclude that the discovery "clearly indicated that the gun was found during a warrantless search." (RB 68.) The court concluded that the discovery did not mention a warrant.

warrant and simply did not mention it; or the search was without a warrant. Appellant was in propria persona. He should not be sandbagged for failing to discern that the absence of the word "warrant" in discovery related to Reese's search meant that Reese seized the pistol without a warrant. (AOB 151-152.)

B. Respondent Has Not Shown That the Warrantless Search of Appellant's Home Was a Valid Parole Search

Respondent contends that the warrantless search was a valid parole search. (RB 68-69.) The record on that issue is cursory: the prosecutor stated that Reese's search was conducted pursuant to a parole search and with the participation of appellant's parole agent; appellant conceded that he was on parole, at least until the time of his arrest; and, after the hearing, the trial court read an excerpt from one of this Court's opinions -- *People v. Burgener* (1986) 41 Cal.3d 505, 536 -- regarding parole searches. (8 RT 1389-1391, 1413.)

Respondent argues that the search was valid because it was conducted by appellant's parole officer on the day of appellant's arrest, was part of a murder investigation, and had a proper parole supervision purpose. (RB 69.)

A warrantless search of a person's home is unreasonable unless the People justify the search under an exception to the warrant requirement. (AOB 153-154.) Both this Court and the high court have held that a valid parole search is such an exception. (See *Samson v. California* (2006) 547 U.S. 843, 846-847; *People v. Reyes* (1998) 19 Cal.4th 743, 753-754.) However, those cases were premised on the fact that the defendant was subject to a search condition as a condition of parole. In *Samson*, the parolee was subject to section 3067, subdivision (a), which provides that a parolee "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." (*Samson*, at pp. 851-852.) In *Reyes*, the defendant had signed a parole agreement that included a search condition. (*Reyes*, *supra*, at p. 746.) In *People v. Stanley* (1995) 10 Cal.4th 764, 790, the case cited by

respondent, the defendant "had acceded to the condition that he and his residence and any property under his control may be searched without a warrant by" law enforcement. (*Id.* at p. 789, fn. 5.) The existence of a search condition significantly lessens a parolee's expectation of privacy in his person and home, and justifies a warrantless search thereof. (See *People v. Sanders* (2003) 31 Cal.4th 318, 332-333 [when subject to a search condition, a parolee's expectation of privacy is diminished, but not eliminated].)

Here, no evidence was presented that appellant's home was subject to a search condition. Respondent observes that the prosecutor "did not introduce the fact of Frederickson's parole because of potential prejudice." (RB 68.) At the suppression hearing, however, the jury was not present. (8 RT 1389.) Thus, there was no impediment to the prosecutor introducing evidence regarding the conditions of appellant's parole.

Moreover, section 3067, subdivision (a), does not apply as it did in *Samson* because it is limited to offenses committed on or after January 1, 1997 (§ 3067, subd. (c)), and appellant's parole-related offense occurred well before that date. Nor was there any evidence that appellant signed a search-condition agreement, as in *Reyes* and *Stanley*, or that he otherwise acceded to or agreed to a warrantless search of his home. Without that evidence, the trial court could not make a full and fair determination that the search was a valid parole search. (AOB 153.)

Further, even when a parolee is subject to a search condition, a warrantless parole search is not valid if it is arbitrary or capricious. (*Samson v. California*, *supra*, 547 U.S. at p. 856; *People v. Reyes*, *supra*, 19 Cal.4th at p. 752.) A parole search is arbitrary or capricious when the motivation for the search is unrelated to the twin purposes of parole: to ensure compliance with the law while on probation or parole; and, second, to ensure compliance with the terms of probation or parole. (See *Reyes*, at pp. 753-754.) Here, the trial court

took no evidence on the reasons why the search was conducted without a warrant.

Finally, respondent contends that appellant was still on parole after the arrest, and presumably one week after the arrest. Yet, no evidence was introduced as to why law enforcement deemed it necessary, one week after his arrest, to obtain a warrant to search his home.

C. Respondent's Newly-Advanced Inevitable Discovery Claim Has Been Forfeited and, in Any Case, the Exception Does Not Apply

On appeal, the standard of review for appellant's Fourth Amendment claim is that set forth in *Chapman v. California* (1968) 386 U.S. 18, 24, not the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836-837, as respondent contends. (Cf. AOB 155-156; RB 70.)

