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

Case No. S051968

Santa Clara County Superior Court Case No. 169362
The Honorable Daniel Creed, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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I. APPELLANT'S KNOWING AND INTELLIGENT WAIVER OF A JURY TRIAL IN FAVOR OF A BENCH TRIAL WAS WELL INFORMED

Appellant has filed a supplemental argument asserting that his waiver of jury for the guilt, special circumstances, and penalty phases of trial was invalid, citing *People v. Sivongxxay* (2017) 3 Cal.5th 151. Mr. Morelos exercised his right to self-represent and in that capacity made various informed decisions about the conduct of his trial. His waiver of a jury in favor of a bench trial in front of Judge Creed was knowing, intelligent, and well informed.

A. Appellant Established his Competence Before Moving to Represent Himself and Entering a Jury Waiver

On August 23, 1993, on the basis of an advisory report from Dr. Robert C. Burr, finding appellant competent, albeit antisocial and sadistic (CTA(1) 156-160), appellant was set for a hearing in Superior Court on his competence. (RT [6/23/1992] 3.) A second report was filed in September 1993 by Dr. Echeandia, also finding appellant competent. (CTA(1) 161-166; see also RT [7/19/1995] 10.) The court found appellant Morelos competent to stand trial on September 22, 1993. (RTA [9/22/1993] 1.)

His competence established, and pursuing his plan for trial step by step, appellant filed a petition pursuant to *Faretta v. California* (1975) 422 U.S. 806, to represent himself at trial. On July 19, 1995, he was questioned by the court. He asserted that he would be ready for trial as scheduled on August 14, 1995. (RT [7/19/1995] 3.) He explained that he was not making his *Faretta* motion because of any dissatisfaction with counsel, he simply wanted to represent himself as was his right. (RT [7/19/1995] 5.) The clarity of his thinking was established, as was the absence of any promises or threats. (*Ibid*.) The court took appellant through his

constitutional trial rights, including the right to a speedy public trial, trial by jury, subpoena power, presence, confrontation and cross-examination of witnesses, to testify or to remain silent, to bail, and to appointed counsel. The court determined that appellant clearly understood those rights and had discussed them with the attorney who had been representing him up to that point. (RT [7/19/1995] 5-7.) The court assured itself of appellant's literacy and that he understood that generally it is a very bad idea to try to represent yourself. (RT [7/19/1995] 7.) The court explained that the trial judge would not be able to give him special treatment and would hold him to the same standard of conduct and knowledge of the law that an attorney would bring. (*Ibid*.) Appellant understood he would face an experienced prosecutor. He was further questioned about his waiver form and understanding of all the points raised there by that prosecutor. (RT [7/19/1995] 10-13.) The court found "that the defendant has given up his right to an attorney after having made a sufficient showing that he is competent to represent himself and that he is aware of the consequences procedurally, penalty-wise of that decision and I will so find and certify the defendant in pro per status." (RT [7/19/1995] 13.)

One of appellant's next steps upon asserting and achieving his *Faretta* rights was to raise the issue of waiving a jury and having a bench trial. (RT [7/21/1995] 19; RT [7/27/1995] 30-31.) Appellant's probation report and Penal Code section 969b packets showed he had three prior separate experiences with the criminal justice system, resulting in three sets of criminal convictions. Appellant was convicted by plea of assault with a deadly weapon and committed to state prison for three years in 1982. He was convicted of being an accessory (Pen. Code, § 32) and was placed on probation for three years for that misdemeanor in 1987. In 1988, he was returned to prison for five years and four months following his conviction,

by plea, of first degree burglary and robbery. (3CT 538A-539, 619, 629-632.)

On August 11, 1995, Judge Ball took a jury waiver on behalf of Judge Creed to whom the case was being transferred:

> THE COURT: All right. Let's take things in order then. First let [me] ask you, 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 or 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 understanding, wish to freely and voluntarily waive those rights to those jury trials provided that Judge Daniel Creed will make this specific to this particular judge, agree is able 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 upon your own knowledge and understanding of the facts, and the law that's been explained to you and that you understand?
>
> THE DEFENDANT: Yes.

(RT [8/11/1995] 48-49.) The court found appellant "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." (RT [8/11/1995] 49.)

