

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF AND RESPONDENT,

V.

VALDAMIR FRED MORELOS,

DEFENDANT AND APPELLANT.

CAPITAL CASE

No. S051968

Santa Clara County
Superior Court

No. 169362

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from Judgment of
The Superior Court of Santa Clara County
The Late Honorable Daniel Creed

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APPELLANT’S SUPPLEMENTAL OPENING BRIEF

I.

**THE RECORD FAILS TO ESTABLISH A VALID WAIVER OF
APPELLANT’S RIGHT TO A JURY AT THE GUILT, SPECIAL
CIRCUMSTANCE AND PENALTY PHASES OF HIS TRIAL;
REVERSAL OF HIS CONVICTION AND DEATH SENTENCE IS
REQUIRED**

A. Proceedings Below

Judge John. T. Ball granted appellant’s pre-trial *Faretta*¹ motion on July 19, 1995 by.² (2CT:416; 7/19/95 RT:3-14.) On July 27, 1995 the prosecutor and appellant informed Judge Ball that they wanted to waive jury as to both the

¹ *Faretta v. California* (1975) 422 U.S. 806.

² Appellant’s unchallenged counsel waiver did not absolve the court of its duty to ensure a valid waiver of his separate constitutional right to trial by a jury. (*People v. Daniels* (2017) 3 Cal.5th 961, 997.)

guilt and penalty phases of trial, but the judge refused to accept a waiver of jury trial for the penalty phase. (7/27/95 RT:30-31.) On August 9, 1995, a single superior court judge was found who would take a jury waiver for both phases of trial. (8/9/95 RT:46.) On August 11, 1995 the case was transferred to Judge Daniel E. Creed, but not before the court took a jury waiver at the request of the supervising judge. Appellant was present without counsel. The text of the jury waiver colloquy follows:

THE COURT: All right. Let's take things in order then. First let ask you [sic], Mr. Morelos, are you thinking clearly this afternoon?

THE DEFENDANT: Yes, I am.

THE COURT: In other words, you're not under the influence of any drugs, alcohol, or medicine of any kind?

THE DEFENDANT: No, I'm not.

THE COURT: Now, you understand that you have an absolute constitutional right to a trial by a jury. In other words, 12 individuals to make the factual determination both as to your guilt and in the event that that jury would find you guilty and determine one of more special circumstances to be true, that you would have a constitutional right to a jury to determine the penalty for which the crimes would be punishable.

Now, that's been explained to you and you understand that, correct.

THE DEFENDANT: Yes. That's been explained and I do understand it.

THE COURT: And you – at this time, it's my understanding based upon that understand, you wish to freely and voluntarily waive those right to those jury trial provided that Judge Daniel Creed will make this specific to this particular judge [sic] is agreeable to hear your trial; is that correct?

THE DEFENDANT: Yes, I waive jury.

THE COURT: Now, has anybody promised you anything, used any force, threats, pressure on you of any kind to get you to make that decision?

THE DEFENDANT: No, no one.

THE COURT: In other words, you've made that decision freely and voluntarily based on your own knowledge and understanding of the facts, and that the law that been explained to you and that you understand?

THE DEFENDANT: Yes.

THE COURT: All right. The people wish to join in the jury waiver, Mr. Schon?

MR. SCHON: Yes, your Honor.

THE COURT: All right. Based upon the fact that the defendant has to indicated, the Court will find that the defendant freely, knowingly and intelligently has, in fact, waived his right to a jury trial both as to the penalty and the guilt phase of the Information. And that waiver is limited specifically to the availability of Judge Daniel Creed hearing the matter.

(8/11/95 RT:48-49.)

Due to the limited availability of Judge Creed, Judge Ball presided over other pre-trial proceedings. Appellant requested advisory counsel. (3CT:479-481.) On December 20, 1995, Judge Ball denied appellant's motion for advisory counsel.³ (12/20/95 RT:1-6.)

Trial before Judge Creed began on January 3, 1996. Judge Creed noted that all previous proceedings took place in other departments; in response to the judge's question, appellant said that he was representing himself. (1RT:1.) Judge Creed followed up with a few more questions about appellant's decision to represent himself. (1RT:1-2.) This colloquy followed:

THE COURT: You also do understand that you have an absolute constitutional right to have a trial by jury.

THE DEFENDANT: Yes.

THE COURT: And you understand that right?

THE DEFENDANT: Yes, sir.

THE COURT: And do you give up that right at this time?

³ Appellant's assignment of error regarding this decision is the subject of Argument I in his opening brief on appeal.