Respondent claims that the error is harmless because the pistol would have been inevitably discovered during the search of appellant's home pursuant to a warrant one week after the warrantless search. (RB 70.) The People, however, did not present that theory to the lower court. Thus, the claim is forfeited:

> If the People had other theories to support their contention that the evidence was not the product of illegal police conduct, the proper place to argue those theories was on the trial level at the suppression hearing. The People offered no such argument at that hearing and may not do so for the first time on appeal

(*Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640-641.) If the claim is not forfeited, then appellant has been denied the opportunity for a full and fair hearing on his suppression motion because he had no notice of the newly advanced theory and thus no opportunity to present evidence and argument in opposition thereto. (U.S. Const., 4th & 14th Amends.; see *Stone v. Powell* (1976)

428 U.S. 465, 482-483; *People v. Hansel* (1992) 1 Cal.4th 1211, 1219-1220.) [14]

In any event, respondent's newly-advanced inevitable discovery claim fails on the merits. Its claim is based on the surmise that the pistol would have been discovered during the search conducted pursuant to a search warrant. (RB 70.) But that search occurred one week after the warrantless search, was supported by the items seized during the warrantless search, and was obtained by use of appellant's unlawfully obtained confession. (AOB 153-155.) Thus, the search by warrant was not genuinely independent of, nor wholly unrelated to, the earlier tainted search, as is required to establish an inevitable discovery claim. (See *Murray v. United States* (1988) 487 U.S. 533, 542-543.)

Respondent also contends that the error was harmless because the evidence of guilt was overwhelming. (RB 70.) That argument fails for the same reason that it fails in Argument 3: the error resulted in the admission in evidence of the putative instrument of the crime. That evidence was plainly important and damaging, and was used by the prosecution throughout trial. Thus, the error contributed substantially to the verdicts and reversal of the judgment is required. (AOB 155-157.)

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14. This Court has at times addressed an inevitable discovery claim first raised on appeal. (E.g., *People v. Robles* (2000) 23 Cal.4th 789, 801, fn. 7.) But it does so only where there does not appear to be any further evidence that could have been introduced to defeat the theory in the trial court. (*Green v. Superior Court* (1985) 40 Cal.3d 126, 137-138 (lead opn. of Kaus, J.).) Respondent does not argue that such is the case here. For instance, evidence could be introduced to show that there was no search condition, that the search was arbitrary or capricious, and why law enforcement believed it necessary to obtain a search warrant for the second search.

5.
APPELLANT'S RIGHT TO OBTAIN AND PRESENT MATERIAL EVIDENCE WAS VIOLATED WHEN THE TRIAL COURT REFUSED TO REQUIRE A REPORTER WHO TESTIFIED AT GUILT AND PENALTY TO DISCLOSE THE NOTES OF HER JAILHOUSE INTERVIEW OF APPELLANT, OR, IN THE ALTERNATIVE, TO STRIKE HER TESTIMONY

A newspaper reporter, Marla Fisher, testified for the prosecution at the guilt and penalty phases regarding a number of highly-damaging statements purportedly made by appellant during a jailhouse interview she conducted with the morning after his arrest. The trial court rejected appellant's attempts to obtain Fisher's notes of her interview. In his opening brief, appellant argued that the court erred under, inter alia, California's press-shield law. (AOB 158-179.)

Respondent concedes that the trial court erred in failing to require Fisher to affirm whether the notes existed. And it also concedes that if the notes did exist, the court erred in failing to review them. Nevertheless, it contends that the error was harmless or, in the alternative, that a limited remand is required. (RB 70-77.)

A. Respondent Concedes That the Trial Court Erred

The parties agree that the record is not clear as to whether the reporter's notes existed and, if so, what they contained. (RB 75-76; AOB 177.) [15] The reason for this lacunae is that the trial court erred in failing to conduct an in-camera hearing on those issues. Respondent agrees:

> if Fisher did indeed have notes from her interview, the court

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15. There are indications in the record that Fisher did in fact possess notes of her interview. She never denied that the notes existed. At a pretrial hearing, when asked whether an answer would be in her notes, she replied "unlikely." (3 RT 343-344.) At the penalty phase, when appellant asked whether she had reviewed her notes and article since her guilt-phase testimony, she replied, "No, I haven't." (14 RT 2576.)

> should have conducted an in camera review of the notes to determine whether any discoverable information existed, and whether Frederickson's interest in the information was such that the immunity from contempt granted to newspersons by the shield law should yield to Frederickson's right to a fair trial.

(RB 76.)

Thus, the parties agree that (1) appellant made the required showing of a reasonable possibility the information would materially assist his defense; (2) the trial court erred in failing to require the reporter to affirm whether the notes existed; and (3) if the notes did exist, the trial court erred in failing to review them. (See AOB 169-174.)

The result, in respondent's words, is that it is now "impossible to determine whether the trial court properly ruled" when it refused to order disclosure of the notes. (RB 75-76.) In other words, Fisher's notes may have contained information material to the defense.

