IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. BILLY RAY WALDON, ALSO KNOWN AS N.I. SEQUOYAH, Defendant and Appellant.	No. S025520 San Diego County Superior Court No. CR82986

APPELLANT'S OPENING BRIEF

Volume I of III
Tables; Introduction; Statement of Appealability, Case, and Facts;
Arguments I - VI (Pages 1 - 290)

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of San Diego

HONORABLE DAVID GILL

MICHAEL J. HERSEK
State Public Defender

KAREN HAMILTON (SBN 171794)
Deputy State Public Defender

MARY K. McCOMB (SBN 132505)
Supervising Deputy State Public Defender

770 L Street, Suite 1000
Sacramento, CA 95814
Telephone: (916) 327-2676

Attorneys for Appellant

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Attorneys for Appellant

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INTRODUCTION

Before this Court are a conviction and sentence based on an odyssey of proceedings replete with so many errors of such magnitude that the principles of due process, the right to a fair trial, and society's need for a reliable determination of guilt and penalty in a capital case under the federal and state constitutions require reversal of the judgment and sentence and, if Mr. Waldon is found competent under adequate procedures, a new trial.

In appellant's case, the trial court's utilization of fundamentally flawed procedures to determine appellant's competence to stand trial, after a doubt had been declared, infected all of the pretrial, guilt trial, and penalty trial proceedings that followed. Because appellant was permitted to

represent himself after such constitutionally inadequate procedures, and because the writ raising the errors at the flawed competency trial was dismissed by appellant while he was unrepresented, the infection increased and spread. Never has any constitutionally adequate proceeding been held to assess whether appellant was competent to stand trial. The conviction and death sentence that resulted were both inevitable and constitutionally unsupportable.

It takes pages to even list the errors in this case. After appellant filed a motion under *People v. Marsden* (1970) 2 Cal.3d 118 to relieve his appointed lawyer, and requesting to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806, the trial judge left the *Marsden* motion unheard in violation of her obligation to immediately do so. Instead, she took psychiatric evidence on appellant's mental state as related to possible self-representation, which led her to declare a doubt about appellant's competence to stand trial while the *Marsden* and *Faretta* motions remained unresolved.

There was then a defective competency trial with numerous errors, two of which fundamentally undermined appellant's constitutional rights to a fair procedure. First, the court gave an instruction that omitted the critical term "rationality" from the definition of competency to stand trial, which raised appellant's burden of proof and is structural error. Also, the trial court constructively abridged appellant's federal and state right to counsel in his competency proceeding, by failing yet again to rule on appellant's *Marsden* motion. This error allowed the prosecutor to make the issues that remained unresolved because of the unheard *Marsden* motion the focus of the competency trial, and also to mislead the jury about the respective roles of counsel and client and representational decision-making by giving erroneous information about this Court's law in *People v. Frierson* (1985)

39 Cal.3d 803. This too is structural error. The competency trial was nowhere near the "adequate procedure" that was appellant's constitutional right under *Pate v. Robinson* (1966) 383 U.S. 375 and *Dusky v. U.S.* (1966) 362 U.S. 402.

The trial court then denied the *Faretta* motion after concluding that appellant's waiver of counsel was not knowing, intelligent, and voluntary, given his mental capacity and other factors. Meanwhile, defense counsel sought writ review of the competency verdict from this Court, and review was granted and a hearing in the Court of Appeal was ordered. However, defense counsel was removed pursuant to a ruling by the Court of Appeal, while that writ remained pending. Without replacing counsel – thus denying appellant his Sixth Amendment right to counsel during this critical proceeding – the trial court reversed itself and granted appellant pro se status, while explicitly stating that appellant's mental capacity as related to his knowing, intelligent, and voluntary waiver of counsel was something it would *not* consider, in spite of clear evidence that appellant misunderstood the role to be played by advisory counsel who would be appointed to assist him in his defense.

Based on the flawed determination with respect to appellant's mental capacity as related to his waiver of counsel, and while appellant was still unrepresented at trial and review proceedings, the Court of Appeal dismissed the competency writ on the erroneous premise that the trial court's grant of pro se status rendered the competency writ "moot." The Court of Appeal's dismissal of the competency writ magnified the constitutional inadequacy of the competency determination procedures under *Pate* and *Dusky*.

One trial judge subsequently attempted to ensure that appellant's mental capacity as related to his knowing, intelligent and voluntary waiver

counsel was properly addressed. Based on appellant's odd behavior and upon his observation that the previous court had not had the information before it to assess appellant's mental capacity, that judge ordered the appointment of experts. However, the Court of Appeal erroneously overruled that judge and vacated his order.

Thereafter, the trial judge failed to declare a doubt as to appellant's competence to stand trial or take any steps to inquire into his mental capacity, despite stating again and again that the defense (viz., that appellant was framed because he was the target of a far-reaching counter-intelligence conspiracy by the government) was a product of fantasy and delusion. This too was error.

After erroneously permitting appellant to represent himself, the trial court subsequently failed to honor appellant's right to put on his defense. Instead, the trial court invited and encouraged "advisory counsel" to develop a shadow defense, which interfered with appellant investigating, preparing, and presenting his own chosen defense. The trial judge also barred appellant from presenting his chosen defense while excluding evidence offered to support it on relevancy grounds. In the penalty phase, appellant was deprived the assistance even of advisory counsel, and again was barred from presenting his chosen case in mitigation.

The string of inconsistent and uninformed rulings made in the trial court and the Court of Appeal were caused partly by the fixations and obsessions of the mentally compromised defendant, and partly by the constant changes of legal and judicial officers involved in the case. Over the five and a half years of pretrial and trial proceedings, seven different attorneys were appointed to represent appellant as counsel for all purposes or as "advisory" counsel to assist him as a pro se defendant. Twenty different judges were involved in the case, and appellant filed dozens of pro

se proceedings in the Court of Appeal. Rulings concerning counsel and self-representation were made and reversed, while appellant accused judges and lawyers of exchanging sexual favors for judicial ones and claimed that they too were part of the plot against him. This indecorous shifting of the case from one judge to the other in the face of obviously unresolved issues made it impossible for the court to meet its duty of assessing whether and to what degree there was doubt as to appellant's competence to stand trial.

Evaluating the flaws in appellant's case requires this Court to carefully consider bedrock due process principles stated by the United States Supreme Court in *Pate, supra*, 383 U.S. 375, *Dusky*, *supra*, 362 U.S. 402, as well as *Johnson v. Zerbst* (1938) 304 U.S. 458, *Westbrook v. Arizona* (1966) 384 U.S. 150, and *Massey v. Moore* (1954) 348 U.S. 105. These principles guarantee that a criminal defendant cannot be tried if he is incompetent to stand trial, and states must provide an adequate procedure to determine the competence of all defendants when it is in doubt. California law mirrors those guarantees, and operates under a statute defining what constitutes an adequate proceeding for determining competence. Analysis of this law will show that a defendant's mental capacity should be taken into consideration in assessing whether a court should allow him to represent himself in a capital case. It will also reveal that the defendant's rationality and reality-based decision-making must be at the core of any determination that a defendant is competent to stand trial and makes a knowing, intelligent and voluntary waiver of counsel.

Assessing the defendant's rationality is the sine qua non of adequate procedures under *Dusky* and *Pate*. The test for competence to stand trial is whether the defendant has a rational and factual understanding of the charges and the proceedings, and has the ability to assist counsel, in a rational manner, to prepare and conduct a defense. Therefore, when a

defendant represents himself, to be competent to stand trial he must be able to select and to conduct his defense in a rational manner. There was no determination in this case that appellant was able to do so – although the trial judge had plenty of evidence that he could not.

Also of great weight in this Court's consideration of this case is a defendant's right to the assistance of an attorney at trial – and although the Sixth Amendment also establishes a right of self-representation, the right to counsel is of higher constitutional magnitude and trial courts have a special responsibility of ensuring that the waiver of counsel is knowing, intelligent and voluntary. That duty is most poignant when the defendant's mental capacity is in question, as here. Granting pro se status to the appellant and trying to fill the gaps by appointing "advisory" counsel and deferring to the lawyer's judgment over appellant's was anything but a solution.

Society's interest in a meaningful and reliable penalty trial was neglected entirely in this case. State law prohibits a capital defendant from representing himself at the penalty trial except when the Sixth Amendment mandates otherwise, and *Indiana v. Edwards* (2008) 554 U.S. 164 establishes that the Sixth Amendment does not require states to grant self-representation to capital defendants lacking the mental capacity to shoulder the responsibility. Indeed, since Edwards explains that *Godinez v. Moran* (1993) 509 U.S. 389 did not state a blanket rule that all defendants competent to stand trail have an "absolute" right to represent themselves, it follows that under cases decided before *Faretta* having continuing vigor today, self-representation by a mentally disturbed defendant in a capital case, especially in its penalty phase, violates due process, the right to a fair trial, and the right to a reliable capital verdict. As appellant shows below, a remand for a determination of whether a retrospective assessment can be

made as to appellant's competence when tried, under *People v. Lightsey* (2012) 54 Cal.4th 668, would not be appropriate or meet the requirements stated by the United States Supreme Court in *Cooper v. Oklahoma* (1996) 517 U.S. 348 – but should this Court disagree on that score, such remand at the very least is required.

Appellant stood accused of terrible crimes, murder, rape, robbery and arson mostly occurring during a short period at the end of 1985. The prosecution sought the most serious penalty our society allows as payment for those crimes. Appellant's defense was that he was persecuted by the FBI and CIA because he was a Cherokee activist with a global following who invented a special language, "Poliespo," a new world religion, and important world organizations that would do everything from saving the rain forest to ending starvation in Africa. The defense was strange indeed, and it was repeatedly characterized by the trial court as "fantasy" or "fiction." At the guilt phase, this defense did nothing to rebut seriously the prosecution's case; and at penalty, no juror could possibly assess appellant's culpability and character and so discharge the juror's profound task of expressing the moral judgment of the community in light of the prosecution's case and the defense case presented by an incompetent defendant. Sadly, all this happened without any court ever making sure that appellant's constitutional right not to be tried while incompetent was met and his right to be represented by counsel unless and until he knowingly, intelligently, and voluntarily waived such right was protected.

When such scenario plays out in a complex murder trial where the defendant is facing the death penalty, resulting in a conviction on all counts and a capital sentence, the due process, fair trial, and reliable sentence guarantees of the Fourth, Fifth, Sixth and Eighth Amendments and state law protections are damaged beyond salvage. The trial court egregiously

breached its duty to use adequate procedures to assure that appellant was competent to stand trial, and failed to provide a fair trial in which appellant's rights under the federal constitution were protected and preserved. As established in the Arguments herein, the conviction and sentence cannot stand.

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a verdict of death. (Pen. Code, § 1239, subd. (b); Cal. Rules of Court, rule 13.)[1]

STATEMENT OF THE CASE

This appeal presents exceptional procedural complexities which are the subject of many of the arguments in this brief. This statement of the case broadly outlines the important events.

On December 23, 1985, a sixteen count complaint was filed against appellant as "Billy Ray Waldon," in San Diego County Municipal Court, Case No. F94004, alleging crimes committed between December 7, 1985 and December 20, 1985. These were: the burglary, robbery and murder of Dawn Ellermann (§§ 187, 211, 459); the murder of Erin Ellermann (§ 187); arson (§ 451, subd. (a)); the robberies of Nancy Ross, Diane Thomas, Judith Meredith, and Ronald Carr (§ 211); the burglary, robbery, and rape of Erin Lab (§§ 211, 261(2), 459); the murder of Charles Gordon Wells (§ 187); the attempted murder of John Copeland (§§ 187, 664); and receiving stolen

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[1]All statutory references are to the California Penal Code unless otherwise indicated.

property. (§ 496.1.) (1CT 1-4.)[2] It was alleged that appellant used a firearm in connection with the crimes (§ 12022.5). (*Ibid.*)

On June 18, 1986, a five count complaint was filed against appellant as "Stephen Midas" in San Diego Municipal Court, Case No. F097385, alleging crimes committed on June 16, 1986. These were auto theft (Veh. Code, §10851, subd. (a)); carrying a concealed dirk or dagger (§ 12020, subd. (a)); carrying a loaded firearm (§ 12031, subd. (a)); carrying a switch-blade knife (§ 653k); and receiving stolen property (§ 496.1.) (1CT 28.) Appellant was arraigned on this complaint on the day it was filed and Defender's Inc. was appointed as counsel. (1CT 30; 1ART 2.)

