

SUPREME COURT COPY

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No. S140894

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

)
 PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff and Respondent,)
)
 v.)
)
 JOSHUA MARTIN MIRACLE,)
)
 Defendant and Appellant.)

(Santa Barbara
County Superior Ct.
No. 1200303)

**SUPREME COURT
FILED**

SEP 19 2014

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Santa Barbara
Frank A. McGuire Clerk
Deputy

HONORABLE BRIAN E. HILL, JUDGE

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DEATH PENALTY

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APPELLANT'S OPENING BRIEF

INTRODUCTION

Appellant and Robert Ibarra were charged with the murder of Elias Silva, found stabbed to death at the home of Ibarra's friend Robert Galindo. Appellant's case proceeded first. Although Penal Code section 1018 expressly prohibits a defendant from pleading guilty to capital murder unless he appears with counsel and has the consent of counsel, the trial court granted appellant's motion to represent himself and accepted his plea of guilty based on the consent of advisory counsel. The court also insisted appellant be visibly shackled throughout the trial, to an extent that exceeded what law enforcement personnel charged with courtroom security thought necessary. The excessive restraints inhibited appellant's ability effectively to represent himself and prejudicially fueled the prosecutor's argument that appellant would pose a danger in prison if not sentenced to death. Finally, the trial court erroneously imposed restitution fines without inquiring into

appellant's ability to pay more than the statutory minimum.

Because appellant's invalid guilty plea must be vacated, his conviction and death sentence must be reversed. The excessive and visible shackling independently warrants reversal of appellant's sentence of death. The restitution fines should be vacated or reduced to the statutory minimum.

STATEMENT OF APPEALABILITY

This appeal from a final judgment imposing a verdict of death is automatic under Penal Code section 1239, subdivision (b).

STATEMENT OF THE CASE

Appellant Joshua Martin Miracle and Robert Quinones Ibarra were indicted on March 7, 2005, for the murder of Elias Silva (Pen. Code, § 187, subd. (a)) (Count 1), alleged to have occurred late Saturday night or early Sunday morning, October 2 or 3, 2004. The indictment charged, as special circumstances, that appellant and Ibarra had intentionally committed the murder while lying in wait (Pen. Code, § 190.2, subd. (a)(15)); that in the commission of the murder appellant and Ibarra had each personally used a deadly and dangerous weapon (a knife) (Pen. Code, § 12022, subd. (b)(1)), rendering the offense a serious felony (Pen. Code, § 1192.7, subd. (c)(23)); and that appellant and Ibarra had each committed the offense for the benefit of, at the direction of, or in association with, a criminal street gang (the Santa Barbara Eastside gang) (Pen. Code, § 186.22, subd. (a)(22)).¹ Appellant was alleged to have committed the murder while an active participant in, and to further the activities of, a criminal street gang (the

¹ At some point the cases were severed for trial, and Ibarra was tried separately in 2011. (See *People v. Robert Quinonez Ibarra* (Mar. 11, 2014, B243065) [nonpub. opn.])

Santa Barbara East Side gang) (Pen. Code, § 190.2, subd. (a)(22)). Appellant was also charged with the September 23, 2004, attempted murder of Jaime Alfaro Lopez (Pen. Code, §§ 664 and 187, subd. (a)) (Count 2). With respect to Count 2 the indictment charged, as a lesser offense, the crime of assault with a deadly weapon (a knife) (Pen. Code, § 245, subd. (a)(1)). Finally, as to Counts 1 and 2 appellant was alleged to have previously been convicted of a serious or violent felony (Pen. Code, §§ 667, subd. (d)(1) & (e)(1), 1170.12, subd. (b)(1) & (c)(1), 1192.7, subd. (c). (1 CT 1-6.)²

On March 23, 2005, the prosecutor stated that he intended to seek the death penalty. (1 CT 21.) Appellant, through his appointed counsel, Michael Carty, announced his intention to file a motion to represent himself, pursuant to *Faretta v. California* (1975) 422 U.S. 806. (*Ibid.*) Mr. Carty indicated that appellant was pursuing the *Faretta* motion against his advice. (1 RT 33.)

On April 5, 2005, Mr. Carty announced that appellant wished to plead guilty to the murder and attempted murder counts and admit at least one special circumstance allegation; that he had informed appellant that Penal Code section 1018 prohibited the court from accepting a guilty plea in a capital case without the consent of counsel; and that he would not consent to the guilty plea. (1 RT 57-58.)

On April 20, 2005, the court heard and granted appellant's *Faretta* motion. (2 CT 534, 537.) The court then proceeded with the arraignment and entered a plea of not guilty and a denial of the special circumstance

² "CT" refers to the Clerk's Transcript; "RT" to the Reporter's Transcript.

allegations on appellant's behalf, over appellant's objection. (1 RT 111-112.)