B. <u>The Conceded Error Requires Reversal of the Judgment</u>

Appellant argued that the error was not harmless beyond a reasonable doubt. (AOB 177-179.) Respondent contends that even *without knowing* what the notes contained, this Court has the ability to determine that the error was harmless. (RB 76-77.) The suggestion is contrary to logic and fairness: a reviewing court cannot perform the weighing process required under state and federal law if it does not know the weight on one side of the scales. Guessing that the notes contained nothing material to the defense is not consistent with the accurate and reliable prejudice determination required under state and federal law. (See *Rosenberg v. United States* (1959) 360 U.S. 367, 371 ["An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled"].) Further, in a capital case, appellate review can hardly be meaningful on a record that is materially incomplete or inaccurate with respect to a claim. (See *Dobbs v. Zant* (1993) 506 U.S. 357, 357-359; *People v.*

Hawthorne (1992) 4 Cal.4th 43, 63.)

Respondent's claim that no prejudice is "conceivable" (RB 70) is extravagant given that it has no earthly idea what the notes contain. At trial, appellant averred that the notes were material to his defense in several ways: to impeach the reporter's credibility, to attack the special circumstance, and to establish relevant mitigation, particularly remorse and acceptance of responsibility. (2 CT 548-549; see AOB 160.) The trial court did not disagree; respondent ignores the matter.

Nonetheless, in the event this Court decides that it can perform the constitutionally-mandated weighing process without knowing whether the notes contained information material to the defense, it should consider that the trial court's error (including its failure to grant appellant's motion to strike Fisher's testimony) placed before the jury at the guilt and penalty phases numerous highly-damaging statements purportedly made by appellant. (See RB 71.) Further, those statements were admitted without the opportunity for full cross-examination because, contrary to respondent's suggestion, appellant was not allowed to cross-examine Fisher "about *all* aspects of the interview." (RB 76, emphasis added.) He was precluded from cross-examining her about her contemporaneous notes, which were undoubtedly an "aspect" of the interview. To compound the error, the prosecutor repeatedly utilized the highly-damaging statements during both his guilt and penalty phase closing arguments. (AOB 177-178.) Thus, there is no doubt that the error contributed to the guilt verdict, the special circumstance finding, and the death verdict. Under any standard of review, outright reversal is required. [16]

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16. Respondent contends that appellant could have testified to "any discrepancies or inaccuracies he perceived in Fisher's testimony." (RB 76.) Putting aside the fact appellant did not testify at the guilt phase, the contention misapprehends the importance of cross-examination and the

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Alternatively, respondent contends that the matter should be remanded to the trial court to review the reporter's notes and to determine whether they contain "any discoverable information." (RB 77; § 1260.) This Court has ordered a limited remand in other situations. (E.g., *People v. Gaines* (2009) 46 Cal.4th 172, 180-181 [limited remand for discovery hearing]; *People v. Moore* (2006) 39 Cal.4th 168, 174-175 [limited remand for suppression hearing].) But the passage of time here (14 years) is such that a remand would likely be ineffectual to vindicate appellant's rights.

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meaning of the right to present a full defense. (AOB 164-166, 174 & fn. 48.)

7.
THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT AN ATTEMPTED ROBBERY IS STILL IN PROGRESS FOR PURPOSES OF FIRST DEGREE FELONY MURDER UNTIL WELL AFTER THE FELONY IS COMPLETE AND UNTIL THE PERPETRATOR HAS REACHED A PLACE OF SAFETY

Appellant was alleged to have committed an *attempted* robbery when he asked the manager for the money and displayed a pistol. The attempt failed when the manager ignored the request and walked away. Appellant, frustrated, shot the manager and fled from the store without the money.

That evidence may have been sufficient to show that the felony and the killing were part of a continuous transaction, as is required for felony-murder liability. But it is one thing to conclude that the evidence is sufficient to show a continuous transaction, and another to instruct the jury that, by law, the commission of the felony continued until well after the attempted robbery had failed.

The trial court here erred when it followed the second course: it instructed the jury that the commission of the underlying felony -- attempted robbery -- continued until after that attempt had failed, indeed until after appellant left the store. (CALJIC No. 8.21.1.) The instruction effectively directed a jury finding on the key disputed issue in the case, i.e., whether the attempted robbery and killing were part of one continuous transaction for purposes of first degree felony murder, and nullified appellant's defense on that issue. (AOB 185-196.)

Respondent contends that the claim is forfeited, that the instruction was both proper and unnecessary, and that appellant's view of the evidence is contrary to logic. (RB 80-83.)

A. <u>The Felony Murder Instructional Claim Is Reviewable on Appeal</u>

Respondent claims that the instructional claim is forfeited because

appellant failed to object to, "even when specifically given the opportunity by the court to do so." (RB 80.) However, appellant did object when the prosecutor first submitted the instruction, after which the instruction was withdrawn. (8 RT 1483-1484, 1492.) Several days later, the trial court inexplicably asked whether there was any objection to the withdrawn instruction. Only then did appellant, on trial for his life and unrepresented by counsel, reply, "No, Sir." (8 RT 1579.)