On June 20, 1986, a hearing was held before Judge Lisa Guy-Schall in Municipal Court in Case No. F94004 (the sixteen count complaint) at which appellant stated that his true name was "Billy Ray Waldon." Defender's Inc., was appointed counsel. Attorney Elliot G. Lande appeared.[3] (1CT 31.)

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[2]Appellant uses the following abbreviations on appeal. "CT" refers to the clerk's transcript on appeal. "ART" refers to the transcript of proceedings from June 18, 1986 to May 2, 1990, which includes transcripts of pre-trial proceedings, of appellant's section 1368 trial, as well some of the proceedings after the 1368 trial but before the criminal trial. "RT" refers to the reporter's transcript on appeal beginning April 9, 1990. "987.9RT" refers to the transcript of the section 987.9 proceedings. "PXRT" refers to the transcript of the preliminary examination from September 5, to September 18, 1986. "MH" refers to the transcript of miscellaneous proceedings from 1987. Some transcripts have an additional volume designation, viz., the number for the transcript volume followed by a hyphen and then a second arabic numeral. Appellant cites to the record by citing the volume number, with the additional numerical designation if needed, followed by the abbreviation for the appropriate transcript, followed by the appropriate page number or numbers. (Cal. Rules of Court, rule 8.204, subd. (a)(1)(C).)

[3]The record misreports the name of the attorney who appeared as "E.

(continued...)

An amended complaint was filed in Case No. F94004 on June 26, 1986. It added robbery and burglary special circumstance allegations in connection with the murder of Dawn Ellerman, robbery and escape from arrest special circumstances in connection with the Charles Gordon Wells murder and a multiple murder allegation. (§§ 190.2, subds. (a)(3), (a)(5), (a)(17)(A), (a)(17)(G).) (1CT 45-49.) Also on June 26, 1986, there was a hearing before Lisa Guy-Schall at which Elliot G. Lande appeared for Defender's Inc. Defender's Inc. was relieved as counsel. (1CT 32; 70CT 15441.)

On July 2, 1986, appellant was re-arraigned on the amended complaint in F94004. (3ART 3.) On that date, Geraldine Russell was appointed counsel in both Case No. F94004 and Case No. F097385. (1CT 8, 33; 3ART 2.)

A second amended complaint in F94004 was filed on September 4, 1986. (1CT 50-54.) It added Count 17 alleging the robbery of Ronald Carr (§ 211) and alleged that appellant used a firearm in the offense (§ 12022.5). Appellant was arraigned on the second amended complaint on that same day. (1CT 13.)

A thirteen day preliminary hearing in F94004 and F097385 was held before Judge William D. Mudd from September 5, 1986 to September 18, 1986. (1PXRT – 13PXRT; 1CT 13-24, 35-38.) On September 18, appellant was held to answer on all five counts in F097385. (2PXRT 110; 1CT 58.) On September 24, in F94004, appellant was not held to answer on the robbery of Dawn Ellermann, the robbery special circumstance for the murder of Dawn Ellermann, on the robbery of Erin Lab, on the special

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[3](...continued)
Landy." (1CT 31.) Elsewhere it is clear that Elliot G. Lande was the attorney appointed. (See 1CT 56.)

allegations accompanying these counts, and not on the special allegation relating to the robbery of Diane Thomas. He was held on the remainder of the counts and allegations in the second amended complaint. (13PXRT 2127-2128; 1CT 59.)

On October 6, 1986, a 24 count information was filed in the San Diego Superior Court with two case numbers (CR82985 and CR82986). Count 1 alleged the burglary of 13622 Mango Drive. (§ 459.) Count 2 alleged the robbery of Dawn Ellermann. (§ 211.) Count 3 alleged the murder of Dawn Ellermann. (§ 187.) Count 4 alleged the malicious killing of a white dog. (§ 587, subd. (a).) Count 5 alleged the malicious killing of a black dog. (§ 587, subd. (a).) Count 6 alleged arson. (§ 451, subd. (a).) Count 7 alleged the murder of Erin Ellermann. (§ 187.) Count 8 alleged the robbery of Carole Franklin. (§ 211.) Count 9 alleged the robbery of Nancy Ross. (§ 211.) Count 10 alleged the burglary of the dwelling of Erin Lab (§ 459) and that the burglary was of an inhabited dwelling. Count 11 alleged the forcible sexual penetration of Erin Lab with a foreign object. (§ 289, subd. (a).) Count 12 alleged the rape of Erin Lab. (§ 261(2).) Count 13 alleged oral copulation. (§ 288a, subd. (c).) Count 14 alleged a second rape. (§ 261(2).) Count 15 alleged the robbery of Erin Lab (§ 211) and that the robbery was of an inhabited dwelling (§ 213.5). Count 16 alleged the robbery of Diane Thomas. (§ 211.) Count 17 alleged the robbery of Julia Meredith. (§ 211.) Count 18 alleged the murder of Charles Gordon Wells. (§ 187.) Count 19 alleged the attempted murder of John Copeland (§§ 187, 664) and the personal infliction of great bodily injury (§ 12022.7). Count 20 alleged the robbery of Ronald Carr. (§ 211.) Count 21 alleged auto theft. (Veh. Code, §10851, subd. (a).) Count 22 alleged carrying a switch-blade knife. (§ 653k.) Count 23 alleged carrying a loaded firearm. (§12031, subd. (a).) Count 24 alleged carrying a concealed dirk or dagger.

(§ 12020, subd. (a).) In connection with counts 1, 2, 3, 8, 9, 10, 15, 17, 18, 19, 20, it was alleged that appellant personally used a firearm. (§ 12022.5.) In connection with counts 11, 12, 13, and 14 it was alleged that appellant used a firearm. (§ 12022.3, subd. (a).) (1CT 73-77.)

In connection with Count 3 (the murder of Dawn Ellermann) the information alleged that appellant killed Ellermann in the course of a burglary (§ 190.2, subd. (a)(17)(G)) and a robbery (§ 190.2, subd. (a)(17)(A)). In connection with Count 18 (the murder of Charles Gordon Wells), it alleged that appellant killed Wells in the course of a robbery (§ 190.2, subd. (a)(17)(A)) and to avoid lawful arrest (§190.2, subd. (a)(5)). A multiple murder special circumstance was alleged. (§ 190.2, subd. (a)(3).) (1CT 73-77.)

On October 20, 1986, appellant pled not guilty as to each count and denied the special circumstance allegations before Judge Richard D. Huffman. (1CT 78, 79; 70CT 15442-15443.)

On December 16, 1986, Judge Michael Greer appointed Charles Khoury as second counsel for the purpose of assisting Russell with motions work. (30CT 6462.)

On March 10, 1987, appellant filed a motion to dismiss his attorneys and to represent himself. (73CT 15715.)[4] At a hearing on March 13, before Judge Richard Haden, Russell stated that appellant was not capable of representing himself. (9-1ART 8.) Haden denied appellant's request for advisory counsel. (*Id.* at 11.)

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[4]Appellant's motion does not cite either *People v. Marsden* (1970) 2 Cal.3d 118 nor *Faretta v. California* (1975) 422 U.S. 806. However, the parties usually refer to the motion as appellant's *Faretta* and/or *Marsden* motion.

On March 31, Judge James A. Malkus appointed Alex Landon as advisory counsel to assist appellant with his decision to represent himself. (9-2ART 16.)

On April 1, 1987, Russell filed numerous pretrial motions in the case: a motion to set aside the information pursuant to Penal Code section 995 (1CT 223-2CT 310); a motion to suppress evidence pursuant to Penal Code section 1538.5 (2CT 311-322); a demurrer to the special circumstances allegations (*Id.* at 323-346); a motion to exclude evidence for failure to preserve evidence as required by *People v. Hitch* (1974) 12 Cal.3d 641 (1CT 171-222); a motion to traverse and quash the search warrants (2CT 347-351); a supplemental discovery motion (2CT 352-361); and a motion to exclude evidence for lack of scientific reliability pursuant to *U.S. v. Frye* (D.C. Cir. 1923) 293 F. 1013 and *People v. Kelly* (1976) 17 Cal.3d 24. (2CT 362-369.)

On April 6, appellant wrote a letter to Judge David Gill requesting a *Marsden* hearing, complaining of Landon's and Russell's representation. (67CT 14971-14972.)

On April 7, 1987, appellant's self-representation motion was assigned to Judge Elizabeth N. Zumwalt. (11A-1ART 27.)[5] On April 10, 1987, Zumwalt appointed Dr. Mark Kalish to examine appellant on the question of whether he could knowingly, intelligently and voluntarily waive his right to counsel. (2CT 389-392.)

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[5]Judge Elizabeth N. Zumwalt is initially referred to in the record as "Judge Zumwalt." Later, she changed her last name to "Kurztner." She is sometimes referred to as Judge Zumwalt-Kurztner. Appellant refers to the judge as "Judge Zumwalt" or "Zumwalt."

On April 21, appellant wrote to Judge Gill requesting a *Marsden* hearing prior to further proceedings before Zumwalt. (2CT 402.) He asked that Benjamin Sanchez be appointed as advisory counsel. (*Ibid.*)

On April 30, there were further proceedings before Judge Zumwalt. Dr. Kalish submitted a report. (14ART 4, 10.) Appellant objected that he was not receiving effective assistance of counsel and requested a *Marsden* hearing. (*Id.* at 37.) Zumwalt denied appellant's oral cause challenge as untimely, and refused to file his written motion because he was represented. (*Id.* at 45-46.)

On May 8, in proceedings before Judge Hayden, appellant objected that he was not receiving the effective assistance of counsel. (15ART 4.) Later the same day, the case came before Judge Zumwalt regarding whether appellant's psychiatric records would be provided to Dr. Kalish. (16ART 1-5.)

Also on May 8, 1987, the prosecution filed a notice of aggravating evidence. (3CT 527-542; 16ART 6.)

On May 13, the case came before Zumwalt for entry of a stipulation concerning the provision of documents to Dr. Kalish. (17ART 1.) Appellant objected to representation by his current counsel. (*Ibid.*)

On May 18, appellant filed a notice of appeal relating to Judge Zumwalt's rulings in the Fourth District Court of Appeal, D006251. (47CT 10425-10426; 3CT 543-544.) The petition was treated as a petition for writ of mandate and denied on May 26. (47CT 10423.)

On May 19, Judge Zumwalt received, but did not file, appellant's document entitled: "Re Defendant's Motion of February 20th, 1987, to Dismiss Attorney in Pro Per," which requested a *Marsden* hearing. (20ART 12; 67CT 14975-14969.)

On May 22, the hearing on self-representation continued. Judge Zumwalt denied appellant's request for Benjamin Sanchez as advisory counsel. (20A-1RT 17-18.) Appellant objected that he was not represented by Russell and co-counsel, Charles Khoury. (*Id.* at 20.) Dr. Kalish testified. (*Id.* at 24-30.) Kalish stated that he questioned appellant's competence to stand trial. (*Id.* at 30.) Zumwalt then declared a doubt about appellant's competence, stayed the trial proceedings, and ordered the proceedings be held in accordance with Penal Code sections 1368 and 1369. (*Id.* at 35-36; 4CT 603.) Appellant filed an "Urgent and Emergency Petition for Writ of Mandamus," D006292, complaining that his *Faretta* and *Marsden* motions were unheard. (3CT 593-601.)

On May 29, there was a hearing before Judge Wayne Peterson to determine the date for the criminal trial. Appellant objected that he was not represented by Russell and renewed his *Marsden* motion. (MH-1RT 1.) The competency trial was assigned to Judge Perry Langford. Russell challenged Langford under Code of Civil Procedure section 170.6. (64CT 14376; MH-1RT 6.)