THE DEFENDANT: Yes, your honor, I do.

(1RT:2.)

On January 9, 1996, the court found appellant guilty on all counts, found the special allegations true, and found true the two prior convictions. (2RT:324-325.) The penalty phase began the next day, and prior to the presentation of evidence the court addressed appellant as follows:

THE COURT: Mr. Morelos, we have ended phase one, which is the guilt phase of the trial. We're about to begin phase two, which is the penalty phase. Let me clarify something. At this particular time if you so desire we could break the trial if you decided, one, you wanted to be represented by an attorney, or two, if you decided you wanted to go to the second phase with the jury, you could make that request at this time and I would grant that request. Is that what you want to do?

THE DEFENDANT: No, sir, I do not.

THE COURT: You want to continue on as a court trial?

THE DEFENDANT: Yes, I do.

(2RT:329.)

B. The Record Fails to Affirmatively Demonstrate That Appellant Knowingly and Intelligently Waived His Right to a Jury Trial at the Guilt, Special Circumstance, and Penalty Phases of His Trial

In *People v. Sivongxay* (2017) 3 Cal.5th 151, 166 (*Sivongxay*), this Court affirmed that a knowing, intelligent, and express personal waiver of the jury trial right is required in a criminal prosecution under both the federal and state constitution. A jury in a criminal case may be waived by the explicit consent of both parties; a jury trial waiver may not be accepted by the court unless it is knowing and intelligent – i.e., made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. (*Ibid.*, citations omitted.) No rigid rubric is required for taking such waiver; the Court will uphold a waiver of a jury trial if the record affirmatively shows from a totality of the circumstances that the waiver was

knowing and intelligent. (*Id.* at pp. 166-167 and *People v. Daniels* (2017) 3 Cal.5th 961, 991.)

Sivongxxay concluded, based on its specific circumstances, that the defendant's waiver was knowing and intelligent. (*Sivongxxay, supra*, 3 Cal.5th at p. 167.) Nevertheless, the court emphasized "the value of a robust oral colloquy" in eliciting a knowing, intelligent, and voluntary waiver of a jury trial. (*Id.* at p. 169.) This Court said trial courts should advise defendants of "the basic mechanics of a jury trial in a waiver colloquy." (*Ibid.*) Specifically, the Court recommended that advisement include statements that a jury consists of 12 members of the community; defendant, through counsel, may participate in jury selection; all jury members must unanimously agree upon a verdict; and, if a defendant waives the right to a jury trial, the judge alone will decide guilt or innocence. (*Ibid.*) The Court also recommended that the trial court take additional steps to ensure that the defendant comprehends what the jury trial right entails by asking a defendant whether he had consulted with his attorney, whether counsel has explained the differences between a jury trial and a bench trial, and whether the defendant understands the right he is waiving. (*Id.* at pp. 169-170.) "Ultimately, a court must consider the defendant's individual circumstances and exercise judgment in deciding how best to ensure that a particular defendant who purports to waive a jury trial does so knowingly and intelligently." (*Id.* at p. 170.)

People v. Daniels (2017) 3 Cal.5th 961 (*Daniels*) clarified that "[w]e do not start with a presumption of validity that may only be rebutted by signs of a defendant's confusion or unwillingness in entering a waiver." Rather, a jury trial waiver will be upheld on appeal only "if the record affirmatively shows that the waiver was voluntary and intelligent under the totality of the circumstances." (*Id.* at p. 991, citation omitted (lead opn. of Cuellar, J.); see also *People v. Doyle* (2018) 228 Cal.Rptr.3d 369 (dis. opn. on review den. of

Liu, J⁴.) Factors the Court considers in whether a knowing and intelligent waiver has been obtained include the quality of the colloquy prior to the court's acceptance of a waiver, the presence of counsel, and references to discussion between the defendant and counsel regarding the jury right, and the existence and contents of a written waiver. (*Ibid.*)

In *Daniels*, the trial court advised Daniels, a pro per capital defendant, that if he waived a jury trial, the court alone would decide the question of guilt, but the waiver colloquy did not mention any of the other advisements recommended in *Sivongxay*. (*Daniels, supra*, 3 Cal.5th at pp. 986-989.) Based on the totality of the circumstances, including “indications in the record that defendant’s overarching aim throughout the proceedings was simply to accept responsibility for the charged crimes” (*ibid.*) a four-to-three majority upheld the jury trial waiver as to the guilt phase, while a different four-to-three majority found the waiver unconstitutionally invalid as to the penalty phase. (See *id.* at pp. 1029-1030 (conc. opn. of Kruger, J.); *id.* at p. 1002 (lead opn. of Cuellar, J.); *id.* at p. 1028 (conc. & dis. opn. of Corrigan, J.)

