SUPREME COURT COPY

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No. S051968

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.	(Santa Clara County Sup. Ct No. SC169362)

SUPREME COURT
FILED

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APPELLANT'S REPLY BRIEF

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

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S051968
v.	)	(Santa Clara County, Sup. Ct. No. SC169362)
VALDAMIR FRED MORELOS,	)	
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant replies to contentions by the State that require an answer in order to present the issues fully to this Court. However, he does not reply to arguments that are adequately addressed in the opening brief. In particular, appellant does not present a reply on Arguments VI and XIII.

The failure to address any particular argument, sub-argument or allegation made by the state, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th

1046, 1071, 1075), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.[1]

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[1] All statutory references are to the Penal Code unless stated otherwise. As in the opening brief, the clerk's transcript is cited as "CT," the Supplemental Clerk's Transcript as "SCT" and the reporter's transcript as "RT." For each citation, the volume number precedes, and the page number follows, the transcript designation. Other shorter transcripts that are not part of a Reporter's Transcript volume are referred to by the date of the proceeding, followed by the page number.

ARGUMENT

I.

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR ADVISORY COUNSEL

Appellant argued, and the record establishes, that had the court recognized it had discretion to grant appellant's request for advisory counsel, it would have done so. (AOB 34-46.) Respondent acknowledges this Court's holding that a court's failure to recognize that California law permits it to appoint advisory counsel is error (RB 58, citing *People v. Bigelow* (1984) 37 Cal.3d 731, 743), but answers that (1) appellant only requested help with expert witnesses, and then withdrew his request, and (2) the court's denial of the request would not have been an abuse of discretion. (RB 58-62.) For the reasons set forth below and in the opening brief, this Court should reject respondent's arguments. Under the circumstances, the court's failure to appoint advisory counsel constitutes reversible error.

Appellant's withdrawal of his request for assisting counsel would have been futile as he did so only after the court repeatedly told him it did not have the authority to grant it, and instead urged appellant to give up self-representation. (12/20/95 RT 1-6, 8; AOB 40-41; see *People v. Chism* (2014) 58 Cal.4th 1266, 1291 [on appeal, defendant may raise claim his codefendant made at trial even though defendant did not join in the objection, where defendant reasonably believed doing so would be futile]; *People v. Hill* (1998) 17 Cal.4th 800, 820 [defendant will be excused from making timely objection and/or request for admonition to prosecutorial misconduct if either would be futile]; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 237 [futility may arise when the trial judge errs by

overruling proper objections].) Respondent's argument that the court never precluded further consideration of appellant's request (RB 62), fails, as additional requests by appellant would have been in vain.

Respondent argues without a citation to the record that appellant withdrew his request when he found out that his application for an attorney in a support role would involve delay and threaten his complete control in the courtroom. (RB 60, 61.) No record support for this assertion exists. (See 12/20/95 RT 1-8.) Although at other times appellant expressed a wish for a speedy trial, that consideration played no role here.

Respondent also argues that appellant withdrew his motion once the court helped appellant realize that what he was really asking for was investigative assistance to help track down mental health experts. (RB 60-62.) Again, the record does not support this contention. The court did not tell appellant he needed investigative help; rather, it distinguished between appellant's requests for experts, which were properly before Judge Hastings, and his application for attorney assistance, which Judge Hastings had sent to the court. (12/20/95 RT 4.)

The topic of expert witnesses came up twice during the hearing on appellant's request for advisory counsel. After the court told appellant that he "need[ed] a lawyer to tell [him] what to do," but that it lacked the "legal ability" to appoint one, the following exchange took place:

DEFENDANT:	Really I would like to have someone in the capacity of an advisor in --
COURT:	That's – you used exactly the right word.
DEFENDANT:	Not really with the court though. I'm asking Judge Hastings for expert witnesses and psychologists and psychiatrists and - -

COURT: Well, you see, those applications are properly before Judge Hastings,[2] and this, of course, came to Judge Hastings and he sent it back to me because I granted your *Faretta* motion, and he thought it was appropriate – and I agreed with him – that I would hear this application and try to explain to you what's involved.