B. The *Sivongxxay* and *Daniels* Cases

As this Court explained in *Sivongxxay*, a criminal defendant may make a voluntary, knowing and intelligent waiver of the right to a jury:

> Under the federal Constitution and our state Constitution, a defendant in a criminal prosecution has a right to a jury trial. (U.S. Const., amend. VI; Cal. Const., art. I, § 16; *People v. Weaver* (2012) 53 Cal.4th 1056, 1071 (*Weaver*).) However, a "jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel." (Cal. Const., art. I, § 16.) Waiver must be "express[ed] in words ... and will not be implied from a defendant's conduct." (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444 (*Holmes*).) Moreover, "a defendant's waiver of the right to jury trial may not be accepted by the court unless it is knowing and intelligent, that is, ' " ' 'made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it,' "' as well as voluntary ' " 'in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.' " ' " (*People v. Collins* (2001) 26 Cal.4th 297, 305 (*Collins*), quoting *Moran v. Burbine* (1986) 475 U.S. 412.) "[W]hether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case." (*Adams v. U.S. ex rel. McCann* (1942) 317 U.S. 269, 278 (*Adams*).)

(3 Cal.5th at p. 166, parallel citations omitted.)

In *Sivongxxay*, the court found there was an inadequate waiver of the right to a jury trial with respect to the special circumstance determination under state law (citing Pen. Code, §§ 190.1, subd. (a), 190.4, subd. (a), *People v. Memro* (1985) 38 Cal.3d 658, 700-704), but found the error was harmless. (3 Cal.5th at pp. 170-171, 176-188.) This Court found, as to the guilt and penalty phases, including the special circumstance determination,

a knowing and intelligent waiver of his right to a jury trial under federal and state constitutional standards. (*Id*. at pp. 167-168, 171-172.) There, the trial court informed the defendant he had the right to a trial by a jury of 12 members of the community selected by the parties, or a trial by the court alone without a jury, under the beyond-a-reasonable-doubt standard. In a court trial, the court would decide whether the prosecutor met the burden of proof. In response to the question of "Do you give up your right to a jury trial and agree that this court, alone, will make those decisions," the defendant responded that he did. (*Id*. at pp. 165-166.)

Sivongxxay claimed on appeal that, while his jury waiver was voluntary, it was neither knowing nor intelligent because the court's colloquy did not explain that a jury must be impartial, that its verdict must be unanimous, or that the trial court must declare a mistrial if the jury fails to reach a verdict. He also complained that the court did not ask any questions confirming Sivongxxay understood how a jury worked, or that he had discussed the jury waiver with his counsel. (*People v. Sivongxxay*, *supra*, 3 Cal.5th at pp. 166-167.)

This Court affirmed the judgment, finding the jury waiver was sufficient under the totality of the circumstances. Although Sivongxxay was a Laotian refugee with no formal education and limited English proficiency, he was represented by counsel and assisted by a translator, and the defense initiated the request for a court trial. Further, the trial court advised him that he had a right to a jury trial, that a jury consisted of 12 members of the community, and that he could participate in jury selection. The trial court further explained that, if he waived the right to a jury, the judge alone would determine guilt or innocence. Sivongxxay responded "Yes" when asked if he gave up his jury trial right in favor of a court trial. In addition, Sivongxxay had prior criminal court experience indicating he fully understood his right to a jury trial. "Viewed holistically," *Sivongxxay*

held, "the circumstances surrounding defendant's jury waiver demonstrate that it was knowing and intelligent." (3 Cal.5th at pp. 167-168.)

In *Sivongxxay*, this Court noted the United States Supreme Court had never held that a defendant had the right to be "canvassed" about his waiver either generally or according to a formula, and that the California Supreme Court had "never insisted that a jury waiver colloquy invariably must discuss juror impartiality, the unanimity requirement, or both for an ensuing waiver to be knowing and intelligent," even though in many cases in which a jury waiver was upheld, the defendant was advised that the 12 jurors must unanimously agree on their verdict. (3 Cal.5th at p. 168.) However, *Sivongxxay* held that, under the totality of the circumstances standard, "the presence or absence of a reference in a colloquy" to the unanimity or impartiality characteristics of jury trials "is not necessarily determinative of whether a waiver meets constitutional standards." (*Ibid*.)