On June 5, Judge Hammes assigned the section 1368 trial to Judge Zumwalt. The prosecution challenged Zumwalt under Code of Civil Procedure section 170.6. (MH-2RT 3; 7CT 1403.)

On June 10, the competency trial was assigned to Judge Jack Levitt. Russell challenged Levitt for cause under Code of Civil Procedure 170.1. (7CT 1405.) Judge Hammes considered the challenge, and on July 10, 1987, denied it. (4CT 811-812; 47CT 10434-10435.) Russell filed a petition for writ of mandate, D006542, on the issue (47CT 10438-10451), which was denied on July 14 (47CT 10432).

On August 17, 1987, Judge Levitt denied Russell's request to continue the competency trial. (25ART 1-2.) The cause was tried by

Russell's co-counsel, Charles Khoury. The competency trial began and voir dire started. (7CT 1410; 25ART 22-43.) Also on August 17, 1987, appellant filed a pro se "Motion For A Fair Trial," requesting leave to file criminal charges against counsel and requesting new counsel. (5CT 847.)

On August 18, a defense motion to inform the jury of the significance of the verdict was denied. (26ART 75.) Voir dire was completed and the jury sworn. (*Id.* at 214.) The defense made an opening statement and presented evidence. (*Id.* at 243.) Judge Levitt granted the prosecution's motion to call appellant as a witness. (7CT 1411; 27ART 386.) The defense immediately filed a petition for writ of mandate on that issue, D006718. (54ACT 11482.) The Court of Appeal issued a stay on the witness issue. (*Id.* at 11385.)

On August 19 and 20, testimony continued in the competency trial. (7CT 1414-1415, 1416.) The prosecution was permitted to present evidence that appellant was charged with capital crimes. (27ART 399.) The court recessed to wait for the Court of Appeal's resolution of the issue of whether the prosecution could call appellant as a witness.

On August 24,1987, appellant filed an "Urgent and Emergency Petition for Writ of Mandamus," D006737, complaining that the court had not acted on his motion filed August 17, requesting hearing on his request for effective counsel. (5CT 860-861.) This was denied as premature on August 27. (*Id.* at 875.)

On September 16, 1987, the Court of Appeal denied the writ in D006718, clearing the way for appellant's testimony. (5CT 877-881.) The competency trial continued. (7CT 1417.) Appellant asked for a stay to take a writ on ineffective assistance of counsel. This was denied. (27ART 335-336.) Levitt returned to appellant's August 17, 1987, "Motion for Fair Trial" and denied it. (*Id.* at 815-817.) On the same day, appellant filed an

"Urgent and Emergency Petition for Writ of Mandamus" in the Court of Appeal, D006849, complaining that he had not had a hearing on his request for substitution of counsel. (62CT 14035-14036.)

Evidence was taken on September 17, and the competency trial concluded on September 21, 1987. (7CT 1418, 1419.) The prosecution called appellant to the stand, and he refused to testify. (29ART 829-833.) Judge Levitt called appellant a "competent witness." (*Id.* at 831.) Over defense objection, Deputy District Attorney David Michael Ebert testified about legal standards. (30ART 1024-1032.) Levitt instructed the jury. (*Id.* at 1087-1096, 1187-1190.) In instructing the jury about the competency standard, Levitt left the word "rational" out of the instruction that a competent person must be able to assist counsel in conducting a defense in "a rational manner." (31ART 1095.) He read CALJIC No. 2.21 and BAJI No. 2.20 over defense objection. (*Id.* at 913, 1092, 1095.) Appellant was found competent to stand trial. (*Id.* at 1193; 5CT 882.) Immediately after the verdict, appellant made a *Marsden* motion. (31ART 1202.)

On September 24, 1987, there was a hearing before Judge Haden to set the trial date. (8CT 1457.) Appellant made a *Marsden* motion. (32ART 1.)

On September 30, 1987, the parties appeared before Judge Levitt on the criminal case. Appellant refused to state whether he would waive time on the grounds that counsel did not represent him. (33ART 4.) He asked for a *Marsden* hearing. Russell filed a challenge for cause against Levitt, which was denied. (24CT 5384.)

On October 1, Russell filed a petition for writ of mandamus regarding the challenge for cause, D006987, which was denied on October 2. (50CT 10864; 50CT 10866-10930.) Also on October 2, Levitt denied Russell's peremptory challenge (Code Civ. Pro., § 170.6) on the grounds

that she had already used one. (35ART 1-6; 24CT 5385; see 64CT 14392.) Levitt set a hearing for appellant's *Marsden* motion. (35ART 11.)

On October 5, defense counsel filed a petition for writ of mandate, D006915, and an emergency stay application concerning the denial of the peremptory challenge. (64CT 14356-14404.) The stay was granted. (8CT 1481.) On October 20, the writ was granted. (8CT 1482-1490.)

Also on October 20, appellant filed a pro se "Urgent and Emergency Petition for Writ of Mandamus," D006996, complaining about Levitt's rulings. (63CT 14279-14282.) On October 22, he filed "Urgent and Emergency Appeal of Competency Trial Which Ended 21Sept87," D007017, complaining of denial of hearings on his *Marsden* and *Faretta* motions. (*Id.* at 14271-14273; 6CT 1225.) Both D006996 and D007017 were denied on October 29, 1987. (*Id.* at 14269, 14292.) In connection with the denial in D006996, the Court of Appeal stated that it was unclear why appellant sought review of the determination that he was competent to stand trial because he stated he wanted to represent himself. (*Id.* at 14292.)

On October 30, 1987, defense counsel filed a motion for new trial and for judgment notwithstanding the verdict, alleging numerous errors at the competency trial. (6CT 1230-7CT 1274; 58CT 12545-12463.) On December 22, the parties appeared before Levitt on the motion. (7CT 1422.) Appellant objected to the failure to hear his *Faretta* and *Marsden* motions, and requested "an emergency Marsden hearing of life-threatening urgency immediately." (MH-5RT 1.) The next day, Levitt denied the motion for new trial. (7CT 1423; 58CT 12543.) On January 19, 1988, Russell filed a petition for writ of mandate in the Court of Appeal requesting review of Levitt's denial, D007429. (56CT 11918-11996.)

On February 11, 1988, Judge Peterson assigned Judge Zumwalt for the hearing on the representation issues. (36ART 3.) Appellant's pro se

cause challenge to Zumwalt was denied on the grounds that he was represented. (*Id.* at 2-4.) Appellant requested appointment of Benjamin Sanchez as advisory counsel. (*Id.* at 11.)

On February 16, Judge Peterson appointed Chuck Sevilla advisory counsel. (8CT 1530; 37ART 2.) The next day Sevilla appeared and stated that appellant would not meet with him. Sevilla was then relieved. (38ART 1-2.) Peterson denied appellant's request to appoint Sanchez as advisory counsel. (8CT 1532; 38ART 3.)

On February 24, the Court of Appeal denied Russell's petition for a writ to review the errors at the competency trial, D007429. (55CT 11702.)

On February 25, Judge Zumwalt began a seven-day hearing on appellant's *Faretta* and *Marsden* motions, ending on March 15. (39ART-45ART.) On the first day, Zumwalt appointed Benjamin Sanchez as advisory counsel. (39ART 30.) Appellant withdrew his *Marsden* motion after Zumwalt's ruling that he had to reveal defense strategy. (42ART 212.) Zumwalt instead heard appellant's motion to relieve counsel, which she treated as a *Marsden* motion. (*Id.* at 214.)

On March 15, 1988, Russell filed a petition for review in this Court from the Court of Appeal's denial of D007429 (the challenges to the competency trial), S004854. (55CT 11638-11703.)

On March 16, 1988, Zuwalt found that appellant was not competent to waive his right to represent himself and denied his *Faretta* motion. She also denied his *Marsden* motion. (8CT 1572-1575.)

On March 30, Russell filed a motion to withdraw as trial counsel. (8CT 1583-1587.) Judge Zumwalt denied the motion. (48ART 532-533.)

On April 12, Russell filed a petition for writ of mandate, D007850, seeking review of the denial of her motion to withdraw pursuant to *People v. Wende* (1979) 25 Cal.3d 436. (72CT 15509-15540.) On April 14, 1988,

the prosecution filed a petition for writ of mandate seeking review of the denial of appellant's *Faretta* and *Marsden* motions, D007873. (45CT 9867-9912.) On May 9, 1988, appellant filed a pro se petition for writ of mandate, D008026, challenging the denial of his *Faretta* motion. Following Russell's objection to appellant's petition, the Court of Appeal ordered the petition stricken on May 12. (9CT 1737; 62CT 13943; 73CT 15742.)

On May 19, 1988, this Court granted a petition for review from the Court of Appeal's ruling in D007429 (the challenges to the competency trial), S004854, and ordered the Court of Appeal to issue an alternate writ. (73CT 15745.) On May 25, it did so. (7CT 1399; 73CT 15747.)

On May 31, the Court of Appeal issued a joint alternative writ in the cases seeking review of Zumwalt's *Faretta* and *Marsden* rulings, D007850, and review of her denial of the motion to withdraw, D007873. (73CT 15749.) After lengthy proceedings, on September 12, 1988, the Court of Appeal issued its decision in those cases. (10CT 1920-1933.) It denied relief in D007873. (*Id.* at 1923.) However, it granted the writ in D007850. The Court of Appeal ordered Russell removed and directed the Superior Court to appoint substitute counsel forthwith. Substitute counsel was given thirty days to consult with appellant and determine whether additional briefing was needed in D007429, the pending petition seeking review of errors at the competency trial. (*Id.* at 1932-1933.)

On December 12, 1988, appellant filed a pro se "Urgent and Emergency Petition for Writ of Habeas Corpus," in the Court of Appeal, D009282, challenging Judge Zumwalt's denial of his motion for self-representation. (52CT 11025.241-11025.343.) On January 6, 1989, the Court of Appeal denied the petition stating that issues not rendered moot by

its decision in D007850 and D007873, could be presented to the Superior Court by newly appointed counsel. (51CT 11025.235.)

The case was assigned to Judge Herbert J. Exarhos. On January 17, Exarhos recused himself. (60ART 14-15; 24CT 5446.)

On January 12, 1989, appellant filed a pro se petition for writ of mandate in the Court of Appeal, D009343, complaining of the delay in considering his motion to represent himself. (42CT 9516-9534.)

On January 20, 1989, the parties appeared before Judge Andrew Wagner. John Cotsirilos was appointed to represent appellant. (62ART 2; 10CT 2054.) On January 27, he appeared and declared a conflict. Attorney Alan Bloom appeared and requested appointment for the limited purpose of appellant's request to represent himself. Wagner denied this request on the grounds that appellant needed a lawyer for all purposes. (62ART 6-10; 10CT 2055.)

On January 31, and February 1, and 2, 1989, the parties appeared before Judge Bernard Revak. (10CT 2057, 2059, 2061.) On February 1, appellant asked for an emergency *Marsden* motion regarding Benjamin Sanchez. (65ART 5.) On February 2, Revak ruled that he would consider appellant's request to represent himself before he appointed counsel for all purposes pursuant to the Court of Appeals' order. (65ART 13; 67ART 2-3.) He appointed Alan Bloom and Benjamin Sanchez for the purpose of appellant's motion to represent himself, which would be held before Judge Malkus. (65ART 13; 10CT 2061.)

On February 10, the parties appeared before Judge Malkus. (67ART; 10CT 2063.) On February 15, they appeared before Judge Greer, who reassigned the case to Judge William H. Kennedy for trial and for the purpose of appellant's motion. (10CT 2065; 68ART 1-2.) Appellant's cause challenge to Greer was denied. (68ART 2.)

On February 17, March 17, and April 10, the parties appeared before Judge Kennedy. (10CT 2067; 24CT 5466, 5468.) On April 10, 1989, appellant challenged Kennedy for cause. (10CT 2097-2109.)

