No. S140894

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF

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

HONORABLE BRIAN E. HILL, JUDGE

MARY K. McCOMB
State Public Defender

ANDREA G. ASARO, SBN 107039
Senior Deputy State Public Defender
Asaro@ospd.ca.gov

Office of the State Public Defender
1111 Broadway, Suite 1000
Oakland, California 94607
Telephone: (510) 267-3300
Fax: (510) 452-8712

Attorneys for Appellant

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Attorneys for Appellant

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APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant's guilty plea must be vacated, and his conviction and death sentence reversed, because the trial court accepted the plea in violation of Penal Code section 1018, which expressly prohibits entry of a guilty plea in a capital case by a defendant who does not "appear with counsel." (Pen. Code, § 1018.) This Court has long since upheld the constitutionality of this statute, and its clear and unambiguous language admits of no statutory construction that would validate appellant's guilty plea. The consent of appellant's advisory counsel did not satisfy the requirement that appellant appear with "counsel," as a matter of law, and in any event appellant's advisory counsel did not serve as the "functional equivalent" of counsel.

Appellant's visible, excessive restraints, which caused him pain and discomfort, exceeded what those charged with courtroom security deemed sufficient, hampered his ability to participate in his own defense, and

prejudicially fueled the prosecutor's future dangerousness argument, warrant reversal of his death sentence.

In this brief, appellant demonstrates that respondent's counter arguments are legally unavailing or unsupported by the record, or both. Appellant addresses respondent's arguments where necessary to present the issues fully and fairly to the Court. Appellant does not reply to those of respondent's arguments that are fully addressed in his opening brief. The failure to reply to any specific argument or allegation, or to reassert a point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1064-1065), but rather reflects appellant's view that the issue has adequately been presented and is fully joined.

ARGUMENT

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

A. Introduction

Penal Code section 1018 expressly prohibits the entry of a guilty plea in a capital case by a defendant who does not "appear with counsel," and provides that a capital defendant who does have counsel must have the consent of "counsel." The trial court nonetheless granted appellant's motion to represent himself and then accepted his guilty plea based on the consent of his advisory counsel, Joseph Allen. As appellant has explained, the plea is invalid under section 1018 as a matter of law. (AOB at pp. 19-48.)

Notwithstanding the plain language of the statute, respondent urges that section 1018 should be "construed" to permit a self-represented defendant to plead guilty to capital murder, "especially" if the plea is part of his penalty phase strategy, which respondent maintains was the case here. (RB at 51.) Despite this Court's considered reconciliation of section 1018 and *Faretta v. California* (1976) 422 U.S. 806 ("*Faretta*") in *People v. Chadd* (1981) 28 Cal.3d 739 ("*Chadd*"), respondent maintains that "interpreting" section 1018 otherwise would render the statute unconstitutional. Respondent argues alternatively that appellant's plea was valid because he had the consent of advisory counsel. (RB at 77-78.)

Respondent's attack on section 1018, the constitutionality of which this Court repeatedly has affirmed, is properly addressed to the Legislature. Respondent's suggestion that section 1018 may be read to accommodate appellant's plea is legally flawed and factually unsupported. Appellant did

not appear with "counsel;" advisory counsel is not the "functional equivalent" of counsel, as a matter of law; and Mr. Allen never represented appellant as counsel.

B. Section 1018 May not be Construed to Permit a Defendant who is not Represented by Counsel to Plead Guilty to Capital Murder

This Court has consistently treated the language of section 1018 as clear and unambiguous in its prohibition against the entry of a guilty plea in a capital case by a defendant who is not represented by counsel. In *Chadd* this Court noted that as a matter of statutory construction it was "difficult to conceive of a *plainer statement of law* than the rule of section 1018 that no guilty plea to a capital offense shall be received 'without the consent of the defendant's counsel.'" (*Chadd*, 28 Cal.3d at p. 746, italics added; see also *People v. Ballentine* (1952) 39 Cal.2d 193, 196 [conviction reversed where guilty plea to capital murder was accepted from a defendant who "was not represented by counsel;" *People v. Massie* (1985) 40 Cal.3d 620, 624-625 [recognizing Legislature's authority to determine that "a defendant who wants to plead guilty in a capital case must be represented by counsel who exercises his independent judgment in deciding whether to consent to the plea"]; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1299 [reaffirming the reasoning in *Chadd* and noting that in that case the Court "[e]mphasiz[ed] the plain language of section 1018"].) Respondent does not dispute that appellant was not "represented by counsel" when he pled guilty.