Respondent urges forfeiture based on the second event. [17] As appellant has argued, however, the claim is reviewable under section 1259, which permits this Court to address, even in the absence of an objection, an erroneous instruction that affects a defendant's substantial rights. (AOB 187-188, fn. 52.) This Court has not been chary in its application of that section, particularly where the instruction concerns the murder count in a capital case. (E.g., *People v. Watson* (2008) 43 Cal.4th 652, 687; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503 ["Instructions regarding the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review"].)

Respondent presents no discursive argument as to why section 1259 should not apply here, but merely cites to *People v. Harris* (2008) 43 Cal.4th 1269, where this Court refused to apply that section. *Harris*, however, involved a trivial instructional error (a failure to change the term "prisoner" to "person" in the written version of escape instructions) that "did not even arguably affect [the defendant's] substantial rights." (*Id.* at p. 1313) Here, the

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17. Respondent does not contend that the error was "invited" by the defense. The invited error doctrine does not apply unless the defense intentionally caused the trial court to err and did so for tactical reasons. (See *People v. Dunkle* (2005) 36 Cal.4th 861, 924, disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22).

instructional error relates to the elements of the capital count, which is not trivial under any reasonable view, and, if meritorious, affected appellant's substantial rights: to wit, his liability for first degree felony murder.

B. CALJIC No. 8.21.1 Erroneously Directed a Finding on the Key Disputed Issue in the Case: Whether the Attempted Robbery and Killing Were Part of One Continuous Transaction

Section 189 defines first degree felony murder as a killing "committed in the perpetration of, or attempt to perpetrate" an underlying felony. This Court has construed that language to mean that the felony and killing were "part of one continuous transaction." (*People v. Young* (2005) 34 Cal.4th 1149, 1175.) Whether the felony and killing are part of one continuous transaction is a question for the jury. (*People v. Sakarias* (2000) 22 Cal.4th 596, 623-624.)

In this case, the jury was not instructed either with the statutory language ("committed in the perpetration of, or attempt to perpetrate") or this Court's description of that requirement ("one continuous transaction"). Instead, it was first instructed first with CALJIC No. 8.21 that:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, *which occurs during the commission or attempted commission of the crime of robbery is murder of the first degree* when the perpetrator had the specific intent to commit that crime. . . .

(10 RT 1976-1977; 3 CT 776; emphasis added.) It was then instructed with CALJIC No. 8.21.1:

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

(10 RT 1981-1982; 3 CT 790; emphasis added) The first instruction explained

that the jury must determine whether the killing occurred during the commission of an attempted robbery; the second instruction -- CALJIC No. 8.21.1 -- directed the jury that an attempted robbery is still in commission until well after it has failed. The second instruction effectively directed a jury finding on the key disputed issue in the case, i.e., whether the attempted robbery and killing were part of one continuous transaction for purposes of first degree felony murder, and nullified appellant's defense on that issue. (AOB 189-191.) [18]

Respondent urges that CALJIC No. 8.21.1 was proper simply because "the People argued that" appellant killed the victim while engaged in the attempted robbery. (RB 81.) But the fact that the People made that argument says nothing about whether CALJIC No. 8.21.1 was proper in this case. If an instruction is erroneous, then the prosecutor's reliance on it in closing argument exacerbates the effect of the error. (See *People v. Hayes* (2009) 171 Cal.App.4th 549, 561.) Respondent also argues, somewhat inconsistently, that CALJIC No. 8.21.1 was "unnecessary." (RB 82.) The prosecutor did not believe so when he first offered the instruction. Moreover, once a trial court decides to give an instruction, it must do so correctly. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.)

Respondent's next contention approaches the heart of the issue:

> Contrary to all logic, Frederickson argues the evidence showed the attempted robbery and murder were two completely separate crimes, but that CALJIC No. 8.21.1 erroneously directed the jury that the attempted robbery was still in progress when he shot Wilson.

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18. Appellant did not concede in his opening brief that CALJIC No. 8.21.1 is "a proper instruction." (See RB 80.) He observed that the instruction "may be" appropriate under certain circumstances, and argued that it was inappropriate in this case. (AOB 189-191.)

(RB 81.)

Before addressing that argument, appellant notes that more than half a century ago, the high court noted that "juries are not bound by what seems inescapable logic to judges." (*Morissette v. United States* (1952) 342 U.S. 246, 276.) That observation holds true where, as here, it is respondent to whom the logic is inescapable.