On June 5, 1989, appellant filed his "Motion To: 1) Assign Counsel to Defendant's Case Who Will Take Direction from Appellant or (If That Motion Is Denied) 2) Allow Defendant to Act as His Own Counsel and to Appoint Advisory Counsel to Work under Defendant's Direction." (11CT 2344-2354.)

On June 22, 1989, Judge Greer stated that Kennedy would no longer be the judge and reassigned appellant's motion to Judge Langford. (24CT 5483; 79A-1RT 3-4.) On that day, Langford denied the first part of appellant's June 5 motion. (78ART 26-35.)

On June 26, 1989 appellant's case was assigned to Judge Boyle. (24CT 5487.) On June 26, July 14, and 21, August 18, September 14, and November 3, 1989, the parties appeared before Boyle. (24CT 5488-5491, 5493, 5495.) On November 3, appellant lodged a challenge for cause against Boyle. (84ART 52-53.) Judge Boyle held that appellant was competent to make a request to represent himself and granted the request. (84ART 64.) Boyle also ruled that appellant should have the assistance of two counsel. (*Id.* at 79-80.) On November 8, the parties appeared again before Boyle. (24CT 5496.) Boyle appointed attorneys Mark Wolf and Benjamin Sanchez as advisory counsel. (*Ibid*; 85ART 86.) Later, Wolf was relieved as advisory counsel. (86ART 15.)

Also on November 8, the Court of Appeal took judicial notice of appellant having been granted self-representation status and dismissed the petition in D009343 (complaining about the delay in hearing the *Faretta* motion) as moot. (12CT 2564; 42CT 9514.)

On January 18, 1990, appellant's criminal trial was assigned to Judge Gill because Judge Boyle had retired from the bench. (88ART 1-3; 89ART 2; 13CT 2741.) Alan Bloom was relieved as advisory counsel. (13CT 2740.) On January 22, the parties appeared for the first time before Gill. Appellant challenged Gill for cause. (90ART 8; 13CT 2742-2753.)

On February 6, appellant withdrew all the motions previously filed by Russell on grounds that Russell did not represent him. (92ART 23-25.)

On February 16, following appellant's fourth extension of time to file additional pleadings in the case (13CT 2830-2834), the Court of Appeals dismissed the writ reviewing errors at the competency trial, D007429, as moot. (62CT 13783.)

On April 9, appellant requested that Mark Chambers be appointed as advisory counsel and that Sanchez be ordered to cooperate with appellant. (24CT 5524; 1RT 9-10.) On April 13, Gill denied appellant's request and appointed Nancy Rosenfeld as advisory counsel. (1RT 26.) On May 2, appellant appeared before Judge Revak, asserting that Rosenfeld and Sanchez were ineffective. (96ART 1.)

On May 7, the prosecution filed an amended information. The pleading added the special circumstance that the killing of Erin Ellermann was during the commission of arson (§ 190.2, subd. (a)(17)(H)). (14CT 2903-2907.)

On June 22, 1990, Judge Greer ordered Russell to turn over to appellant all papers and transcripts in appellant's case, with the exception of work product. (53CT 11200.)

On July 9, 1990, appellant asked to have Benjamin Sanchez relieved as advisory counsel and Mark Chambers appointed. This was granted. (25CT 5557; 1RT 171.)

Judge Raymond Edwards, Jr., was assigned to hear issues concerning Russell's papers and transcripts that she was to turn over. (25CT 5563.) On July 31 and August 30, 1990, the parties appeared before Edwards. (25CT 5564, 5566-5567.) During the hearing on August 30, Edwards stated that he had a grave doubt about appellant's capacity to waive his constitutional right to representation. (2RT 286.) On September 5, Edwards appointed two psychiatrists to examine appellant to determine whether he had the capacity to waive his right to representation. (14CT 3030.) On September 7, Edwards appointed Hodge Crabtree and Beverly Barrett as counsel. (14CT 3033.)

On September 12, 1990, the prosecution filed a petition, D012975, requesting review of Edwards' decision. (72CT 15685-15709.) On September 17, the Court of Appeal stayed the mental capacity examinations of appellant. (15CT 3175.) On September 26, appellant filed a pro se petition for writ of mandate requesting review of Edwards' orders, D013055. (74CT 16050-75CT 16123.) On October 10, the Court of Appeal granted a peremptory writ in consolidated cases, D012975 and D013055. (*Id.* at 3182-3190.) It held that Judge Edwards did not have an adequate basis to order a psychiatric examination (*id.* at 3188) and ordered the Superior Court to vacate the order for an examination and the appointment of counsel. (*Id.* at 3190.) On October 16, Edwards vacated his orders for examination of appellant and the appointment of counsel. (*Id.* at 3181.)

On December 13, 1990, appellant filed a motion to suppress pursuant to section 1538.5. (15CT 3281-3290.) On December 28, he filed a motion to exclude evidence pursuant to *Hitch, supra*, 12 Cal.3d 641 (*Id.* at 3324-3380), a demurrer pursuant to section 995 to set aside the amended information (*Id.* at 3381-3395), a motion to exclude evidence for lack of

scientific reliability pursuant to *Kelly*, *supra*, 17 Cal.3d 24 and *Frye*, *supra*, 293 F. 1013 (15CT 3314-3321); and a motion to sever (*Id.* at 3297-3323).

On February 1, 1991, the parties appeared before Judge Gill. Appellant requested that Mark Chambers be dismissed as advisory counsel and new advisory counsel appointed. (25CT 5589; 8RT 474-476.)

On February 1, 4, 5, 6, 7, 1991, there were hearings about advisory counsel before Judge Revak. (25RT 5590, 5591, 5593, 5594, 5595.) On February 4, 1991, Revak dismissed Chambers. (9-1RT 525.) On February 7, Revak vacated this order. (16CT 3518; 9-2RT 564.) Before Gill on February 15, appellant objected to the presence of Chambers because he was ineffective and he did not consider him advisory counsel. (9RT 576.) Throughout the trial appellant made repeated requests that Chambers be relieved. (See, e.g., 987.9-17RT 12.)

On February 19, appellant filed a petition for writ of mandate, D013911, asking that Chambers be relieved as advisory counsel. (80CT 17127.) On February 25, the Court of Appeal denied the petition. (*Id.* at 17248.)

On March 28, 1991, appellant moved to withdraw the severance motion and the demurrer on the grounds that it violated his religious beliefs. (25CT 5610; 11RT 700-701, 814.) Gill denied appellant's motion to withdraw the motion and also denied the severance motion. (*Id.* at 711-714.) On April 24, 1991, appellant filed a motion for discovery of the prosecution's charging practices policies. (17CT 3659-3760.)

On April 29, 1991, Gill denied appellant's *Kelly/Frye* and *Hitch* motions. (25CT 5623, 5624; 13RT 1002, 1017.) The superior court granted the motion to strike the arson special circumstance from count seven (murder of Erin Ellerman) and denied the remainder of the motion to set aside the information. (13RT 991-992; 25CT 5622.) Appellant was

then arraigned on the amended information. (25CT 2562; 13RT 924-926) Gill also consolidated CR82986 and CR82965. (25CT 2562.)

The motions to discover the prosecution's charging practices and to suppress pursuant to section 1538.5 were denied on May 20, 1991. (25CT 5638; 16RT 1711, 1722.)

Voir dire was conducted from May 15 to June 26, 1991. (25CT 5633-5644, 5646-5651, 5653-5666, 5668, 5671-5679.) On June 26, the jurors were sworn (*id.* at 5659; 31RT 5087) and alternate jurors were selected and sworn. (25CT 5678-5679; 31RT 5139.)

On July 1, the prosecution gave its opening statement. (25CT 5682; 32RT 5281.) From July 1 to September 11, 1991 the prosecution presented its case. (25CT 5682-5683, 5685-5687, 5690-5698, 5700-5708, 5710-5719, 5721-5726, 5728-5729, 5731-5757, 5759-5764, 5766-5768.) On September 11, the prosecution rested. (25CT 5767; 53RT 10269.) Appellant's Penal Code section 1118.1 motion for acquittal on Counts 2, 12, 14, the second special related to Counts 3 and 7, and both specials related to Count 18 was denied. (25CT 5767; 53RT 10273-10298.)

On September 12, appellant gave his opening statement. (25CT 5769-5770.) From September 12, to October 30, appellant presented his guilt case. (25CT 5770; 26CT 5771-5774, 57765781, 5783-5790, 5792-5801, 5803-5808, 5810-5818, 5820-5823, 5825-5830.) He testified on his own behalf. On October 8, appellant's motion to admit the testimony of FBI expert Wesley Swearingen was denied. (61RT 12240.) On October 9, Gill denied appellant's motion to reconsider the admissibility of Swearingen's testimony. (26CT 5805; 62RT 12398-12399)

On October 16, appellant filed a petition for writ of mandate, D015502, seeking review of Gill's decision barring Swearingen's

testimony. (39CT 8423-42CT 9510.) This was denied on October 17. (39CT 8420.)

On October 23, appellant's motion for mistrial on the grounds of bailiff misconduct was denied. (65-1RT 13129.)

On that day, appellant renewed his motion to allow the testimony of Wesley Swearingen. (26CT 5820; 65RT 13131.) On October 29, there was an Evidence Code section 402 hearing on that testimony. (26CT 5827; 66RT 13483-13513.) Gill found the testimony inadmissible. (26CT 5827; 66RT 13523-13524.)

On November 1, the trial court found that appellant had rested. (26CT 5832; 67 RT 13683.) On November 4, appellant's Penal Code section 1118.1 motion for acquittal on Count 24 (carrying a dirk or dagger) was denied. (26CT 5835; 68RT 13953.) The prosecution's rebuttal case was on November 5. (26CT 5837-5838.) On November 6, appellant presented his own testimony on surrebuttal. (26CT 5839-5840; 69RT 14165-14169; 14201-14202.) The trial court found appellant rested on surrebuttal. (69RT 14204.) The trial court began instructions. (26CT 5840; 69RT 14205.) On November 7, instructions were concluded and the prosecution began argument. (26CT 5841; 70RT 12438-14310; 14310-14358.) On November 8, the prosecution concluded its argument (26CT 5842; 70RT 14398) and appellant began his. (26CT 5842; 70RT 14399.) On November 15, 1991, appellant concluded his argument. (26CT 5848; 71RT 14710.) The prosecution argued. (26CT 5848; 71RT 14711-14750.) The jury was instructed and began deliberation. (26CT 5848; 71RT 14752-14777.)

On the morning of November 18, 1991, the jury continued its deliberations and announced its verdicts that afternoon. (26CT 5849; 72RT 14798.) They found appellant guilty on all counts and found all the special

allegations and special circumstance allegations true. (19CT 4341-4369; 72RT 14798-14807.)

On November 21, Gill informed the parties that Nancy Rosenfeld would not be available as advisory counsel for the penalty phase. (26CT 5851; 72RT 14829.)

On November 22, 1991, the penalty phase began. (26CT 5852.) The prosecutor made his opening statement (26CT 5852; 72RT 14875-14886) and began his case. The prosecution presented evidence on November 25 and 26 and December 2 through 4. (26CT 5855-5862.) The prosecution rested on December 4. (*Id.* at 5862; 74RT 15400.) Appellant gave his opening statement on December 9 (26CT 5866; 75RT 15483-15495) and began his case. (26CT 5866.) Appellant's penalty case continued December 13, 16, and 17. (26CT 5869-5870, 5872-5875.) On December 17, the jury was instructed (76RT 15925-15944) and the parties argued. (*Id.* at 15945-15946; 15947-15985; 15986-15995.) The jury began deliberations. (26CT 5874.) On December 19, the jury continued deliberation in the morning and in the afternoon reached a verdict. The jury returned death verdicts for the murders of Erin and Dawn Ellermann and Charles Gordon Wells. (26CT 5877; 76RT 16010-16011.)

On February 4, 1992, Judge Gill granted appellant's motion to continue the deadline for a new trial motion, in part based upon Rosenfeld's declaration that she was available to help appellant. (77RT 16022-16030; 26CT 5883.) Gill also considered and denied appellant's motion appoint to Richard Eiden for Chambers as advisory counsel. (77RT 16037-16050.)