Respondent nonetheless maintains that to "construe" section 1018 as requiring the consent of counsel when the defendant seeks to plead guilty in furtherance of a "defense of remorse" or to demonstrate his acceptance of responsibility would violate the defendant's "fundamental right to control

and present a defense" (RB at 56), as well as the right to self-representation recognized in *Faretta*. Respondent's arguments are unavailing.

First, as a matter of statutory construction, there is in fact no basis to "construe" section 1018 at all. As this Court has recognized: "When the language of a statute is 'clear and unambiguous' and thus not reasonably susceptible of more than one meaning, 'there is no need for construction and courts should not indulge in it.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 621, citations and internal quotations omitted; see also *People v. Foreman* (2005) 126 Cal.App.4th 338, 342 ["When statutory language is clear and unambiguous, additional construction is unnecessary."]; *People v. Jae Jeong Lyu* (2012) 203 Cal.App.4th 1293.) "This principle is but a recognition that courts 'must follow the language used and give to it its plain meaning, whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature.'" (*People v. Weidert* (1985) 30 Cal.3d 836, 843.) The relevant language of section 1018 – "No plea of guilty of a felony for which the maximum punishment is death . . . *shall be received* from a defendant who does not *appear with counsel* . . . ." – is plain, clear and unambiguous. (Pen. Code, 1018, italics added.)

Second, construing section 1018 to permit a self-represented defendant to plead guilty to capital murder would render superfluous the separate statutory provision for noncapital defendants, since then all defendants would be able to plead guilty if they knowingly and intelligently waived the right to counsel.[1] As this Court observed in *Chadd*, such a

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[1] This portion of section 1018 provides:

(continued...)

construction would be "manifestly improper" because it would "obliterate the Legislature's careful distinction between capital and noncapital cases, and render largely superfluous its special provision for the former." (28 Cal.3d at p. 747, citation and footnote omitted; see also *People v. Massie*, *supra*, 40 Cal.3d at p. 624 (same).) Respondent simply ignores this fundamental rule of statutory construction.

Third, respondent effectively asks this Court to add words to section 1018 that are not there; i.e., that a self-represented capital defendant may not plead guilty "unless" the plea is "part of a strategy to obtain a life sentence at the penalty phase." (RB at 51.) Yet section 1018 categorically and unconditionally prohibits the acceptance of a guilty plea to capital murder from a defendant who "does not appear with counsel." Respondent's proposal thus contravenes the "elementary principle that the judicial function is simply to ascertain and declare what is in the terms and substance of a statute, *not to insert what has been omitted* or omit what has been inserted." (*People v. Foreman*, *supra*, 126 Cal.App.4th at p. 342, citations omitted, italics added.) In *People v. Jae Jeong Lyu*, *supra*, 203 Cal.App.4th 1293, the court reversed the defendant's conviction of sexual

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[1] (...continued)

> No plea of guilty to a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and unless the court shall find that defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel.

(Pen. Code, § 1018.)

penetration and oral copulation of an unconscious person, rejecting the state's argument that the statutory definition of unconsciousness – "not aware, knowing, perceiving, or cognizant that the act occurred" – should be construed to mean *additionally* that the victim "did not see the attack coming and was not aware or conscious of it until it had occurred." (*Id.* at p. 1301.) The court declined to "add that meaning to the clear and unambiguous language of the statutes." (*Ibid.*) Similarly here, there is no basis to add to the clear and unambiguous language of section 1018.

Finally, it bears noting that the Legislature has amended section 1018 – since the 1973 amended discussed in *Chadd* (28 Cal.3d at pp. 749-750, citing Stats. 1973, ch. 719, § 11, p. 1301), that clarified that a defendant wishing to plead guilty to capital murder must not only *have* counsel, but also the consent of counsel – and has elected to retain this language. (Pen. Code, § 1018, Stats. 1991, ch. 421 (AB 2174) § 1.) "When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." (*People v. Bouzas* (1991) 53 Cal.3d 467, 475; see also *People v. Zambia* (2011) 51 Cal.4th 965, 976 ["pattern of legislative inaction signaling acquiescence" in courts' interpretation of statute].) The Legislature must be deemed to have been aware of *Chadd* and its progeny and to have acquiesced in this Court's construction of section 1018.