On April 28, 2005, the court appointed Joseph Allen as appellant's advisory counsel. (2 CT 558, 559-560.)³

On July 29, 2005, advisory counsel announced that he consented to appellant pleading guilty to Count 1 (murder) and admitting the special circumstance and other allegations. (2 CT 599-600.) The court accepted appellant's plea. (2 CT 599-600, 3 CT 602-610.) Appellant maintained his plea of not guilty as to Count 2 (attempted murder). (3 CT 601.)

On September 8, 2005, the court granted the prosecution's motion to amend Count 2 to add the allegation that appellant had used a knife in the commission of the offense (Pen. Code, § 245, subd. (a)(1)) and to dismiss the street gang allegation (Pen. Code, § 186.22, subd. (b)(1)). Appellant then changed his plea on Count 2 to guilty and admitted the remaining special allegations. (3 CT 613-615; 618-625.)

On November 3, 2005, the court granted the Santa Barbara County Sheriff's motion to have appellant physically restrained in the courtroom. (3 CT 881-882.)

Jury selection began November 14, 2005 (3 CT 895) and was concluded December 6, 2005, with the swearing of the jurors and the alternates (4 CT 948).

The penalty phase began December 7, 2005. The court gave preliminary jury instructions and the prosecutor gave his opening statement and began presenting the state's case in aggravation. (4 CT 1008-1009.)

³ The court originally appointed Adam Pearlman as advisory counsel, but relieved him based on a conflict of interest arising from his former representation of a prospective percipient witness in this case. (2 CT 557.)

The prosecution and defense rested on December 15, 2005. (4 CT 1018.)

The defense presented no evidence.

On December 19, 2005, the prosecutor gave his closing argument. The defense gave no closing argument. The court further instructed the jury and the jury began its deliberations. (4 CT 1063-1064.) The jury reached its death verdict the same day, after deliberating approximately an hour and a half and addressing a note to the court in writing. (4 CT 1064-1065, 1113-1115.)

On January 17, 2006, the court denied appellant's automatic motion, pursuant to Penal Code section 190.4, subdivision (e), for modification of the death sentence. On January 24, 2006, appellant was sentenced to death on Count 1 (Pen. Code, § 187); to 10 years imprisonment for the associated street gang allegation (Pen. Code, § 186.22, subd. (b)(1)), stayed pending this Court's disposition of appellant's automatic appeal; and to a total of seven years imprisonment on Count 2 (Pen. Code, §§ 245, subd. (a)(1), 12022, subd. (b)(1) and 12022.7), also stayed. (4 CT 1152.) Appellant was ordered to pay over \$20,000 in restitution and parole revocation fines, pursuant to Penal Code sections 1202.4, 1202.44 and 1202.45. (4 CT 1152-1153, 1169, 1171.) The parole revocation fines, only, were stayed. (4 CT 1169, 1171.)

STATEMENT OF FACTS

I. The Circumstances Of the Silva Homicide (Count 1)

In support of his position that the "circumstances of the crimes," within the meaning of Penal Code section 190.3, subdivision (a), warranted imposition of the death penalty, the prosecutor called lay witnesses who described what they heard and saw at the apartment where the homicide occurred; law enforcement personnel who described the crime scene and the

recovery of evidence; a gang expert; and the victim's mother and wife, who described the impact of his death. Autopsy photos were introduced by stipulation. From this evidence the jury learned the following.

A. Robert Galindo

Elias Silva was stabbed to death Saturday night, October 2, 2004, at the apartment where Robert Galindo lived with his brother Rodney Galindo and Rodney's partner Phillip Alliano. Galindo pled guilty to voluntary manslaughter in exchange for testifying for the prosecution at appellant's and Ibarra's trials. (7 RT 1623-1624; People's Ex. 6.) He had not yet been sentenced when he testified at appellant's trial. (7 RT 1623.) Asked whether the plea arrangement gave him "some concern that what you say in this trial needs to be what the district attorney believes the truth is," Galindo replied, "Well, yes, of course." (7 RT 1709.)⁴

Galindo had known Ibarra and Silva for about three years. (7 RT 1620, 1622.) Ibarra used to "hang out" at Galindo's apartment and the two used "crystal meth" together. (7 RT 1621-1622, 1625.) There had been some animosity between Ibarra and Silva: they had had a girlfriend in common, and Ibarra resented that Silva had a good job and was doing well. (7 RT 1627.) Galindo also offered that nobody liked Ibarra. (7 RT 1718.) Silva sold crystal meth, including to Galindo. (7 RT 1647, 1710.)

Galindo was confused about the timing of the parties' comings and goings during the two or three days preceding the homicide. (7 RT 1631-1637.) At some point, a day or two before Silva was killed, Galindo's friend Danny Ramirez came by the apartment, with appellant. (7 RT 1628-

⁴ Galindo's plea bargain also required him to testify truthfully at Ibarra's trial. (7 RT 1709-1710.)