Because *Keenan* counsel is not a synonym for expert witnesses or investigation or anything of that nature. It is solely limited – none of these are involved in your case. This is our next case, Mr. Morelos – so I'm in a spot, and I don't want to put you in a spot.

(12/20/95 RT 3-4.) The court continued to urge appellant to abandon self-representation, and indicated it might continue the matter to bring in the public defender, appellant's former counsel. (12/20/95 RT 3-5.) It was then that appellant stated, "I would like to have it withdrawn, then, withdraw the motion, if it's –." (12/20/95 RT 5.) The court responded that it was "trying to plead" with him to accept counsel. (*Ibid.*) The colloquy continued:

DEFENDANT: Well, everything's going fine in my preparations, except this (sic) new expert witnesses. I'm not really – I could kind of, you know, work it around, you know but --

COURT: Well, I – again I just hope it's going fine for you, because I just think it's so important that you have representation, and I – I'm so hesitant to have granted your motion, which you have the absolute right to bring, but – I've discussed this matter with you on the record before, and I

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[2] Judge Hastings was assigned to handle the section 987.9 motions. (11/17/95 RT 1-3.)

don't want to plough any ground we've already ploughed, but I – You don't want me to call Mr. Cavagnaro [appellant's former counsel] for you.

DEFENDANT: No. No. No, thank you.

(12/20/95 RT 6.) These are appellant's only statements about expert witnesses during the hearing.

Thus, appellant never stated that he needed help with tracking down expert witnesses and the record does not suggest appellant had a problem doing so. (See, e.g., 1 RT 128 [appellant has new psychiatrist]; 2 RT 388-389 [appellant describes using superior court list to obtain a mental health expert].) Later, when appellant planned to have the competency examiners testify at the penalty phase, there was a discussion about whether the district attorney, defense investigator or court should contact them (2 RT 390-391, 450), but nothing in the record suggests that appellant's problem was tracking down experts.

Rather, as discussed *post*, in section G.2. of this argument, the record indicates that appellant's problem was that he did not understand the appropriate expert or experts for purposes of a penalty phase mitigation case. Determining the appropriate mental health expert or experts for a capital trial is the responsibility of the attorney, not an investigator. (See, e.g., American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003 rev.), guidelines 5.1., Qualifications of Defense Counsel, § B.2.e.; 10.11, The Defense Case Concerning Penalty, § F.2 and commentary thereto at p. 1061 ["Counsel should choose experts who are tailored specifically to the needs of the case. . . ."].)

In summary, the court erroneously believed it lacked authority to appoint advisory counsel for appellant, whether it was to help appellant in general, or for the specific purpose of working with mental health experts.

Respondent argues that in any case, it would not have been an abuse of discretion to deny the application for advisory counsel. (RB 61-62.) Respondent claims that "appellant managed his trial preparations actively and effectively," citing to appellant's requests for supplies, a legal runner, an opportunity to contact witnesses, and asking the court for help when he had trouble getting these things. (RB 59.) Respondent does not address appellant's specific argument and record citations showing that while appellant was able to discuss concrete matters such as supplies and phone privileges, appellant's participation in legal discussions during hearings on pretrial matters was minimal. (AOB 43-44.) Thus, for example, unlike the defendants in *People v. Clark* (1992) 3 Cal.4th 41, 111-112, abrogation on another ground recognized by *People v. Pearson* (2013) 56 Cal.4th 393, 462, and *People v. Crandall* (1988) 46 Cal.3d 833, 864-866 (*Crandall*), abrogated on other grounds in *People v. Clayton* (2002) 28 Cal.4th 346, 364-365, appellant never demonstrated any abilities regarding arguing motions or examining witnesses. (AOB 42-45.)