C. Section 1018's Prohibition Against the Entry of a Guilty Plea by a Self-Represented Capital Defendant does not Violate the Defendant's Right to Counsel or to Present a Defense

Respondent maintains that interpreting section 1018 as prohibiting a self-represented capital defendant from pleading guilty would violate the defendant's right to self-representation and to present a defense. (RB at 51.) Respondent's lengthy discussion sidesteps this Court's considered analysis of the issue in *Chadd*, is largely beside the point, and relies on cases that are legally inapposite.

Respondent acknowledges that, after *Faretta* was decided, this Court held in *Chadd* that "section 1018 provided that a guilty plea to a capital offense required the consent of counsel" and that the Court reasoned that "the state's interest in reducing the danger of erroneously imposing a death sentence by subjecting the capital defendant's right to plead guilty to the consent of counsel outweighs the infringement on the right to self-defense." (RB at 53, citing *Chadd* at pp.746, 748-749.) Respondent asserts, however, that "subsequent cases . . . have recognized that the state's interest in a reliable judgment does not justify infringement of a criminal defendant's right to self-representation, and that the right to plead guilty is a personal right that is not surrendered to an attorney." (RB at 54.) Yet, none of the cases respondent cites undermines this Court's holding or reasoning in *Chadd*; nor does any of them address the constitutionality of a statute limiting a self-represented defendant's right to plead guilty to capital murder.

In *Godinez v. Moran* (1993) 509 U.S. 389, first, the United States Supreme Court held that the standard for competency to plead guilty and waive counsel is the same as the standard for competency to stand trial, and

rejected a Nevada defendant's claim that he was not competent to represent himself.[2] The decision has no bearing on the constitutionality of section 1018. *McKaskle v. Wiggins* (1984) 465 U.S. 168, on which respondent also relies (RB at 54), is a non-capital case in which the high court rejected the defendant's claim that his stand-by counsel was permitted too active a role, at trial. The case is thus even farther from the mark. Respondent's reliance on *Lenhard v. Wolff* (1979) 443 U.S. 1306 (*Lenhard I*) (RB at pp. 54-55), is also baseless, for in *Lenhard I* Justice Rehnquist, acting as Circuit Justice, simply continued a stay of execution, pending consideration by the full court, in a *Nevada* case in which a self-represented defendant had pled guilty.

If anything, "subsequent cases" have reaffirmed this Court's holding in *Chadd*. Most recently, in *People v. Boyce* (2014) 59 Cal.4th 672, this Court rejected the defendant's claim that he should have been permitted to represent himself at the penalty phase, stating that "the right to self-representation is not absolute." (*Id.* at p. 702, quoting *Indiana v. Edwards* (2008) 554 U.S. 164, 171.) The Court noted by way of example that a *Faretta* motion may be denied as untimely, and observed that:

> Additionally, special considerations inform a request for self-representation in a capital case. By statute, "a plea of guilty to a capital felony may not be taken except in the presence of counsel, and with counsel's consent. (§ 1018.) Even if otherwise competent to exercise the constitutional right to self-representation, a defendant may not discharge his lawyer in order to enter such a plea over counsel's objection."

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[2] Respondent's observation that there is no dispute on appeal that appellant was competent to stand trial (RB at 65) is true, but irrelevant. At issue is the propriety of the trial court's acceptance of the guilty plea of a self-represented capital defendant, which is prohibited by section 1018.

(*Id.* at pp. 702-703, quoting *People v. Mai* (2013) 57 Cal.4th 986, 1055.)

Respondent next contends that "[a] self-represented capital defendant has total control over his defense even if it ultimately leads to a judgment of death." (RB at 55.) Again, respondent misses the point. Appellant does not dispute that a self-represented capital defendant would have control over his "defense," at trial; section 1018 simply prohibits that defendant from foregoing a trial by pleading guilty.

Indeed, respondent's very argument was squarely rejected in *Chadd*: "[F]rom the defendant's conceded right to 'make a defense' in 'an adversary criminal trial,' the Attorney General attempts to infer a defendant's right to make no such defense and to have no such trial, even when his life is at stake. But in capital cases . . . the state has a strong interest in reducing the risk of mistaken judgments." (*Chadd*, 28 Cal.3d at p. 751.) Subsequently in *People v. Frierson* (1985) 39 Cal.3d 803, in which this Court found the trial court had erred in allowing the defense counsel to override his client's request to present a diminished capacity defense, the Court was quick to point out that its holding was fully consistent with *Chadd*:

> Our conclusion that defense counsel may not override defendant's decision to present a defense at the guilt/special circumstance phase is not in any way inconsistent with this court's decision in *People v. Chadd* (1981) 28 Cal.3d 739 . . ., in which we held that, by virtue of a specific statutory provision (Pen. Code, § 1018), a plea of guilty to a capital offense requires the concurrence of both the defendant and his counsel. The statutory provision at issue in *Chadd* reflected a determination by the state that a particular procedural guarantee - the right to require the People to prove a defendant's guilt of a capital offense beyond a reasonable doubt at a fair and public trial - is so basic that it must be afforded unless *both* defendant *and* counsel agree that it

should be waived.