Appellant has not, and does not, claim that the attempted robbery and killing were two "completely separate crimes." The crimes were related temporally and spatially. But appellant's defense was that the jury should consider other factors in determining whether the shooting was part of a continuous transaction for purposes of felony-murder liability. (See CALCRIM No. 549 [defining one continuous transaction for purposes of felony murder].) First, the killing could not have furthered or advanced the attempted robbery because it occurred after that attempt had failed and appellant ran out of the store empty-handed. This Court has held that first degree felony murder does not require that the killing further or advance the underlying felony, so long as some logical nexus existed between the two. (*People v. Cavitt* (2004) 33 Cal.4th 187, 198.) But if the killing does not further or advance the felony, then that is a factor that the jury must consider in determining whether the prosecution has proved the continuous transaction requirement beyond a reasonable doubt. Second, appellant shot the victim out of frustration: that fact was relevant to determining whether the continuous transaction requirement was met because it attenuates the logical connection between the attempted robbery and the killing. [19] Third, the jury

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19. Respondent categorically denies that appellant shot the victim "out of frustration." (RB 83.) It is not so categorical in its response to Argument 8:

> Frederickson admitted that because Wilson did not follow his command to "put the money in the bag," and instead "just closed

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could reasonably have concluded that an intent to steal no longer existed when appellant shot the victim. Under these circumstances, a reasonable juror could have concluded that the prosecution had not proved the continuous transaction requirement beyond a reasonable doubt.

This Court need not rely on appellant's word that his defense to the felony murder theory was logical: the prosecutor who tried the case did not once state that the defense was illogical. In his opening argument, he immediately addressed the issue of whether the attempted robbery was in progress when the victim was killed (10 RT 1993-1997), and frankly acknowledged that the defense theory was "at the forefront of this case" (10 RT 1998).

The prosecutor's response to that defense was that CALJIC No. 8.21.1 decided the issue:

> Let's go to the second rule that's important in this case. When is an attempted robbery in progress? When is it completed? That's an important rule. And the judge already read this to you, so I'm going to do this again to highlight this rule. [Prosecutor reads CALJIC No. 8.21.1.]
>
> Now, this explains how far and wide this course of attempted robbery is defined. Likewise, it is still in progress so long as immediate pursuers are attempting to capture the perpetrator. Attempted robbery is complete when the perpetrator had eluded any pursuers and has reached a place of temporary safety.

(10 RT 1996.)

> the safe and started walking away," Frederickson got "mad" and "frustrated," so he shot him.

(RB 86.) Moreover, the prosecutor argued that "when [appellant] was frustrated -- when he was frustrated, when Scott Wilson closed the safe," that was when he shot the victim." (10 RT 2049-2050.) Similarly, the trial court, in its section 190.4 ruling, explicitly found that appellant "became frustrated with not receiving any money, so he [shot the victim.]" (16 RT 3235.)

The prosecutor then observed that "[s]ome of you must have been wondering, wasn't the attempted robbery complete at the time that, say, the safe was closed?" His answer was not that such a theory was illogical, but rather that the answer was dictated by CALJIC No. 8.21.1:

> No. You see, an attempted robbery is complete when the perpetrator has eluded any pursuers and has reached a place of temporary safety. . . . When he reached some destination where he had eluded the captors, that's when the attempted robbery, by law, is closed. . . . ¶ . . . Hopefully that's clear. That's the law. That's the law that the judge has given to you."

(10 RT 1996.) In his closing argument, the prosecutor could not have been more plain that CALJIC No. 8.21.1 decided the issue as a matter of law:

> And we know that from this instruction that the attempted robbery does not cease until he, Mr. Frederickson, has gone to a place of temporary safety, and that's a long ways away from Home Base.

(10 RT 2049.)

The issue here is similar to that presented in *People v. Sakarias*, *supra*, 22 Cal.4th 596. In *Sakarias*, the trial court instructed that "if the jury finds that the defendant committed burglary by entering the house with the intent to steal, the homicide and the burglary are parts of one continuous transaction." (*Id.* at p. 623.) This Court found error:

> Even where substantial evidence supports such a finding, it is for the jury to decide whether or not the murder was committed "in the perpetration of" (§ 189), or "while the defendant was engaged in . . . the commission of" (§ 190.2, subd. (a) (17)), the specified felony. By its answer to the jury's question, the trial court in this case effectively removed that factual issue from the jury's consideration.

(*Id.* at p. 624, ellipses in original.) In other words, it is one thing to conclude that the evidence is sufficient to show a continuous transaction, but another to instruct the jury that the evidence conclusively shows that requirement. The second approach, the one followed by the trial court here, is constitutional

error. (*Id.* at pp. 624-625.)