On February 26, Gill denied appellant's *Marsden* motion and his renewed motion to appoint Richard Eiden. (77RT 16066-16076.) He also denied appellant's motion for new trial. (77RT 16079-16088.) The judge

denied appellant's section 190.4, subdivision (e) motion. (26CT 5886; 76RT 16129.)

On February 28, the trial concluded. Gill sentenced appellant to death on Counts 3, 7, and 18. Appellant was sentenced to seventy years and four months on the remaining charges. The execution of the sentence on these counts was stayed pending the determination of appellant's death sentences. (77RT 16188-16191; 26CT 5889-5893.)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Evidence

The crimes of which appellant was convicted occurred in San Diego in a two week period in December, 1985. The prosecution presented: evidence of a fire at a home on Mango Drive which resulted in the deaths of Dawn and Erin Ellermann, the testimony of the victims of five other robberies, and evidence of the rape and robbery of Erin Lab. There was also evidence of the stop of appellant's Honda, and the events leading to the shooting of John Copeland and the death of Charles Gordon Wells. Evidence in the Honda connected appellant to most of the charged crimes. Ballistics evidence connected the Dawn Ellermann and Wells homicides to each other. The prosecution presented evidence of appellant's assumption of the identity of "Stephen Midas" and his apprehension six months after the crimes, as well as evidence of some of appellant's activities at the time of the December crimes. Finally, there was evidence of an attempted escape from the San Diego County jail.

1. Ellermann Fire and Homicides

Thomas Collimore testified that at 9:45 PM on December 7, 1985, he was driving with his daughter Katherine when they saw a fire at the home of Dawn Ellermann and her daughter, Erin Ellermann, on Mango Drive in

Del Mar Heights. (32RT 5322-5323.) He tried to enter the home, but the smoke was too intense. (*Id.* at 5328.) Katherine Collimore ran across the street to find someone to phone the fire department. (*Id.* at 5339.) She saw the garage door of the house open and saw a man wearing dark slacks and a jacket run out. (*Id.* at 5341, 5357.) A couple of weeks later, she saw a picture in the newspaper of someone who might have been responsible for the fire. (*Id.* at 5342.) This was the same person whom she saw running out of the garage. (*Id.* at 5343.) She identified appellant as the man she saw. (*Id.* at 5343.)

Lloyd and Martha Cowgill Hutchinson went out to dinner on the evening of December 7 and hired Erin Ellermann as a babysitter. (33RT 5401-5402, 5408.) Lloyd Hutchinson dropped Erin off back at her house on Mango Drive at 9:30 or 9:35 PM. (*Id.* at 5406.) He did not watch her go into the house. (*Id.* at 5403.)

Fire fighters testified about the intensity of the fire and the discovery of the bodies of Dawn and Erin Ellerman. San Diego Fire Department Captain Ronald Riley and his crew were the first to arrive at the scene at 9:57 PM. (33RT 5410.) When they arrived, the fire was already well-involved, meaning that there was a lot of flame inside and fire was coming out of the openings. (*Id.* at 5411, 5414.) Riley thought the fire was suspicious because the fire was quick and intense, suggesting an accelerant was used. (*Id.* at 5439-5440.) Jack L. Gosney was a Del Mar fire captain. (38RT 6558.) He was in the second unit on the scene, and helped knock back the fire. After he did so, he went into the house. He found a body in the hallway off the den, which was later identified as Erin Ellerman. (*Id.* at 6560; People's Exhibit No. 21.)

Fire fighter Tim Thorpe fought the fire at the front of the home. (34RT 5721.) He found a body that later identified as Dawn Ellermann. (*Id.*

at 5743, 5765; People's Exhibit No. 18.) Thorpe did not think that the fire was accidental because there was so much fire and he did not think an accidental fire could get so far without being noticed. The fire was also hard to extinguish because it rekindled very rapidly. (*Id.* at 5753, 5768.) Thorpe also noticed that the garage door of the home was open. (*Id.* at 5766.) Fire fighter Timothy Adkins helped put the fire out at the rear of the house. There was fire everywhere. (33RT 5646-5647.) Adkins thought that the fire was suspicious because of the position of the bodies. One of the bodies (Erin Ellermann) was face down, but she was not trying to get out of the fire. The other (Dawn Ellerman) was face up. The fire was also suspicious because the burns on the bodies were very severe, more severe than would have been expected from the five to ten minutes needed to knock back the fire. (*Id.* at 5713.) Fire fighter Rick Roy noted that the garage door was open. He and Brian Covert turned the gas and water off. They both appeared to be functioning normally. (36RT 6316; 6378.) Covert also turned off the electricity. (*Id.* at 6378.) The circuits had not been tripped, so Covert thought the electricity had been working until he turned it off. (*Id.* at 6380.)

Dawn Ellermann's sister, Deborah K. Halseth, testified that a computer and monitor were missing from the Ellermann home. (33RT 5570; People's Exhibit Nos. 61, 62.) She testified that other items in court, an identification card for Dawn Ellermann, a portrait of Dawn and Erin Ellermann, an address book, a suitcase and contents, a Citicard Visa card, a jewlery case and contents, also belonged either to Dawn or to Erin Ellermann. (*Id.* at 5572-5577: People's Exhibits Nos. 52, 65, 59.)

Two dead dogs were also found. Dawn Ellerman had two black and white Shih-tzus living with her. (33RT 5566; 39RT 6938.) Tom McHale was a firefighter who helped with the overhaul of the house. He opened the

shower door of the bathroom in the master bedroom and found a dead dog. (38RT 6606.) Captain Melvin Medhurst also helped fight the fire. (37RT 6488.) When he was in the bathroom, he tripped on a second dog that was underneath a carpet. (*Id.* at 6492.) The dog underneath the carpet had blood coming from its head. Medhurst thought that the carpet had been thrown on top of the dog. (*Id.* at 6494.)

Investigators concluded that the fire had been deliberately set. Javier Mainar was a fire captain, who at the time of the fire was assigned to the Metro Arson Strike Team ("MAST"). (38RT 6618-6619.) He was a fire investigator whose task it was to figure out where the Mango Drive fire began, what caused it and whether it was deliberately set. (*Id.* at 6621-6624.) As he walked through the house, he noticed that drawers were open and that the sides of the drawers were burnt. This showed that they were open during the fire. (*Id.* at 6627.) He also noted that there was a lot of difference in how badly the two bodies were burnt, even thought they were not far apart. (*Id.* at 6628.) The area of greatest damage from the fire was the master bedroom. There was significant damage in the area where the bed was. (*Id.* at 6630.) He thought that this was the point of origin for the fire because of the amount of damage to the area. (*Id.* at 6666-6667.) He thought that the fire started directly on the bed because of the damage to the bed and to the ceiling above the bed. (*Id.* at 6670.) He examined small appliances and the electrical circuits and concluded that the fire was not started by either. (*Id.* at 6674, 6804.)

Mainar testified that the fire was arson. The position of Dawn Ellerman's body supported arson (in the family room and on her back), as did the open drawers, especially since the rest of the house was tidy. (38RT 6675.) He learned later that a computer had been taken from the home. The evidence of stealing was relevant to the arson investigation because

sometimes fires are started to cover up evidence of a crime. (*Id.* at 6676.) There was other evidence of theft: the glove compartment of the car in the garage was open and there were papers strewn about. (*Id.* at 6678.)

Jeffrey Carle, James R. Smidt, John A. Hale, and Michael H. McCormic were all MAST employees. They all concluded that the fire was arson and that the start of the fire was in the master bedroom. (39RT 6853-6857; 6872-6876; 6933-6934.) There were no indications of an electrical malfunction, and no indication of a smoldering fire. (*Id.* at 6858, 6866.)

Criminalist Walter K. Fung from the San Diego Police Department analyzed the remains of clothing taken from Dawn Ellerman's body for accelerants. The items had been placed in three cans. (47RT 8753-8755; People's Exhibit No. 37.) Fung conducted an analysis using gas chromatography and detected a medium petroleum distillate on two of the three items. (*Id.* at 8755.) Medium petroleum distillates are compounds that include mineral spirits, oil base paint thinners, and some charcoal starter fluids. (*Id.* at 8756.) They are volatile and ignitable. (*Id.* at 8757.) Fung agreed that the evidence he examined was consistent with charcoal lighter fluid sprayed on the clothing and body of Dawn Ellermann and then lit with a match. (*Id.* at 8759.)

Dr. John W. Eisele did the autopsy for Erin Ellermann on December 8, 1985. Erin's body was extensively charred, with much of the skin burned away. (35RT 6187.) He found soot in her pharynx, at the back of the throat. (*Id.* at 6190.) He did a test for carbon monoxide and carboxyhemoglogin. (*Id.* at 6192.) There was a substantial amount of carbon monoxide in her blood. (*Id.* at 6277.) He concluded from the results of this test, and the soot in her airway, that she had died as the result of asphyxia by inhalation of smoke and the other products of a fire. (*Id.* at 6192.) Eisele visited the Mango Drive house and saw the damage and,

based on what he saw, he thought that Erin died or became incapacitated in less than a minute. (*Id.* at 6194-6195.) The fire burned a hole in the skull, so that if there had been a blow to the back of Erin's head, he would not have known it. (*Id.* at 6278.)

Dr. Eisele also did an autopsy of Dawn Ellermann. Her body was more charred than Erin's was. Much of the skin and soft tissue had been burned away, as had much of the extremities. (35RT 6198.) Eisele found a half inch hole in the top right of the skull which he thought was a bullet hole because of the beveling on the inside. (*Id.* at 6199.) Because he found no soot in the airway, Eisele thought that Dawn had died before the fire started. (*Id.* at 6203.) Later, Eisle reexamined Dawn's body. He and Dr. Bucklin, the supervising pathologist for the office removed the spinal cord for examination. (*Id.* at 6208.) He discovered a bullet wound with a bullet lodged in the third cervical vertebrea in the upper neck. (*Id.* at 6210-6211.) The bullet was cut in two during the examination. (*Id.* at 6211.) The bullet paralyzed the muscles required for respiration and was fatal. (*Id.* at 6212.)

Veterinarian Hubert C. Johnstone testified that on December 10, 1985, he did a necropsy on the two dogs. (39RT 6880.) The white dog had a hole in its skull the size of an index finger. (*Id.* at 6881.) This was caused by a blunt object, causing an injury to the brain which could have been fatal. (*Id.* at 6882.) The black dog had skull fractures and fractures to the first cervical vertebrae. (*Id.* at 6882.) Johnstone said the blows to the dogs could have been fatal. (*Id.* at 6883.) Dr. Eisele did carboxyhemoglobin tests on the dogs, the results of which indicated that the dogs were dead at the time of the fire. (35RT 6207.)

2. Ross Robbery

On December 15, 1988, Nancy Ross lived in Del Mar. (40RT 6976.) She and her mother had been at a party and returned about 10:00 p.m. (*Id.*

at 6977.) She let her mother out of the car, pulled into the garage, and closed the garage door. When she turned from closing the door, a man was in front of her. (*Id.* at 6978.) The man had on dark pants, a blue windbreaker and a blue ski mask with white around the mouth and eyes. He had a gun, which he pointed at her face. (*Id.* at 6979-6980.) The man moved the gun to show he wanted the purse and grabbed it. (*Id.* at 6980.) He then grabbed the purse a second time and yanked it so strongly that she fell. The man ran away. (*Id.* at 6981.) The purse contained cash, a driver's license and some credit cards. (*Id.* at 6986; People's Exhibit Nos. 82A, 92B.)