(*Id.* at p. 817, fn. 7, italics in original.)

Moreover, neither of the two cases respondent's cites (RB at 55) supports the argument that a self-represented capital defendant is constitutionally entitled to plead guilty. In *People v. Taylor* (2009) 47 Cal.4th 850, a capital defendant representing himself pled *not* guilty, went to trial, and then argued he should not have been found competent to stand trial. In *People v. Joseph* (1983) 34 Cal.3d 936, the Court reversed a capital defendant's conviction, *following a jury trial*, finding the trial court had erred in denying the defendant's *Faretta* motion. Neither case involved section 1018 or the constitutionality of its prohibition against entry of a guilty plea by a capital defendant who has been granted leave to represent himself.

Respondent also notes that a capital defendant "has a fundamental right not to present a defense and to take the witness stand to confess his guilt and request the death penalty[,]" and that "[t]he state's interest in a reliable judgment may not trump" that right. (RB at 55.) True. As this Court had noted, that is one reason why section 1018 *is* constitutional: "The statute . . . does not prevent a defendant from waiving his right to the aid of counsel and defending himself. It merely prohibits the court from receiving a plea of guilty to a felony for which the maximum punishment is death made by a defendant not represented by counsel." (*People v. Ballentine*, *supra,* 39 Cal.2d at p. 195.) Thus, section 1018 does not prohibit a capital defendant from choosing to present "no defense," at trial; it simply requires the state meet its burden affirmatively to prove its case against him. (See, *Chadd*, 28 Cal.3d at p. 750, fn. 7.)

In any event, none of the cases respondent cites here for the

proposition that a self-represented capital defendant "has total control over his defense" (RB at 55) undermines the constitutionality of section 1018. In *People v. Brown* (2014) 59 Cal.4th 86, the defendant, who had been *represented by counsel* and pled *not guilty*, argued on appeal that his counsel was ineffective at the penalty phase for *acquiescing* in his request for the death penalty. In *People v. Koontz* (2002) 27 Cal.4th 1041, *People v. Bradford* (1997) 15 Cal.4th 1229, and *People v. Clark* (1990) 50 Cal.3d 583, which respondent also cites (RB at 55), the defendants proceeded in pro. per.; but in none of these cases was a guilty plea entered: in *Koontz* the defendant challenged his competency to stand trial; in *Bradford* and in *Clark* the issue was whether the trial court had erred in granting the defendant's request to represent himself.

People v. Ramirez (2006) 39 Cal.4th 398 and *People v. Covedi* (1966) 65 Cal.2d 199, on which respondent also relies (RB at 55), are also inapposite; neither case involves a guilty plea by a capital defendant, much less one proceeding in pro. per. In *Ramirez* the court rejected the defendant's argument that the trial court should not have granted his motion to substitute allegedly ineffective counsel, and in *Covedi*, a non-capital case, this Court reversed the conviction on the grounds the trial court had erred in appointing defense counsel's law partner to represent the defendant when defense counsel became temporarily incapacitated. None of these cases undermines *Chadd* or the constitutionality of section 1018.

Respondent also maintains that "the United States Supreme Court has *held* that a competent self-represented defendant's guilty plea and refusal to present any mitigating evidence at the penalty phase did not interfere with the state's interest in a reliable judgment." (RB at 55, italics added.) Respondent's reliance on *Lenhard v. Wolff* (*Lenhard II*) (1979) 444

U.S. 807, for this assertion is misplaced. As noted, in *Lenhard I* Justice Rehnquist merely extended a stay of execution in a Nevada capital case. In *Lenhard II* the full Court, in a single sentence, then denied the stay, over a lengthy dissent by Justices Marshall and Brennan. *Lenhard II* thus does not "hold" anything, much less that California's statutory prohibition on the entry of a guilty plea to capital murder by a self-represented defendant in unconstitutional.