Lack of Waiver with Respect to Substantive Crimes: In this case, the record fails to affirmatively demonstrate that appellant, who like Daniels was representing himself, knowingly and intelligently waived his right to a jury trial. The waiver colloquy was at least as minimal as that in *Daniels*. Appellant was advised of his right to jury trial by in a single, convoluted statement by Judge Ball: “In other words, 12 individuals to make the factual

⁴ Justice Lui wrote to question the continued validity of the rule stated in *People v. Langdon* (1959) 52 Cal.2d 425, 432 (*Langdon*), that a trial court’s failure to explain to a defendant the nature and possible consequences of waiving a jury trial was not grounds for finding the waiver invalid where defendant was represented by counsel and failed to show in the record that either he or his counsel was misled as to the result that may occur because of the waiver. Because appellant was not represented by counsel when jury waivers were taken, the *Langdon* rule is not applicable here.

determination both as to your guilt and in the event that that jury would find you guilty and determine one of more special circumstances to be true, that you would have a constitutional right to a jury to determine the penalty for which the crimes would be punishable.” (8/11/95 RT:48.) Appellant agreed that that had been explained to him and that he understood it. (*Ibid.*) The judge’s statement may have illuminated the size of a jury (12 individuals), but it did not elaborate on what a jury trial entails, how a jury is selected, that jury members must be impartial and their verdict unanimous, or that a judge alone would decide his fate. The “waivers” of a jury trial as to the guilt phase taken by Judge Creed were even more barebones – before the guilt phase appellant was told that he had “an absolute constitutional right to have a trial by jury” and was asked if he wanted to give up that right; he agreed. (1RT:2; 2RT:329.)

As to the other *Sivongxay* factors, appellant was not represented by counsel and there is no record that either his prior counsel or the district attorney prosecuting the case ever discussed the matter with him. “The sparseness of the colloquy’s substance in this case is especially conspicuous given that [the defendant] was without the benefit of counsel when he proffered his waiver.” (*Daniels, supra*, 3 Cal.5th at p. 996.) In fact, appellant asked for but was erroneously denied advisory counsel prior to being sent to trial with Judge Creed (see AOB, Argument I); the trial court thus affirmatively precluded any consultation with counsel in this regard, contrary to this Court’s recommendation that in cases in where a defendant has waived counsel, that standby counsel be appointed for the limited purpose of discussing the defendant the consequences of waiving a jury trial. (*Daniels, supra*, 3 Cal.5th at p. 999.)

Finally, there is no written waiver of appellant’s right to a jury trial in the record.

In *Daniels*, three justices maintained that Daniels was sufficiently aware of the essential aspects of a jury trial because of his five prior felony guilty

pleas during which he was represented by counsel. (*Daniels, supra*, 3 Cal.5th at p. 1023 (conc. & dis. opn. to lead opn. by Corrigan, J.)) However, in this case, unlike *Daniels*, there was no record of the two plea colloquies, so there is no evidence of what those advisements were in fact. (People’s Exhibits 29 & 30; 3CT:538A-538AA.) And like *Daniels*, appellant’s pleas were remote in time – 7 years in one case and 13 in the other. (*Ibid.*) These remote plea advisements cannot fill the record’s void of whether appellant waived his jury right in this case in accordance with constitutional requirements. (Accord, *Daniels, supra*, 3 Cal.5th at p. 1002.)

Lack of Waiver with Respect to Special Circumstances: *People v. Memro* (1985) 38 Cal.3d 658, 700-704 (*Memro*) interpreted the Penal Code to require, in addition to an advisement regarding the right to a trial by jury at the guilt phase, that a defendant be separately advised of his right to a jury trial as to the special circumstance allegations. In *Sivongxxay, supra*, 3 Cal.5th at p. 187, this Court concluded that when “a defendant has personally entered a knowing, intelligent and voluntary jury waiver as to all aspects of his or her trial, *Memro* error admits of harmless error analysis.” Here, however, the record fails to establish such a waiver of jury trial as to any phase of his capital trial. The predicate assumption of *Sivongxxay* in allowing a harmless error analysis, that the defendant was made aware of his right to a jury trial (and all that entails), is absent in this case. Under these circumstances, the failure to obtain a specific and separate waiver of appellant’s right to a jury trial on the special circumstance allegations constitutes structural error. (*Sivongxxay, supra*, 3 Cal.5th at pp. 200-202 (conc. & dis. opn. of Lui, J.))