3. Lab Rape and Robbery

Erin Lab testified that on December 17, 1985, she lived in a ground floor apartment in Pacific Beach with her boyfriend Douglas Hackley. (40RT 7024-7025, 7028.) On that evening, she arrived home after 10:00 p.m. She entered the apartment, locked the door from the inside, and went to take a shower. (*Id.* at 7029-7030.) After she got out, she turned the knob to the bathroom door when the door flew open. A man wearing a dark blue ski mask stood there. (*Id.* at 7031.) He told her not to scream and ordered her to get into the bed. (*Id.* at 7032, 7044.) He ransacked the room. (*Id.* at 7032-7033.) He then said: "I'm not going to hurt you I just want to make love to you." (*Id.* at 7033.) She said "No," and he drew a gun and asked her if she knew what it was for. (*Id.* at 7034.) He pointed the gun at her head and got into bed with her. (*Id.* at 7035.) Before he did this, he took his clothes and ski mask off. (*Id.* at 7039.) He had bad body odor and was nervous. (*Id.* at 7164.) He put his finger and then his penis into her vagina. He heard a noise from outside and got up to investigate. (*Id.* at 7037.) He then got back into bed and put his mouth on her vagina. She thought she was going to die. He made her rub his penis with her hand and once he had

an erection put his penis in her vagina. He still had the gun at her head. (*Id.* at 7038, 7040.) He ejaculated. (*Id.* at 7040.)

He then put his clothing back on and told her to take a shower, which she did. (40RT 7040.) She did not see his face because her head was covered with a towel. (*Ibid.*) While she was in the shower, he told her that he wanted her new driver's license. When she told him she did not have a new one, he got angry and threw her old one at her over the shower door. (*Id.* at 7041.) After she got out, he led her to the bed, and wiped the palms of her hands with toilet paper. She heard more ransacking and the television go on. (*Id.* at 7042.) He told her that if she called the police, he would hunt her down and put a bullet through her head. (*Id.* at 7043.) After a while, Lab realized he had gone, wrapped a blanket around herself, jumped out the window, and went to find the apartment manager. (*Id.* at 7043-7044.) She called the police. (*Id.* at 7044.)

After the man left, all the drawers were open. (40RT 7046.) Her bags of Christmas presents had been gone through. (*Id.* at 7046.) A picture of her and Hackley was missing. Some coins from a bottle belonging to Hackley were missing as were her Gemco Card, and some hand grips belonging to Hackley. (*Id.* at 7047-7048.) Later, she noticed that the assailant had gotten in through the front window. (*Id.* at 7157.)

In the summer of 1986, the police asked her to view a line-up. She said at the lineup that she "tentatively" identified appellant as the man who raped her because the man had said he would kill her if she called the police. However, she was certain of the person because of his eyes. (40RT 7056.) In court, she identified appellant as her assailant. (*Id.* at 7057.) Appellant had the same eyes. (*Id.* at 7059.)[6] Lab identified a Gemco card,

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[6]In cross examination of Lab, appellant asked Lab a question about (continued...)

a blank check of Hackley's, a business card from her father, and a photo of her and Hankley as missing from the apartment. (*Id.* at 7047-7048; People's Exhibit Nos. 82D, 82E, 82F.)

Douglas K. Hackley testified that he lived with Erin Lab at the time of the attack. (40RT 7180.) He identified matches, a photograph of himself and Lab, Lab's Gemco card, a check carbon, and a business card from Erin's father as items that were missing after the attack. (*Id.* at 7181-7183; People's Exhibits Nos. 82C, D, E, F.) A gold watch and wedding ring were also missing, as well as a coin purse and coins in a big jar. (*Id.* at 7183-7184.) Hackley stated that he had previously seen appellant in an alley about a block from where he and Lab were living. (*Id.* at 7185-7186.) Appellant spoke to him and said: "Oh, a Raiders fan," a reference to a cap Hackley had on and the Raiders stickers he had on his car. (*Id.* at 7187.)

Dr. Barbara Groves prepared a rape kit on Erin Lab on December 18, 1985, and turned the material over to San Diego police officer David. R. Kersch. (44RT 8576, 8604; 48RT 9308.) Kersch also collected a pair of pants from Lab. (48RT 9309.) San Diego Police Department Criminalist John Simms analyzed the pants Kersch collected. (49RT 9593.) He found pubic hair. (*Id.* at 9594.) He compared this hair with pubic hair that had been collected from appellant. Based on the microscopic similarities he found, the pubic hair collected from the pants could have come from appellant. (*Id.* at 9601.)

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[6](...continued)
the length of the tongue of her assailant. Later, on cross-examination of appellant, the prosecution brought out a newspaper interview in which appellant stated that he had asked Lab questions about this because he had a congenital defect which prevented him from sticking out his tongue very far. The prosecution cross-examined appellant about this issue and introduced a photograph of appellant with his tongue out. (65RT 13231, 13235; People's Exhibit No. 252.)

4. Franklin Robbery

Carol A. Nicolette testified that she used to have the last name "Franklin." (41RT 7416.) On December 14, 1985, she got home from a party at 11:00 p.m. She heard someone yelling behind her, turned and saw someone come running at her. (*Id.* at 7417-7418.) It was a man wearing a medium to dark blue ski mask with a small gun in his hand. (*Id.* at 7418-7419; 7429.) She threw her purse, shoes and keys on the ground, possibly because he told her to do so. (*Id.* at 7419-7420.) He grabbed the purse and ran away. (*Id.* at 7420.) Her purse had her driver's license in it. (*Id.* at 7422; People's Exhibit No. 144.) She went to a lineup, but was not able to identify anyone. (*Id.* at 7424.)

5. Thomas Robbery

Diane L. De Po testified that in 1985 she had the last name "Thomas." (44RT 7963.) On December 19, 1985, she lived in Pacific Beach. (*Id.* at 7963-7964.) On that evening, she walked home after an argument with her boyfriend. (*Id.* at 7964.) She heard footsteps running towards her and screamed her boyfriend's name. (*Id.* at 7967.) She turned and looked at the man chasing her for about five seconds. (*Id.* at 8015-8016.) She was wearing high heels and she fell, and as she fell her purse fell off her shoulder. (*Id.* at 7967, 7970.) The man was wearing dark clothing and a black or navy blue ski mask. (*Id.* at 7968, 7979.) The man's left hand was raised, but she did not see anything in it. (*Id.* at 7968.) She assumed that he had a gun. (*Id.* at 8014.) She did not see what happened to her purse. (*Id.* at 7968.) She identified the contents of her purse in court. (*Id.* at 7972; People's Exhibit No. 106.) She viewed a lineup in September, 1986. She identified appellant as the man who took the purse. She recognized the eyes and height. (*Id.* at 7974-7975.) She identified

appellant at the preliminary examination and again in court. (*Id.* at 7975-7977.)

6. Meredith Robbery

On December 20, 1985, Julia Meredith lived on Van Buren Street near where it crossed Cleveland, Maryland and Campus Avenues. (40RT 7232.) She arrived home from work at about 5:45 p.m. It was already dark. (*Id.* at 7235.) She took some things out of the car, and unlocked the front door to put them in the house. (*Id.* at 7237.) She put her purse on her shoulder, and returned to her car to go shopping. (*Id.* at 7237-7238.) A man with a ski mask appeared out of nowhere. (*Id.* at 7239; 41RT 7253.) He had overwhelming body odor. (42RT 7254.) Meredith screamed. The man reached for her purse. She covered herself with her forearms across her chest, and backed away from him as he approached. (41RT 7240.) He got his right arm around her, and hit her in the solar plexus. (*Id.* at 7241-7242.) She noticed he had a gun. He ripped the purse off her shoulder, and ran up Cleveland. (*Id.* at 7243.) She identified the stolen purse in court. (41RT 7254; People's Exhibit No. 79.) She identified appellant as the person who took her purse at a lineup in September, 1986. (*Id.* at 7258-7259.) At the scene, the man told her to "Give me your goddamn purse." Appellant's voice in court appeared to be the same as the voice of her assailant. (*Id.* at 7285.)

7. The Chase of Appellant's Honda

At 6:00 p.m. on December 20, 1985, San Diego Police Officer Karen Phenix, whose name at the time was "Karen Eiben" got a call about a robbery on Van Buren. (41RT 7308-7309.) She turned down Van Buren where she saw a car parked in the alley between Campus and Cleveland. (*Id.* at 7311.) She saw that the driver was just closing the door. (*Id.* at 7312.) She had a trainee in the car with her, Lisa Gaskill. (57RT 11233-

11235.) As they pulled up, the driver started driving the car down the alley. They followed, and the driver accelerated. (41RT 7312.) She followed the car down the alley, onto Tyler, down Campus, and onto Washington Street. After the car did not stop for a stop sign at Campus and Tyler, Phenix turned on her flashing lights and siren. (*Id.* at 7313.) She followed the car from Washington, to Cleveland, to Lincoln, and then to Normal Avenue. Normal was divided by a raised median. The driver crossed the median, and drove on the wrong side of the road. Phenix tailed the car to the intersection of Park and University Avenues. The driver then went across another raised median and into a bank parking lot. (*Id.* at 7316.) The car blew a tire as it did so. (*Id.* at 7380.) The car drove to the corner of the lot which was bordered by two walls. (*Id.* at 7317.) A man got out of the car. He stopped to pick up a jacket he dropped and then ran. (*Id.* at 7317.) The man jumped over the wall. It looked like a long jump. (*Id.* at 7325.)

In September 1986, Phenix identified appellant in a line-up as the person she saw jump out of the Honda. (41RT 7332-7333; 7395-7396.)

San Diego Police Department Sergeant Kenneth Anderson secured the Honda. (43RT 7863.) The lights of the car were on, and the door was open. (*Id.* at 7864.) He found coins, a wallet, and a passport on the ground. (*Ibid.*) A driver's license was in the wallet. The driver's license and passport were in the name "Billy Ray Waldon." (*Ibid.*) There was also a Long Beach State Identification card in the name of Waldon and a deposit ticket in his name. (*Id.* at 7865, 7898.) There was a driver's license for Carol Franklin. (*Id.* at 7864.) Anderson searched the area where the man jumped over the wall. It was about an eight foot drop on the other side. (*Id.* at 7867.) He found a pair of pants with the name "Waldon" stenciled on them. (*Id.* at 7868.) He also retrieved a radio which Phenix told him she had dropped. (*Id.* at 7891-7892.)

Edward G. Cervantes, an investigator for the San Diego District Attorney, processed the Honda. (44RT 8068.) He seized many items from the car among which were: computer equipment (44RT 8079; People's Exhibits Nos. 61, 62, 63); a suitcase with the name Erin Ellermann containing a notebook with the name D.S. Ellermann, a jewelry box, and a bracelet with the name Erin (44RT 8084; People's Exhibit No. 65); a black purse with papers inside belonging to Julia Meredith (44RT 8093; People's Exhibit No. 79); and a bag with a black purse in it together with some identification in the name Diane L. Thomas (44RT 8095; People's Exhibit No. 106). There was also a box of .25 caliber bullets in the car. (44RT 8091-8092; People's Exhibit No. 168.) There was also a picture of a black man and white woman, a Gemco card in Erin Lab's name, a license for Nancy Roos, a blank check for Douglas Hackley, a watch and wedding band (which was missing from court). There was also a business card for Lou Lab, one for Nancy Ross and a hand grip. (44RT 8100-8101; People's Exhibit No. 82 D, E.) There were U.S. and foreign coins. (44RT 8101; People's Exhibit Nos. 111, 114.) San Diego Police Department Criminalist Georgia Innis collected a registration in Billy Ray Waldon's name from the car. (44RT 8267.)

8. Wells Homicide and Copeland Shooting

John M. Copeland stated that on December 20, 1985, he lived in an apartment at the rear of a duplex on Cleveland Ave owned by the Wells family. (41RT 7436-7437.) Early that evening, Copeland saw Gordon Wells working in the garage. (*Id.* at 7445.) At about 6:00 p.m., Copeland heard voices and a loud bang. (*Id.* at 7441.) When he went out to the balcony of his apartment overlooking the garage, he saw Wells and a man in the area between the garage and the alley. (*Id.* at 7441-7442; 7468.) Wells had blood on his hand. (*Id.* at 7442.)