Finally, the court "recommended" that in the future "trial courts advise a defendant of the basic mechanics of a jury trial in a waiver colloquy, including but not necessarily limited to the facts that (1) a jury is made up of 12 members of the community; (2) a defendant through his or her counsel may participate in jury selection; (3) all 12 jurors must unanimously agree in order to render a verdict; and (4) if a defendant waives the right to a jury trial, a judge alone will decide his or her guilt or innocence." (*People v. Sivongxxay*, *supra*, 3 Cal.5th at p. 169.)

Two months later, in *People v. Daniels* (2017) 3 Cal.5th 961, a plurality of the court found that the defendant validly waived jury trial as to the guilt and special circumstance phases (per Corrigan, J., with two Justices concurring and one Justice concurring in the result), but a different plurality found that the jury waiver on the penalty phase was invalid (per Cuellar, J. with two Justices concurring and one Justice concurring in the result). The court again rejected imposition of rigid formulae or

specification of particular words a court must use to ensure a knowing and intelligent jury waiver. (*Id.* at pp. 992 [lead opn. of Cuellar, J.], 1018 [conc. & dis. opn. of Corrigan, J.].) Daniels, unlike Sivongxxay and appellant Morelos, was not the initiating force behind the jury waiver. He waived counsel and confirmed a trial date, then two weeks later, the court asked if he preferred to proceed by a jury trial or a court trial. Daniels selected a court trial. (*Id*. at p. 993.)

> The court orally advised Daniels that the judge alone, instead of a jury, would make determinations in the different phases of his capital trial. The court admonished Daniels that, in the event of waiver, the judge alone would determine whether Daniels was guilty, whether special circumstances were true, and whether the appropriate punishment was death. . . .

(*Id.* at p. 994.) Justice Corrigan explained that:

> Here, Daniels personally entered an express waiver of his right to jury trial three separate times: twice before trial began and a third time before the start of the penalty phase. During the colloquy, the trial court informed Daniels that he had a right to be tried by a jury made up of members of the community and that, if he waived jury trial, the court alone would determine the issues of guilt, special circumstances, and penalty. Daniels stated no fewer than 15 times that he understood the jury trial right he was giving up. He unwaveringly assured the court that he understood the nature of the proceedings and the decisions he had made. He specifically expressed his confidence that he would receive a fair trial before the judge who would hear his case. He was no stranger to criminal proceedings. Approximately a decade before, when represented by counsel, he had thrice pleaded guilty after being informed that he was entitled to a unanimous verdict of 12 jurors on the question of guilt. The totality of these circumstances demonstrates a knowing and intelligent waiver of the jury trial right.

(*Id*. at pp. 1011-1012 [conc. & dis. opn. of Corrigan, J.].)

The court orally confirmed the desire to forego a jury when the guilt phase commenced, and obtained express waivers of jury before each phase. (*People v. Daniels*, *supra*, 3 Cal.5th at p. 995.) The plurality finding the

penalty phase waiver invalid noted that "although the court provided Daniels another opportunity to opt for a jury trial right before the penalty phase, it did not describe any aspect of a jury's role in the penalty phase or otherwise add to what had been conveyed to Daniels earlier in the trial." (*Id*. at p. 1004.) The plurality focused on the "societal interest in the integrity of the capital process," and found it threatened by a procedure that did not explain the jury's role in reaching a determination about the appropriate penalty. (*Id*. at pp. 1004-1006.)

C. Appellant's Jury Waiver Was Valid for Each Stage of the Proceedings

Appellant approaches this Court's recent cases as if this the recommendations for future trial courts in *Sivongxxay* determine the present outcome. First, appellant's understanding of these concepts is shown by the record. Second, even if proof of an aspect we found wanting, *Sivongxxay* and *Daniels* support a finding that appellant's waiver of a jury in favor of a court trial at each stage of the proceedings was knowing and intelligent. As set forth in the respondent's brief, appellant was following a plan, step by step, to control his own destiny, by first establishing his competence, next asserting his *Faretta* rights, then waiving his right to a jury in favor of a bench trial for the guilt phase, special circumstance findings, and penalty phase of trial. As in *Sivongxxay*, the motion to waive a jury was instigated by appellant Morelos. When Judge Ball said he would only approve a bench trial for the guilt phase, but would insist on a jury for the penalty phase, appellant located a judge in the county who would agree to preside over a bench trial on all phases of the trial. All three determinations were discussed during the waiver. (RT [08/11/1995] 48 ["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 or 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"].)