People v. Sullivan (2007) 151 Cal.App.4th 524, 554-555 (*Sullivan*), cited by respondent (RB 61), supports appellant's position. There, the trial court's refusal to appoint advisory counsel for the trial was not an abuse of discretion, because unlike appellant, the defendant had acted as his own attorney many times in the past and had demonstrated his legal abilities pre-trial when he brought "a plethora of motions that related to admission of evidence, presentation of defenses, [and] discovery." (*Ibid.*) In addition, the *Sullivan* court pointed out that the court had exercised its discretion by

appointing advisory counsel for the limited purpose of investigating and presenting mental defenses. (*Sullivan, supra,* 151 Cal.App.4th at p. 554.) This demonstrated that the trial court understood how to exercise discretion. (*Ibid.*) Following *Sullivan*, the court minimally should have appointed advisory counsel to assist appellant in working with a mental health expert or experts for purposes of presenting mitigating evidence at the penalty phase.

G. Reversal Is Required Under Any Standard of Prejudice

1. The Per Se Reversal Standard

Respondent has not addressed appellant's argument that under the per se reversal standard of *People v. Bigelow, supra,* 37 Cal.3d at p. 744 (*Bigelow*), appellant's conviction and death sentence must be vacated. (AOB 46.) Respondent suggests in a footnote without development that this per se reversal standard may have been impliedly overruled by *Crandall, supra,* 46 Cal.3d at p. 863, which found no error in failing to appoint advisory counsel and then applied the test of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (RB 58-59, fn. 3.) Respondent seems to suggest that because there is no federal constitutional right to advisory counsel, only the *Watson* test is applicable. (*Ibid.*)

However, while this Court in *Bigelow* recognized that there was no federal constitutional right to advisory counsel, it nevertheless applied a per se standard of reversal where a court's failure to appoint advisory counsel (because it failed to recognize its authority to do so), would have been error. (*Bigelow, supra,* 37 Cal.3d at p. 744.) The Court chose this standard because of "the impossibility of assessing the effect of the absence of counsel upon the presentation of the case." (*People v. Good Willie* (2007)

147 Cal.App.4th 695, 715, quoting *Bigelow, supra,* 37 Cal.3d at pp. 744-745.)

In *Crandall*, where, had the court understood it had the authority to appoint counsel and its refusal to do so would not have been an abuse of discretion, this Court held that "a rule of per se reversal is unnecessary and unwarranted." (*Crandall, supra,* 46 Cal.3d at p. 864.) In that circumstance, the *Watson* standard for state law error applied. (*Ibid.*) This was not an implied overruling of *Bigelow*; rather, the Court there applied different prejudice tests to different factual and legal scenarios.

Bigelow is also consistent with California's "miscarriage of justice" standard under Article VI, section 13 of the state Constitution as applied to procedural errors under state law that may or may not have affected the outcome. (See *People v. Blackburn* (2015) 61Cal.4th 1113 [2015 DAR 9457, 9465].) In this regard, "it may be impossible, or beside the point, to evaluate the resulting harm by resort to the trial record, ..." (*Id.* at p. 9466.) *Bigelow* discussed analogous case scenarios on the impossibility of assessing prejudice. (*Bigelow, supra*, 37 Cal.3d at p. 745, citing *In re William F.* (1974) 11 Cal.3d 249, 256 [no realistic measure of prejudice from counsel's nonparticipation in argument is possible where record does not reflect different directions proceedings might have taken and what different results might have obtained] and *People v. Horner* (1975) 15 Cal.3d 60, 70 [denial of free transcript of prior trial does not just taint one piece of evidence but infects all evidence offered at later trial; no way of knowing how transcript could have assisted defense].)

In determining that the per se reversal standard applied in *Bigelow*, the Court found that while the trial judge occasionally offered advice and assistance to the defendant, and his prior counsel helped with getting family members in to testify, no one explained to the defendant how to select a