The man had on dark clothing and a ski mask. (41RT 7453.) Copeland heard Wells shout: "Get out of here you son of a bitch." (*Id.* at 7443.) Copeland went down to help. (*Id.* at 7444.) He saw the man run away and Wells chase after him. The man tried to go through a gate near the front of the house, but he could not get through it. (*Id.* at 7447-7448.) The man turned and fired at Wells. (*Id.* at 7449, 7469.) The man went through the garage and tried to get out through the door, but it shut and closed when he hit it. (*Id.* at 7469.) The man moved from the front gate, back across the yard, and jumped over a wall in the area of a back gate, but could not get over the gate. (*Id.* at 7450-7451.) Meanwhile, Wells had moved closer to the man. He had a stick or broken shovel handle and poked the man in the stomach. The man doubled over. (*Id.* at 7453, 7470.) He straightened up and ran to an area of banana trees in the yard. (*Id.* at 7454.) Wells swung the stick at the man's head, but hit the tree. At some point the man said, "Don't come any closer or I'll shoot." (*Id.* at 7451-7452; 7455; 7471.) The man fired at Wells two or three times while he was standing behind the banana tree. (*Id.* at 7456, 7471.)

Copeland took the stick from Wells, moved towards the man, and waved the stick at him. (41RT 7457, 7472.) The man said a second time "Don't come any closer or I'll shoot." Copeland did not come closer, but the man shot anyway. (*Id.* at 7458.) Copeland was shot in the neck. (*Id.* at 7458-7459.) Copeland went back through the yard and out the front gate. (*Id.* at 7459, 7473.) He got to the porch where he found Alice Wells, Gordon Well's wife, who asked him if he wanted a gun. (*Id.* at 7460; 42RT 7738.) Copeland asked her to call the police. (41RT 7460.) The police asked him where the gunman went. He told the police that he ran out the front gate because Copeland heard the bells on the gate ring. (*Id.* at 7461.) Copeland was in the hospital for five days. He still had the bullet inside

him. (*Id.* at 7463-7462.) He had nerve damage in his shoulder and had numbness and tingling in his elbow, chest and fingers. (*Id.* at 7466.)

In September, 1986, Copeland went to a lineup and identified two men, one of which was appellant, as possibly being the man who shot him. He was more positive it was appellant than the second man. (41RT 7480-7481.) Copeland identified appellant at the preliminary hearing, and again identified him in court at trial. (*Id.* at 7481.)

Alice Wells testified that on the evening of December 20, 1985, she was in the kitchen and her husband was in the garage working on an engine. (44RT 8164-8165.) She heard hollering and a loud bang from the backyard. (*Id.* at 8167.) She ran to the back door and started out, but when she saw a masked man, she shut the door because she did not want the man in the house with her. (*Id.* at 8167.) Through the window, she saw the man run towards the gate. (*Id.* at 8168.) She went to get her gun, but she did not get it. She heard Copeland shouting, and heard two shots. Copeland told her to call for help because he and Gordon Wells had been shot. Immediately before that she saw Copeland chasing a man. (*Id.* at 8169.)

San Diego Police Department evidence technician Randy E. Gibson seized four shell casings from the area of the Wells' duplex. (48RT 9129-9134.) Charles Steven Wells, Gordon Wells' son, testified that on December 30, 1985, he found a casing under an engine in the garage. On August 28, 1986, he was in the garage with his mother and members of the San Diego District Attorneys office when he pointed out a bullet hole in a beam of wood. (44RT 8193.) He got the bullet out, and put it in a Baggie. (*Id.* at 8193-8194; People's Exhibit No. 166.)

Dr. Robert Bucklin testified about his autopsy of Gordon Wells, which he performed on December 21, 1985. (44RT 7944.) The cause of death was four gunshot wounds, three of which were to the shoulder and

face area and the fourth to the brain. The brain shot entered above the left eyebrow and was fatal. (*Id.* at 7945, 7950.) He collected a bullet from the brain. (*Id.* at 7950; People's Exhibit No. 167.) The brain injury would have caused unconsciousness within seconds and death within minutes. (*Id.* at 7951.) Two of the shots, one to the forehead which did not enter the skull, and one to the left cheek, showed stippling, suggesting that the gun was no more than eighteen inches from the face. (*Id.* at 7946-7948.) A third wound to the shoulder showed blackening, but not stippling. (*Id.* at 7949.)

9. Robbery of Ronald Carr

Ronald Carr testified that on December 20, 1985, he lived on First Street in San Diego. Between 7:30 and 8:00 p.m., he went to his driveway, and was just about to leave in his El Camino truck, when a man in a dark ski mask approached him holding a gun. (49RT 9426.) The man asked for the keys and money. Carr told him he did not have his billfold because he only had his gym bag with him. The man told him to go through the bag, and the man went through Carr's jacket. The man took keys and the jacket, and told Carr to lay down in the driveway. (*Id.* at 9431.) The man turned the car on. The stereo was blasting, and Carr told him how to turn it down. Carr also told him how to work the lights and windows. The man pointed to a fence and told Carr that if he jumped over the fence, he would not shoot him. Carr did so, waited until he was sure he was gone, and then called the police. (*Id.* at 9435.) Larry Morton from the San Diego Police Department later recovered the car. (50RT 9557.)

10. Appellant's Capture

Stephen M. Midas testified that in 1985 and 1986, he lived in a condominium in Imperial Beach. (42RT 7762-7763.) In January 1986, he noticed that his wallet was missing after he had left it in his unlocked car. (*Id.* at 7765.) Terena M. Medina was the manager of the apartment

complex Stephen M. Midas lived in. (48RT 9292.) A few days before June 16, 1986, a man identifying himself as Stephen Midas stated that he wanted the security deposit. Medina told him the deposits were mailed, but the person said that he wanted it now. (*Id.* at 9293.) She told the man to come back. She identified appellant as the man calling himself "Stephen Midas." (*Id.* at 9296.)

Howard McAllister, a supervisor at the San Diego County Office of Education, testified about the records of computer classes offered in 1985-1986. (48RT 9119.) The records showed that a "Stephen Midas" attended in April, 1986. (*Id.* at 9120; People's Exhibit No. 210.) Gloria Renas was a teacher at the Mar Vista adult school in Imperial Beach. (50RT 9539.) In April, 1986, she had a student who said he was "Stephen Midas." (*Id.* at 9541-9542.) She identified appellant as this person. (*Ibid.*) Fellow student Nereida Spreitzer testified that the person in the class who called himself "Midas" was appellant. (*Id.* at 9548.)

Daniel Roman testified that his 1968 Mustang had been stolen. (47RT 8709-8711.) San Diego Police Officer Kevin S. Barnard was on duty near Pacific Beach on June 16, 1986. (46RT 8423-8424.) While on patrol, he saw a 1968 Mustang. When the Mustang stopped, Barnard noticed that it had no brake lights. He activated his blue and red lights. (*Id.* at 8426.) The car accelerated and Bernard followed. (*Id.* at 8427.) After the car stopped, the driver got out and fled between some houses. (*Id.* at 8430.) Bernard was in radio communications with other officers and told them which way the person was headed. (*Id.* at 8431.) Officer Ivan A. Sablan was with Bernard and also pursued the man, but lost sight of him. (*Id.* at 8511-8512.) Sablan saw him again in the parking lot of a Kentucky Fried Chicken. The driver stopped running, and fell down. (*Id.* at 8515.)

Officer Mark Keyser saw Sablan trying to arrest someone who was resisting. (46RT 8620.) Keyser assisted. (*Id.* at 8609.) When patting the man down, Keyser found a switchblade, a Swiss army knife, an ice pick, a pouch, some coins, handcuffs, a flashlight and a ladies' watch. (*Id.* at 8610-8611; People's Exhibits Nos. 187, 188, 189, 190.) He also found a Thomas Brothers map book in a pocket and a ski mask. (46RT 8612-8614; People's Exhibit Nos. 193, 195.) Sablan retraced the route used when the officers pursued the man, and found a .357 Magnum.[7] The officers found .357 caliber bullets on the person of the arrested man, which could have been used in the gun. (*Id.* at 8515-8516, 8612.)

Salban did a report on the arrested man as "Stephen Midas." (46RT 8521.) Sablan identified the person they pursued as appellant. (*Id.* at 8610.) Samuel Campbell, a San Diego Police Department sergeant, tried to get information from the person Salban arrested. Initially that person refused to give a name, but finally gave the name "Stephen Midas." (47RT 8735-8736.) Campbell identified appellant as the person who gave the name "Midas." (*Id.* at 8735.) San Diego Police Detective Gerald Berner was involved in the investigation of an incident that evolved out of the arrest of "Stephen Midas." (44RT 8412.) He saw a photo of the person who had been arrested as "Midas." (*Id.* at 8413; People's Exhibit No. 129.) He thought he recognized the face and compared the photo with a wanted poster for Billy Ray Waldon. (*Id.* at 8414.) He did a fingerprint check which confirmed that the person who had been booked as "Midas" was

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[7]The .357 gun was destroyed before appellant's trial. It was destroyed by San Diego Police Officer Larry Griffin on April 14, 1988. (49RT 9284.) Griffin testified that guns were sometimes destroyed when they were no longer needed for a case. He checked under the name of the person arrested, Stephen Midas, to determine whether there was still an active case. (*Id.* at 9286.)

"Billy Ray Waldon." (*Id.* at 8414.) Greg McClain, a deputy district attorney, testified that at a hearing on June 18, 1986, appellant identified himself as "Stephen Midas." (50RT 9666.) Chuck Patrick, a former deputy district attorney, testified that at hearings on June 20, July 2, and August 29, 1986, appellant stated that his true name was "Billy Ray Waldon." (*Id.* at 9648-9650.)

11. Ballistics Evidence

Lance Martini, a ballistics consultant, compared the bullet pieces from Dawn Ellerman's spinal column with the bullet removed from Gordon Wells' brain, and the bullet found at the Wells' scene. (44RT 8383-8384; People's Exhibit Nos. 71, 166, 167.) They were .25 caliber projectiles. (*Id.* at 8384.) He concluded that all three were fired from the same gun. (*Id.* at 8385.) He also compared the casings found at the Wells' scene. (*Id.* at 8386-8387; People's Exhibit Nos. 160-164.) All were fired from the same gun. (*Id.* at 8388.) He could not say that the gun that fired the bullets was the same gun that fired the casings, only that they were the same caliber and bullet configuration. (*Ibid.*)

He also examined a box of cartridges found in the blue Honda. They were .25 caliber cartridges manufactured by the Federal Cartridge Corporation. (44RT 8389-8390; People's Exhibit No. 168.) The casings from the Wells' scene were manufactured by the same company. (*Id.* at 8390.) The bullets from Dawn Ellermann, Gordon Wells, and from the Wells' scene were consistent with the cartridges found in the Honda. (*Ibid.*) The bullets and the casings could have come from the box of cartridges found in the car. (*Id.* at 8391.) Looking at the markings on the cartridges in the box, Martini concluded that they were made by five different machines. The cartridges found at the scene were made by four of the same five machines, which meant that it was likely that the cartridges at the scene

were from the box. (*Id.* at 8397-8400.) Martini consulted an FBI database and concluded that the gun used was likely a .25 ACP semiautomatic pistol manufactured by "Firearms Import and Export" company (FIE). (*Id.* at 8394.) Martini showed the jury an exemplar of a .25 ACP manufactured by FIE. (47RT 8394; People's Exhibit No. 125.) Several witnesses identified this exemplar as similar to the one the assailant used. (40RT 7014, 7075; 41RT 7284, 7426.)

Walter Fung also testified about the bullets and casings. He concluded that the bullet taken from Ellermann and the bullets from the Wells' case were all fired from the same gun. (47RT 8762.) He also testified that all the casings found were fired from the same gun. (*Id.* at 8763-8764.)