1630.) Ibarra and Silva apparently were already there. (7 RT 1630-1631.) Galindo did not know appellant, but Ibarra and appellant knew each other. (7 RT 1630.) Ramirez, a tattoo artist, had come because he had agreed to do a tattoo for Silva; but they decided to postpone the project and Silva left. (7 RT 1627-1629, 1631.) Ramirez asked Galindo if he and appellant could stay the night at Galindo's apartment and Galindo agreed, expecting Silva would pick them up the next morning. (7 RT 1631.)

Ibarra, Ramirez and appellant spent the night at Galindo's apartment; Galindo seemed unsure whether this was the Thursday or the Friday before the homicide. (7 RT 1631, 1636.) The next morning, while Galindo was in the shower, Silva stopped by and picked up Ramirez, but not appellant or Ibarra. (7 RT 1632.) This, and the fact that Silva had not come in to say hello, upset Galindo. (7 RT 1623, 1634-1635.) Galindo made breakfast for himself, Ibarra and appellant. (7 RT 1633.) Ibarra and appellant then left together; appellant returned to the apartment alone. (7 RT 1633-1634.)

Galindo, still upset with Silva, persuaded his friend Darren to come by and drive him to Silva's house, where he then told Silva how much the slight had bothered him. (7 RT 1634-1635.) According to Galindo, "he" – it is not clear whether this meant Silva or Ramirez – said he should "get that guy out of your house," referring to appellant, because he was "no good." (7 RT 1635.) Darren then drove Galindo back to his apartment, stopping on the way so they could buy food and get gas. (7 RT 1636.) Galindo was confused as to whether this occurred on Friday or Saturday. (*Ibid.*)

Appellant was still at Galindo's apartment, but Galindo expected Ramirez would pick him up. (7 RT 1637-1638.) Galindo felt he was doing Ramirez a favor by allowing appellant to stay with him, and appellant was "not doing anything wrong." (7 RT 1638.) Appellant was quiet and they just "kicked

back” and watched television. (*Ibid.*) Ibarra apparently then also returned to the apartment. (*Ibid.*)

Galindo woke Saturday morning to find Ibarra and appellant still there. (7 RT 1638.) Galindo’s brother Rodney, who worked nights at the Chumash Casino, came home from work. (7 RT 1638-1639.) Ibarra and appellant were getting along well and spent a lot of time using crystal meth together. (7 RT 1639.) At Galindo’s request, they did this in the bathroom. (*Ibid.*) Galindo identified Ibarra’s glass pipe shown in a photograph introduced as People’s Trial Exhibit 17, noting that Ibarra always had a pipe with him. (7 RT 1699-1700.) Galindo testified that he did not use drugs that day because he was preparing to take a drug test, as part of a drug diversion program he was in as the result of a drug-related arrest. (7 RT 1639, 1708, 1713-1714.) But Galindo admitted he had used meth with Ibarra the day before appellant first came to his apartment. (7 RT 1706.)

Ibarra apparently left at some point on Saturday to visit his daughter. (7 RT 1640.) He returned in the early evening with a large black bag on wheels. (7 RT 1641-642.) Ibarra told Galindo it contained the clothes he and appellant were going to wear to a party. (7 RT 1641-1642.) Appellant was in the kitchen, fixing something to eat with the groceries he and Galindo had gotten earlier that day. (7 RT 1642-1643.)

According to Galindo, “[t]he mood changed when Ibarra got there.” (7 RT 1644.) “He was pretty much like wired. He was like, you know just all, antsy. He was like, you know, ready, like, okay, let’s do it, you know, let’s go party, or do this, or whatever. Because he was more like [in] a very hyper mood.” (*Ibid.*) Galindo moved Ibarra’s black bag out to the patio. (7 RT 1644.) Although he had earlier testified that he did not see what was in the bag, he changed his testimony and said it looked like “there was a white

plastic bag in there.” (7 RT 1641-1642, 1644.)

Galindo gave Ibarra some needles to use to inject crystal meth intravenously. (7 RT 1645.) Galindo had gotten them from his father (who was diabetic), at Ibarra’s request. (*Ibid.*)

Galindo then overheard a conversation between Ibarra and appellant about “rats” and the need to “take care of this rat,” which he understood referred to people who cooperated with law enforcement by “ratting out” people, “like for drugs.” (7 RT 1646.) Ibarra and appellant also talked about “some girls, or whatever, you know” (*Ibid.*) Galindo did not recall hearing them discuss “taking somebody down, or something along those lines.” (*Ibid.*) Nor did he recall Ibarra or appellant saying much about Silva. (7 RT 1715.)