Respondent counters that *Sakarias* is distinguishable because nothing in CALJIC No. 8.21.1 "directed the jury to find that the killing occurred during the commission of an attempted robbery." (RB 82.) But the instruction clearly states that the attempted robbery felony "is still in progress" during the shooting and until well after appellant fled, as the prosecutor's arguments confirm. Instructing the jury that the attempted robbery "is still in progress" at the time of the shooting is no different than instructing the jury that the shooting occurred during the commission of the attempted robbery. The prosecutor recognized that, which is why he argued that the instruction nullified appellant's defense.

Finally, respondent contends that CALJIC No. 8.21.1 simply described the "escape rule" which:

> "defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony, by deeming the felony to continue until the felon has reached a place of temporary safety."

(RB 82, quoting *People v. Cavitt*, *supra*, 33 Cal.4th at p. 208.) *Cavitt*, however, involved a completed robbery, not a failed attempt. More importantly, this Court in *Cavitt* did not decide whether the escape instruction in that case was accurate:

> There is case support for the proposition that, under the escape rule, a felony continues as long as any one of the perpetrators retains control over the victim or is in flight from the crime scene. We need not decide whether this instruction accurately states the law in California, however, because we find that any error could not have prejudiced [the defendant].

(*Id.* at p. 209, citations omitted.) And, although this Court has stated that while the continuous transaction requirement "may" include a defendant's flight after the felony to a place of temporary safety (*People v. Young*, *supra*, 34 Cal.4th at p. 1175), it has not held that a trial court is permitted to instruct the

jury that, as a matter of law, an *attempted* robbery continues and is in commission after it has failed and until the defendant reaches a place of temporary safety. Under *Sakarias*, a court could not do so because that is an issue for the jury to decide.

Given the categorical language in CALJIC No. 8.21.1, and the prosecutor's emphatic reliance on that instruction, it is almost certain that the jurors believed that by law, the commission of the attempted robbery continued until after it had failed and well after appellant left the store. The trial court here erred when it instructed the jury with CALJIC No. 8.21.1.

C. Directing a Finding on the Key Disputed Issue in the Case Was Not Harmless

The correct standard of review for federal constitutional error is, at a minimum, proof beyond a reasonable doubt that the error was harmless. (AOB 193.) Respondent does not allege that appellant conceded or admitted the continuous transaction requirement (see *People v. Flood* (1998) 18 Cal.4th 470, 504-505), undoubtedly because he vigorously disputed that issue. (AOB 185-187.) Nor does it contend that the record shows that the jury necessarily found defendant guilty on a proper theory: the prosecutor disavowed reliance on a theory of premeditated and deliberate first degree murder (10 RT 2048-2049), and the jury found appellant guilty of first degree murder, without specifying the theory upon which it relied. (3 CT 808; cf. *People v. Haley* (2004) 34 Cal.4th 283, 315.)

Instead, respondent contends that CALJIC No. 8.21.1 was not prejudicial in light of three other instructions given at the guilt phase. (RB 82.)

The first of those instructions, CALJIC No. 17.31, informed the jurors that not all the instructions were necessarily applicable, and to "disregard any instruction which applies to facts determined by you not to exist." In this case, CALJIC No. 8.21.1 was clearly at issue and was emphatically relied upon by the prosecutor; no juror would not have disregarded that instruction as

inapplicable. Respondent also relies on CALJIC No. 1.01, which informed the jurors that the instructions were to be considered as a whole and in light of the others; however, that instruction simply made clear that CALJIC No. 8.21 must be considered in light of CALJIC No. 8.21.1. The jurors are presumed to have followed both instructions. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) The third instruction cited by respondent, CALJIC No. 8.81.17, relates to the felony murder special circumstance instruction, not first degree felony murder, and was itself erroneous. (See Arg. 8, *post*; AOB 207-210.)

Finally, respondent contends that the error is harmless because "the evidence overwhelmingly showed that [appellant] murdered Wilson during the commission of an attempted robbery." Specifically, it notes that appellant fled from the store, and that only seconds passed between the failed attempted robbery and the shooting. (RB 82.) Those facts are relevant to determining whether the attempted robbery and the killing were part of a continuous transaction. But, as argued made above, neither is conclusive of the issue as a matter of law. The jury must consider a number of other factors, including those set forth above. CALJIC No. 8.21.1 prevented it from doing so by directing a finding on the issue. The instructional error nullified appellant's defense by directing a verdict on a key finding necessary for first degree felony murder, and requires reversal of the judgment.

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8.
THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS ON THE SOLE SPECIAL CIRCUMSTANCE ALLEGATION -- ATTEMPTED-ROBBERY FELONY-MURDER -- REQUIRE REVERSAL OF THE SPECIAL CIRCUMSTANCE FINDING AND THE ENSUING DEATH JUDGMENT

The trial court's instructions regarding the sole special circumstance -- attempted-robbery felony-murder -- were erroneous on two points: first, the court erred by deleting the "carry out or advance" language from the standard CALJIC No. 8.81.17; second, the court erred by directing the jurors pursuant to CALJIC No. 8.21.1 that an attempted robbery is in progress until well after the perpetrator reaches a place of temporary safety. (AOB 197-210; see Arg. 7, *ante*.)