The factors for future trial courts to make clear were made clear in this case. Appellant was well aware that a jury involves 12 persons charged with determining whether he is guilty, whether one or more special circumstances have been proven, and whether death or life in prison without parole is the appropriate penalty. (RT [7/19/1995] 7; RT [08/11/1995] 48.) He was aware that he would participate in any jury selection. (RT [7/27/1995] 30 [discussing jury selection by a pro per].) He understood that the court alone would make any the guilt, special circumstance, and penalty determinations in the event of a jury waiver, requesting in particular that Judge Creed be that court.

Appellant had considerable prior criminal experience, indicating he knew precisely the nature of the right he was waiving. He is educated, English-speaking, and literate. He was twice questioned about his understanding of his jury rights, whether he had been informed about them, and whether he was giving them up willingly, knowingly, and freely. First he was questioned on voir dire at his *Faretta* hearing concerning his taking responsibility for enforcing his jury rights, among others. (RT [7/19/1995] 5 [Appellant answered yes to the following question: "you have initialed and indicated to me that you understand each of your constitutional rights . . . . I want to be absolutely sure that you understand what each of them are. You understand that you have a right to a public, speedy trial and trial by a jury . . .?") Appellant initiated the topic of jury waiver. ((RT [07/21/1995] 19.) Then there was considerable discussion about whether Judge Ball would accept a jury waiver that included the penalty phase, as he believed a jury should determine the appropriate penalty if the case got to that point. (RT [8/2/1995] 34, 36-37, 43.) Both appellant's motion to

represent himself (3CT 404 et seq.) and his motion to waive jury establish this was a course of action he deliberately pursued.

The above discussion of *Sivongxxay* demonstrates that nothing in this Court's opinion compels reversal here. Appellant had a right to represent himself, exercised it, and thus was not represented by counsel as he entered the waiver. However, he had discussed it with counsel while represented, and his understanding of his jury right was established not only when he waived jury, but when he successfully moved to represent himself. The court assured itself that when appellant took over his own representation it was with his eyes open and with full understanding of all the trial rights to which he was entitled and over which he would exercise control; he would determine whether to exercise or waive those rights. Moreover, like the defendant in *Sivongxxay*, appellant's probation report demonstrated his literacy, noted his prior experience with the criminal justice system, and suggested that he fully understood the jury system. Indeed, the instant case compares favorably with *Sivongxxay* in that the record contains no indication appellant had any problem understanding or expressing himself in his native English language. Appellant personally expressed a desire to waive his right to a jury trial and have the court decide the facts, including the special circumstances, and the penalty. He set conditions on his waiver, including that he go before Judge Creed. He managed his time waivers closely to achieve his goals without unduly burdening his speedy trial rights. Given the totality of the circumstances, appellant's waiver was knowing, intelligent, well-informed and well-managed. *Sivongxxay* affirms that appellant sufficiently and properly waived his right to a jury trial in favor of a court trial.

Nothing in *Daniels* changes that analysis. The key factors that convinced a plurality of this Court to reverse the penalty determination in *Daniels* are not present here. Appellant understood that the jury would not

only make the factual determinations, but also, should he be found guilty, and should the special circumstances be found true, decide the appropriate penalty to punish those offenses. Nothing about this plea threatened the societal interest in the integrity of the capital process. Appellant proceeded thoughtfully, step by step, and according to his plan, to demonstrate he was capable of understanding his rights, competent to manage them, and knowledgeable about them. When he waived his right to a jury at the guilt phase, for the special circumstance determination, and for the penalty phase, it was a voluntary, knowing, deliberate, intelligent and well-informed decision.

CONCLUSION

For the foregoing reasons, and those stated in respondent's brief, the judgment should be affirmed.

Dated: April 4, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 3,521 words.

Dated: April 4, 2018

XAVIER BECERRA
Attorney General of California

/s/ Catherine A. Rivlin

CATHERINE A. RIVLIN
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No.: **S051968**

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I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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SUPPLEMENTAL RESPONDENT'S BRIEF

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 4, 2018, at San Francisco, California.

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California Dept of Justice, Office of the Attorney General

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