Lack of Penalty Phase Waiver: In addition, the record is even more bereft of support for the conclusion that appellant’s penalty phase waiver was valid. After the guilt phase Judge Creed told appellant he could request a jury for the penalty phase; appellant declined. (2RT:329.) No information regarding the nature of the right he was waiving was provided. Even supposing

that appellant retained information he may have received orally in connection with the two prior pleas, that does not serve as an adequate basis to presume appellant understood the “intricacies of the decisionmaker’s role in the penalty phase of a capital trial.” (*Daniels, supra*, 3 Cal.5th at p. 1004.) “In contrast with the guilt phase, the decisionmaker’s role at the capital penalty phase ‘is not merely to find facts, but also – and most important – to render an individualized, normative determinations about the penalty appropriate for the particular defendant – i.e., whether he should live or die.’” (*Ibid.*, citation omitted.)

The record reflects that appellant misunderstood the nature of relevant mitigation and the penalty phase decisionmaking process. When asked by the prosecution during his penalty phase testimony whether he would have liked to have had testimony from a psychiatrist regarding the abuse his father inflicted on appellant and his family, appellant replied:

I don’t think anything that happened in my past, even though it may be a circumstance of why I commit certain crimes, I don’t think it’s directly related to and has any real significance one way or the other. I don’t think it would sway the Court’s mind one way or the other. It’s just a waste of time.

(2RT:513.) Appellant’s belief that there needed to be a “causal nexus” between his mitigation presentation and his crimes was and is contrary to federal constitutional law. (*Lockett v. Ohio* (1978) 438 U.S. 586; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Penry v. Lynaugh* (1989) 492 U.S. 302 (*Penry*), abrogated on other grounds by *Atkins v. Virginia* (2002) 536 U.S. 304; see also *Tennard v. Dretke* (2004) 542 U.S. 274, 283-287 [rejecting Fifth Circuit’s interpretation of *Penry* as requiring a causal nexus between act and defense mitigation presentation].)

Appellant has not found a modern case involving a pro per capital defendant in which a jury trial waiver was upheld on a record as devoid of any indicia of a knowing and intelligent waiver of a jury trial as found in this case.

The lack of a meaningful inquiry militates against this Court’s ability to confirm whether a valid waiver of rights was obtained. (See *Daniels, supra*, 3 Cal.5th at p. 992 [“a meaningful colloquy – or lack thereof – bears on our ability, on review” to confirm a valid waiver].) While the right to a jury is waivable, “we do not presume acquiescence in the loss of fundamental rights.” (*Daniels, supra*, 3 Cal.5th at p. 993, internal quotation marks and citation omitted.) The record in this case would require the Court to do exactly that – the record fails to affirmatively show that appellant made a knowing and intelligent waiver of his fundamental right to a jury trial as to all phases of his capital trial.

C. The Failure to Obtain an Informed Waiver of Jury Trial Requires Reversal of Appellant’s Conviction and Sentence of Death

A failure to obtain an informed waiver results in a complete denial of defendant’s right to a jury trial. (*Daniels, supra*, 3 Cal.5th at p. 1003, citing *People v. Tran* (2015) 61 Cal.4th 1160, 1169.) Both the United States Supreme Court and this Court hold that the complete deprivation of the constitutional right to a jury trial right is a structural error compelling reversal. (*Daniels, supra*, 3 Cal.5th at p. 1003, citing *Rose v. Clark* (1986) 478 U.S. 570, 578, *People v. Collins* (2001) 26 Cal.4th 297, 312 and *People v. Cahill* (1933) 5 Cal.4th 478, 501.)

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CONCLUSION

For all the foregoing reasons, reversal of appellant's conviction and judgment of death is required.

DATED: March 13, 2018

Respectfully Submitted,
MARY K. McCOMB
State Public Defender

/s/
KATHLEEN M. SCHEIDEL
Assistant State Public Defender

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

I, Kathleen M. Scheidel, am the Assistant State Public Defender assigned to represent appellant, Valdamir Fred Morelos, in this automatic appeal. I directed a member of our staff to conduct a word count of this supplemental opening brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 2,915 words in length, excluding the tables and this certificate.

DATED: March 13, 2018

/s/
KATHLEEN M. SCHEIDEL

DECLARATION OF SERVICE

People v. Valdamir Fred Morelos

Cal. Supreme Court No. S051968
Santa Clara Co. Superior Court No. 169362

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **March 13, 2018**, at Oakland, California.

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RANDY PAGADUAN

STATE OF CALIFORNIA
Supreme Court of California

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