Respondent apparently concedes that the claims are reviewable on appeal, as it does not urge forfeiture or invited error. (RB 83-86.) It mentions that the trial court "slightly modif[ied]" CALJIC No. 8.81.17 (RB 83), but fails to acknowledge that the court made the modification at the instigation of the prosecution and over appellant's objection. (AOB 198-200.)

Nor was the modification to CALJIC No. 8.81.17 – the deletion of the "carry out or advance" language -- "slight." The prosecution moved to delete that language to preclude appellant from arguing his defense:

> I think it allows him, if you give the instruction, to make an argument such as what they talk about in their brief, that at the time of the shooting the robbery was over -- the attempt was over and all he was trying to do or all he was doing was shooting for purposes of revenge because the safe wasn't opened.

(10 RT 1944-1945.) In other words, the prosecutor argued that the jury might infer that the attempted robbery and killing were not part of one continuous. And the prosecutor recognized that the jury could have concluded that any intent to steal no longer existed when appellant shot the victim. Those reasonable inferences were at the heart of appellant's defense.

Respondent contends that this Court has held that "carry out or advance" language is not an element of the felony-murder special circumstance-allegation. (RB 84-85, citing *People v. Horning* (2004) 34 Cal.4th 871, 907-908; but see AOB 210-211, fn. 58.) Yet, this Court has often held that the "carry out or advance" language is appropriate where, as here, "the evidence suggests the defendant may have intended to murder his victim without having an independent intent to commit the felony that forms the basis of the special circumstance allegation." (*People v. Navarette* (2003) 30 Cal.4th 458, 505; see AOB 204.) [20]

Regarding the second error -- instructing the jurors with CALJIC No. 8.21.1 that an attempted robbery is in progress until well after the perpetrator reaches a place of temporary safety – respondent does not deny that the jurors would have applied that instruction to the felony-murder special circumstance. (RB 85-86.) Instead, it lumps the first instructional error in with the second, and repeats its sufficiency of the evidence argument from Argument 7:

> [A]s explained in Argument XII [*sic*], there was no evidence whatsoever to suggest the robbery was merely incidental to Wilson's murder.

(RB 86.) As appellant argued above, and as the prosecutor recognized below, there was evidence showing that the attempted robbery and shooting were not part of one continuous transaction. That is the same as saying that the attempted robbery was incidental to the shooting.

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20. The current pattern jury instruction for the felony-murder special circumstance, CALCRIM No. 730, requires the prosecution to prove that the killing and the felony "were part of one continuous transaction," that there was a "logical connection" between the two beyond a mere spatial and temporal connection, and that the defendant intended to commit the felony "independent of the killing." As noted above, CALCRIM No. 549 defines the phrase "One Continuous Transaction" with reference to a number of factors that the jurors must consider.

A reasonable juror could have concluded that the robbery was merely incidental to the killing, and that the prosecution had not proved the felony-murder special circumstance requirements beyond a reasonable doubt.

With regard to prejudice, the correct standard of review for federal constitutional error is, at a minimum, proof beyond a reasonable doubt that the error was harmless. (AOB 212-213.) Respondent once again does not contend that the error was harmless due to a concession or admission by appellant, or that the jury necessarily found appellant guilty on a proper theory. (See Arg. 7, *ante*.) Instead, it repeats its contention that the evidence overwhelmingly showed that appellant shot the victim in the course of robbing him. (RB 86.) Appellant's answer to this assertion is set forth in Argument 7 of this reply.

The instructions erroneously directed a verdict on a finding that was necessary to impose felony-murder liability and nullified appellant's defense. Therefore, the special circumstance finding and the death judgment must be reversed.

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13.
THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED A NUMBER OF PENALTY-PHASE JURY INSTRUCTIONS REQUESTED BY THE DEFENSE

In his opening brief, appellant raised a number of claims relating to the trial court's refusal to give his proposed penalty-phase instructions. (AOB 248-279.) The issues are mostly joined. (RB 99-111.)

However, one is in need of a reply. At page 261 of his opening brief, appellant noted that he had offered an instruction regarding the proper consideration of the prosecution's rebuttal evidence:

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

(3 CT 1015.) The trial court refused to give the instruction, summarily concluding: "Rebuttal evidence, there was none." (16 RT 3073-3074.) Respondent also contends that there was no rebuttal evidence. (RB 105.)