Respondent argues that post-*Chadd* cases recognize that while a defendant may surrender *"most* of his fundamental personal rights" to his counsel's control, the "fundamental and personal right to plead guilty" is not one of them. (RB at 56, italics in original.) Preliminarily, it bears reiterating that appellant did not have counsel. In any event, none of the cases respondent cites (RB at pp. 56-57) supports the argument that a capital defendant has the right to plead guilty without the consent of counsel, much less that a self-represented capital defendant may do so. In *People v. Hinton* (2006) 37 Cal.4th 839, the defendant, represented by counsel at trial, was convicted of murder with special circumstances, including a prior-murder special circumstance. On appeal this Court rejected his claim that the waiver of the right to a separate proceeding on the prior murder must be given by the defendant personally, rather than by counsel. (*Id.* at pp. 873-875.) The case has no bearing on the issues at hand.

Florida v. Nixon (2004) 543 U.S. 175, which respondent also cites (RB at 56), is likewise inapposite. In that case the United States Supreme Court held that defense counsel's failure to obtain his client's consent to his strategy of conceding guilt at the guilt phase did not automatically render counsel's performance ineffective. The Court noted that the concession

was not the "functional equivalent" of a guilty plea and that the state was still compelled to present "competent, admissible evidence of the essential element of the crimes . . . charged." (*Id.* at pp. 187-188.) The Court had no occasion to decide the constitutionality of a state statutory limitation on a capital defendant's right to plead guilty. If anything, *Florida v. Nixon* is fully consistent with this Court's analysis of section 1018 in *People v. Bloom* (1989) 48 Cal.3d 1194 (*Bloom*), where the Court cited *Chadd* for the proposition that a capital defendant representing himself has no duty to present a defense, but may simply "put the state to its proof" and take the stand and confess guilt. (*Id.* at p. 1222, citing *Chadd*, 28 Cal.3d at p. 750, fn. 7.)

Respondent's reliance on *Jones v. Barnes* (1983) 463 U.S. 745, a non-capital case (RB at 56), is equally unavailing. In that case the high court held that appellate counsel did not have a constitutional duty to raise every non-frivolous issue the defendant requested be raised. The cases respondent cites regarding the "conflict between counsel and defendant about whether to present a defense" at the guilt phase of a capital trial (RB at 57) are also inapposite, as here it is undisputed that appellant did not have counsel, much less a conflict with counsel regarding guilty phase strategy. In *In re Horton* (1990) 54 Cal.3d 82, 95, this Court found that defense counsel had impliedly stipulated that the case could proceed before a commissioner acting as a temporary judge, noted that through an "oversight" the defendant's personal stipulation was not obtained, and held that the right to a trial by an elected superior court judge was not one that required the defendant's personal waiver. (*Id.* at p. 100.) The case has no bearing on whether a self-represented defendant may plead guilty to capital murder. If anything, both *Barnes*, *supra*, 54 Cal.3d 82, and *Horton*

undermine the notion that a criminal defendant has "total control" over his defense. (RB at 55.)

In *People v. Freedman* (2004) 8 Cal.4th 450, which respondent also cites (RB at 57), this Court rejected the claim by a capital defendant that his counsel's strategy of focusing on intent rather than identity amounted to a "concession of guilt" requiring the defendant's knowing and voluntary waiver of his constitutional rights. Here, the issue is whether a capital defendant wishing to plead guilty must have the consent of counsel, as section 1018 provides.

In *Cooke v. State* (Del. 2011) 977 A.2d 803, finally, the Delaware Supreme Court held that by electing to proceed on the theory that the defendant was guilty of murder but mentally ill, over his client's objection and contrary to his assertion of factual innocence, defense counsel had violated the defendant's right to plead *not* guilty and to testify on his own behalf. The case has no bearing on the constitutionality of a California state statutory prohibition on entry of a guilty plea by a self-represented capital defendant.

Respondent's observation, next, that "the defendant's right to control his defense does not render his death judgment unreliable" because he "has a right to forego mitigating evidence" (RB at pp. 57-58; see also p. 60) is beside the point; appellant does not dispute that a capital defendant, whether represented by counsel or not, may elect not to present mitigating evidence at the penalty phase. The cases respondent cites here – *People v. Clark* (1992) 3 Cal.4th 41; *Bloom*, *supra*, 48 Cal.3d 1194; and *People v. Taylor*, *supra*, 47 Cal.4th 850 (RB at pp. 57-58) – are all cited for the proposition that the defendant has the right to determine how his case should be presented at the penalty phase. Similarly, in support of the