At some point Galindo was asked to call Silva, to have him bring drugs over. “Ibarra wanted to get some drugs because he just got his check.” (7 RT 1647.) When Galindo called, Silva declined the request, reminding Galindo that he “d[idn]’t want anything to do with them” and telling Galindo to “get them out of [his] house.” (7 RT 1648.) Ibarra, whose cell phone was losing its charge, urged Galindo to go use a pay phone to try calling Silva again, because he wanted drugs to “party with the girls.” (*Ibid.*) Galindo agreed to go call Silva again and left the apartment, but he did not call Silva. (7 RT 1649.) When he returned he was surprised to find Ibarra and appellant again in the bathroom using drugs, even though Ibarra had made it seem they had exhausted their supply and needed Silva to provide more. (*Ibid.*)

Ibarra and appellant again asked Galindo to call Silva: “Ibarra is all, ‘Just f--ing call him again,’ he’s all, ‘you know, and we’ll be out of here.’” (7 RT 1650.) Galindo reminded Ibarra that his phone was dying and asked,

“how am I supposed to call?” (*Ibid.*) Ibarra persisted, “Just give him a call, you know, call him.” Galindo told Ibarra he had already called Silva more than once. (*Ibid.*) Galindo then took the phone (presumably Ibarra’s dead or dying cell phone) and pretended to call Silva. (7 RT 1650-1651.) Ibarra urged Galindo to “keep on trying.” (7 RT 1651.) Galindo then left, saying he would try Silva again from the pay phone, and get some cigarettes while he was out. (7 RT 1652.) When Galindo returned Ibarra was still “persisting” on his calling Silva. (*Ibid.*) Galindo told Ibarra he had been trying and had left messages for Silva on his voicemail. (*Ibid.*) Galindo initially testified that appellant was in the kitchen taping the loose handle of a kitchen knife (7 RT 1652-1653), but later acknowledged he did not see appellant put tape on the knife (7 RT 1716). Ibarra, who had become “pushy” and angry, again urged Galindo to call Silva, and again Galindo responded that he had already called many times. (7 RT 1653.) Ibarra and appellant were both getting agitated, repeatedly telling Galindo to call Silva. (7 RT 1654.)

Galindo left the apartment once again, but decided not to call Silva. (7 RT 1655-1656.) He smoked a cigarette and contemplated how to get Ibarra and appellant to leave his apartment: “[B]ecause the way Ibarra was already, like, agitated and jumpy, and I was just like sh-t, you know. And I knew how Ibarra is, you know, I seen how he got, you know, I’ve been around him and that’s why I didn’t stay.” (7 RT 1656.)

When Galindo returned to his apartment this time, two pieces of furniture had been moved into the kitchen, leaving more open space in the living room. (7 RT 1656, 1658.) When Galindo asked Ibarra why, Ibarra told him to shut up and call Silva. (7 RT 1657.) Appellant also told Galindo to call Silva. (*Ibid.*) When Galindo asked Ibarra why they were

“doing this” to him, Ibarra again told Galindo to shut up and call Silva. (*Ibid.*) At that point appellant brought out a knife from the kitchen, held it up to Galindo’s throat and told him to call Silva. (7 RT 1657-1658.) Appellant threatened to stab him if he did not, and said, “Just call. The only reason I’m not going to do this is because you didn’t disrespect me.” (7 RT 1659.) Appellant was standing behind Galindo; Ibarra was facing the two of them. (7 RT 1660.) There was a lot of “cussing” and yelling, and Galindo began to cry. (7 RT 1660-1661.)

Ibarra’s cell phone then rang; it was Silva calling. (7RT 1663-1664.) Galindo spoke to him and repeated what he had said in the message he had left earlier, in an effort to get Silva to bring drugs: that his cousins wanted Silva to bring drugs over because they were going with some girls to “party.” (*Ibid.*) Galindo asked Silva to pick him up in the back of the apartment complex, which he thought might signal Silva that “something was up.” (7 RT 1664-1665.) Galindo suspected Ibarra was intending to steal drugs from Silva. (7 RT 1665.)

Silva called again and said told Galindo he was just getting off the freeway. (7 RT 1665.) Appellant told Galindo not to go outside but to wait for Silva to come to the door. (7 RT 1665-1666.) Galindo “kept on telling Ibarra, ‘Why are you doing this to me, you know, why?’” (7 RT 1666.) Silva called again. He was coming up to Galindo’s front door and asked why Galindo had not met him out back. (*Ibid.*) Appellant, still holding the knife to Galindo’s throat, told Galindo to let Silva in. (7 RT 1666-1667.)

Silva started to enter the apartment and Ibarra struggled to pull him into the living room. (7 RT 1669, 1671, 1681.) Appellant then pushed Galindo to the side, still holding the knife, to help Ibarra get Silva into the room, and told Galindo to lock the door. (7 RT 1670, 1681, 1768.) Ibarra