Both are mistaken. Although there was no "rebuttal case" put on by the prosecution at the penalty-phase (see § 1093, subd. (d)), it did in fact present "rebuttal evidence" to the defense's mitigating case. It simply introduced that evidence during its case-in-chief, including testimony concerning appellant's negative character, lack of remorse, failure to accept responsibility, lack of adjustment in prison, and lack of mental illness. (AOB 261.)

In his opening brief, appellant pointed out that the introduction of rebuttal evidence during the prosecution's case-in-chief is improper under *People v. Boyd* (1985) 38 Cal.3d 762, 772-776, and, in a footnote, acknowledged that he had not raised a *Boyd* objection at trial. (AOB 261, fn. 73.)

Respondent views this acknowledgment as a concession that "the claim" has been forfeited. (RB 105.) But the claim that was raised in the opening brief is not whether *Boyd* error occurred, but whether the trial court erred in refusing appellant's proposed instruction. That claim was preserved for appeal when appellant submitted the instruction.

The proposed instruction was also a correct statement of law: it is similar to an instruction that was given by the trial court in *People v. Johnson*, *supra*, 6 Cal.4th 1, and approved by this Court. (*Id.* at p. 53.) [21]

Respondent claims that even if rebuttal evidence had been introduced during the prosecution's case-in-chief, "the jury would not possibly have understood Frederickson's proposed instruction to apply to such evidence." (RB 105.) Why would a jury not understand that? The terms used in the proposed instruction-- "evidence," "rebuttal" and "mitigation" -- are reasonably clear. And, closing argument is available precisely so that the defense can argue to the jurors how the instruction relate to the facts. The trial court erred in failing to give the requested instruction, and reversal of the judgment is required.

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21. In *Johnson*, after the prosecution introduced inadmissible evidence of the defendant's juvenile burglaries, the trial court instructed the jury that:

> this evidence could be considered only in rebuttal of defendant's mitigating evidence "or as evidence of the absence of mitigating or extenuating circumstances raised by the defendant. . . . You may not consider evidence of such other criminal acts for any other purpose."

(*People v. Johnson*, *supra*, 6 Cal.4th at p. 53.) This Court concluded that "the instruction correctly limited the jury's consideration to rebuttal evidence, leaving it to the jury (guided perhaps by counsel's closing arguments) to decide whether the proffered evidence indeed rebutted any evidence elicited by defendant." (*Ibid.*)

CONCLUSION

For all of the reasons stated above and in appellant's opening brief, the conviction, special circumstance finding, and death sentence in this case must be reversed.

DATED: March 8, 2011.

MICHAEL J. HERSEK
State Public Defender

DOUGLAS WARD
Deputy State Public Defender
Cal. State Bar No. 133360

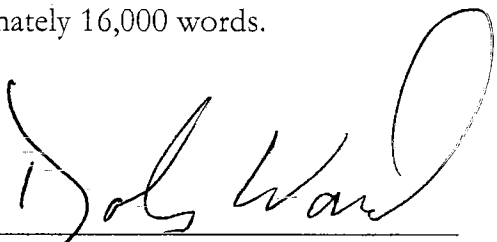
221 Main Street, Suite 1000
San Francisco, California 94105
Phone (415) 904-5600

Attorneys for Appellant
DANIEL FREDERICKSON

CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to California Rules of Court, rule 8.630(b)(2), I hereby certify that I have verified, through the use of our word processing software, that this brief, excluding the tables, contains approximately 16,000 words.

DATED: March 8, 2011.



DOUGLAS WARD
Deputy State Public Defender

Attorney for Appellant
DANIEL FREDERICKSON

DECLARATION OF SERVICE

Re: *People v. Frederickson*, No. S054372

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

The Honorable Jerry Brown
Attorney General of the State of California
110 W. "A" Street, Suite 1100
San Diego, California 92101

Clerk of Superior Court
Attn: Death Penalty Appeals
Superior Court of Orange County
700 Civic Center Drive West
Santa Ana, California 92702

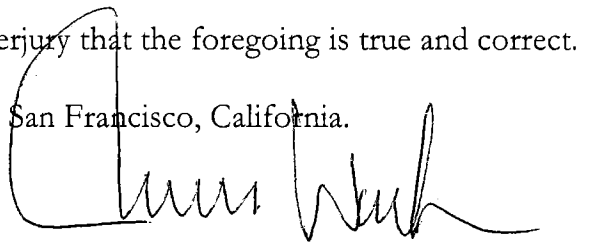
James Tanizaki, Esq.
Orange County District Attorney
P.O. Box 808
Santa Ana, California 92702

Mr. Daniel Frederickson
San Quentin State Prison
Tamal, California 94974

Each said envelope was then, on March 8, 2011, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on March 8, 2011, at San Francisco, California.



Neva Wandersee