12. Appellant's Activities in December, 1985

Iris Kay Rose, appellant's half-sister, testified that in 1985 and 1986 she lived in a condominium on Via Alicante in San Diego. (47RT 8666-8667.) In September 1985, appellant came to live with her. He had just returned from Europe, where he had taken a group of youths on an Esperanto related trip.[8] (*Id.* at 8668.) He was driving a blue Honda. (*Ibid.*) He brought with him from Europe an unusual bicycle, which appellant referred to as a swing bicycle. (*Ibid.*) Appellant left San Diego about September 10, telling his sister he was going back to Oklahoma. (*Id.* at 8671.)

He returned on November 25, 1985 at 3:00 or 4:00 a.m. (47RT 8671) He told her that he had driven straight through from Oklahoma, but that he had car trouble. (*Id.* at 8672, 66RT 13456.) He then left for a day or

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[8]Esperanto is "an invested language for international (chiefly European) use . . ." (Webster's New World Dict. (3d College ed. 1991) p. 464.

two to visit his wife Keiko and their two children. (46RT 8672.) Rose and appellant had Thanksgiving together on November 28. (*Id.* at 8672.) After that, he stayed with her for a while and kept all hours. (*Id.* at 8673.) She knew he was out late because sometimes he was not home when she went to bed at 10:00 p.m., and sometimes he woke her when he came in. (*Id.* at 8681-8682.) Appellant worked on his resume, applied for college and for food stamps. (66RT 13456.) He told her he wanted to set up a computer. Rose later saw the warrant for the search of appellant's car, and noticed that the make of computer listed on the warrant was the same as the one appellant wanted to set up. (*Id.* at 13458-13459.)

On December 7, 1985, appellant came in late. He ate some leftover pizza. (66RT 13452.) After the pizza, appellant turned on the television. Rose remembered something from the news about people dying in a fire. (*Id.* at 13453-13454.) She did not discuss the fire with him. Appellant had something on his neck which she thought was a hickey. He told Rose it was a burn. (*Id.* at 13455.)

In 1985, Michael Finnerman was a counselor at an agency in San Diego that helped people get certified for employment training programs. (49RT 9413-9414.) He identified an appointment card with Sim Andrade from his agency for "Billy Ray Waldon." (*Id.* at 9413.) The records showed that Waldon was scheduled to be certified for office training with the San Diego Urban League. (*Id.* at 9414-9415.) Leroy Martin testified that he was a deputy director of San Diego Social Services in charge of the office issuing food stamps. He identified a book of food coupons found in appellant's car. (*Id.* at 9581; People's Exhibit No. 104.) The card was for "Billy Ray Waldon," and had the address "2509 Imperial" on it. This was the address the county office used for homeless recipients. (*Id.* at 9583.)

13. Attempted Jail Escape

San Diego Deputy Sheriff Douglas Sanders was on duty at the central jail on September 21, 1986. (48RT 9183.) He heard pounding, and went over to appellant's cell where he saw appellant pounding on the wall with a bolt wrapped in a sock. (*Id.* at 9184.) Appellant was chipping a hole in the wall. (*Id.* at 9189.) The hole would normally have been covered with a shelf. (*Id.* at 9189.) Sanders found other things in the cell: a piece of conduit, a handcuff pin, an eight foot long piece of cloth, spoons, screws, and other contraband. (*Id.* at 9192-9194.)

B. Defense Evidence

The bulk of appellant's case was evidence that he was targeted by government agents who kidnaped him and framed him by putting evidence of the charged crimes in his car. Though ultimately the trial court did not permit him to put on evidence of conspiracy, appellant's defense was that he was the target of a cointelpro[9] because he was the inventor of the language Poliespo, and had founded political and cultural organizations the government did not like. Appellant put on evidence of his character and evidence raising doubt about the identification of appellant.

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[9]COINTELPRO is an acronym for "Counter Intelligence Program," a controversial program of domestic spying on the part of the FBI beginning in 1956. (54RT 10296; see Weiner, *Enemies: History of the FBI* (2012), p. 195.) The word identifying the FBI program, COINTELPRO is written in all capital letters. However, when discussing the parties framing him for the crimes, appellant frequently refers to "cointelpros" and states that he was the object of *"a* cointelpro." In this brief, unless the record clearly refers to the program run by the FBI, appellant writes cointelpro in small letters. He uses capital letters only when the record clearly refers to the specific FBI program.

1. Appellant's Organizations, Government Persecution and Kidnaping

Appellant testified on his own behalf.[10] He was born in Tahlequah, Oklahoma, the capital of the Cherokee nation.[11] (61RT 12244.) He was around many Cherokee who yearned for sovereignty. (*Id.* at 12252.) Through his grandfather, he was one-eighth Cherokee. (*Id.* at 12255.)[12] His grandfather gave him the name "Nvwtohiyada Idehesdi Sequoyah." (*Id.* at 12263-12264.) He married and divorced Rhonda Watston. (*Id.* at 12790.) Appellant was in the Navy and went to Asia, Africa, and Europe. He lectured before Esperanto groups on Cherokee autonomy where ever he

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[10]Appellant questioned himself during the examination, with advisory counsel, Nancy Rosenfeld standing next to him. (61RT 12242.) The transcript of appellant's testimony is in a question answer format with appellant asking and then answering the questions.

[11]Appellant attempted to elicit information about the history of the Cherokee nation and its demise because it was critical to his defense that he was the target of a cointelpro. He wanted to show the historic confrontation of the two nations and to show that the Cherokee were once independent. (63RT 12245.) He wanted to put on evidence of Cherokee history so that he could show that it was his attempts to restore Cherokee autonomy that was the motivation for the government to make him a target. (*Id.* at 12246.) The trial judge did not permit this. (*Id.* at 12251.) At other places, appellant attempted to elicit information about Cherokee history, including the trail of tears, but the trial judge refused to allow it in. (See, e.g., *Id.* at 12265; 62RT 12645-12646.)

[12]Appellant asked to put on evidence about the culture of Cherokee's and to show that Cherokee nationality was not based on race. He wanted to show that "I've always been in my life the mental state of Cherokee." This would show the motive of the FBI and CIA in hunting him. (61RT 12261.) It was his Cherokee identity that caused him to be the subject of their attention. (*Id.* at 12272.) The trial judge, Judge Gill did not permit the evidence. (*Ibid.*)

went. (*Id.* at 12346.)[13] He was honorably discharged in March, 1984. (*Id.* at 12344.) One of the reasons he was discharged from the Navy was that he had heart problems. He had problems with his knee, so could not run fast. (*Id.* at 12422-12424.)

Appellant testified that he founded four organizations in Switzerland in 1984: the World Humanitarian Church, the World Esperanto Organization, the World Poliespo Organization and the United Nations of Autonomous People (UNAP). He also founded the Exiled Government of the Cherokee Nation as a part of UNAP. (63RT 12650.) Appellant invented a new language, Poliespo,[14] a combination of Esperanto and Cherokee, which was a fast thinking language. (*Id.* at 12652.) This was the project of a lifetime, beginning in 1958. (*Id.* at 12658.) It was born of the lightening bolts he experienced as a child when he realized that he could think and talk faster in Cherokee. (*Ibid.*) He was motivated to invent the

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[13]Appellant asked to put on multiple details about where and when and what kind of lectures he gave, as well as additional details about newpaper and media coverage of his activities. He argued that he should be permitted to do this because one of the signs that a person was a target of a cointelpro was that the person had media coverage and this showed that appellant had an audience. Judge Gill sustained most of the prosecution's relevance objections when questions were asked about these issues. (61RT 12949.)

[14]Appellant created the name because "Poliespo" is "polysynthetic Esperanto." (63RT 12652.) A "polysynthetic" language is one where individual words contain many morphemes (the smallest meaningful unit in a language). (See http://www.sil.org/linguistics/GlossaryOfLinguisticTerms/WhatIsAPolysyntheticLanguage.htm, retrieved August 4, 2012.) Appellant attempted, but was not permitted, to explain on the record what a polysynthetic language is because Gill held that he had not shown why Poliespo being polysynthetic had anything to do with his guilt. (*Id.* at 12654-12655.) Appellant argued that it was the polysynthetic nature of Poliespo that made the FBI want to frame him. (63RT 12654.)

language because he wanted to benefit all mankind. (*Id.* at 12657.) He wrote the *Fundamentals of Poliespo* in 1985. (*Id.* at 12659.)

When he was in Germany he obtained a special bicycle which he wanted to market for the benefit of the Cherokee people. He founded the Cherokee Bicycle Company to do that. (63RT 12663-12664.) Iris Rose, Erwin Spruth, Mary Barksdale, and Birgitta Holenstein, agreed to be on the board of directors. (*Id.* at 12667-12668.) He was also working on a new Cherokee national constitution for the Exiled Government of the Cherokee Nation. (*Id.* at 12801.)[15]

After he was out of the Navy, he lived with his second wife Keiko Aono and their two children (Eli and Sequoyah) in Los Angeles. (63RT 12791.) He went to San Francisco State in summer 1985, and was the leader of an Esperanto youth delegation that traveled in Germany. They were in Augsberg. (62RT 12417.)[16] When he was in Germany, he distributed the *Fundamentals of Poliespo* to the Esperantists he met.[17] (63RT 12660.) He also enrolled at California State University, Long Beach. (*Id.* at 12779.) At some point, he went to Oklahoma for a Native American conference and to do research. (65RT 13170-13171.)

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[15]Appellant argued he should be allowed to put on evidence of work with the Exiled Government of the Cherokee Nation because it showed why he was framed. (63RT 12799.) Gill refused. (*Id.* at 12800-12802.)

[16]Appellant attempted to elicit information that he was repeatedly strip searched when he was in Rome and Germany and that he was not strip searched until after he talked with Mark Williams. (67RT 13610.) The prosecution's relevance objections were sustained. (*Ibid.*)

[17]Appellant asked himself whether the *The Fundamentals of Poliespo* had expanded to 200 pages, if the language had spread and whether its spread had been stopped by the CIA. Judge Gill sustained the prosecutor's relevance objections. (63 RT 12661.)

Appellant knew a man named Mark Williams, whom appellant thought was a CIA agent. When appellant was in Augsberg, Mark Williams was there. (62RT 12418.) Appellant also saw Williams in Rome and Augsberg. (64RT 12909.) He had demonstrated the bike to Williams when he was in Germany. (*Id.* at 12909.) Appellant had also seen Williams when he was in college in Long Beach, at his home in Los Angeles, in San Francisco, and at a powwow he attended in Riverside. (*Id.* at 12905.)[18] Williams used female drug mules, and used false identities. (*Id.* at 12925.)[19] Appellant made tape recordings of several of his conversations with Williams, which had been stored in a storage shed he had in Los Alamitos. (*Id.* at 12916-12917.) He tried to get these tapes, but the material had been auctioned off. (*Id.* at 12917.) After he was arrested, he asked Geraldine Russell (his former attorney) to look into this, but she refused to do so. (*Id.* at 12917-12918.) He also had other material in the shed critical to proving his innocence, including all his files relating to the founding of his four organizations and his Esperanto and Cherokee language material. (*Id.* at 12919-12920.)

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[18]Appellant asked to put on evidence that the Native American activist Russell Means was in Riverside, that Means had been cointelproed and that Means had tried to recruit appellant for an army that would go to Nicaragua to support the Misquito and Sumo Indians in their fight for autonomy against the Sandinistas. He asked to put on evidence that the army was a CIA sponsored event. (64RT 12905-12907.) Gill refused to allow this. (*Id.* at 12907.)

[19]Appellant testified that Williams murdered Mary Barksdale (one of the people who helped appellant found his organizations) shortly after she had promised to send him evidence about cointelpro defenses. (63RT 12650; 64RT 12992-12993.) Later, appellant attempted to put on testimony that Barksdale was killed with a sophisticated, undetectable, aerosol spray developed by the CIA. (67RT 13629.)

William Dickerson, who was likely also a CIA agent, was also in Augsberg. Dickerson had previously been around appellant: he was a student at appellant's class at San Francisco State, and was at Esperanto conferences appellant attended. (62RT 12418-12419.)

Appellant met Erwin Spruth at the library of the campus of University of California at San Diego. (64RT 12910.) Spruth waved him down to talk about the bike. Appellant explained it to him, and let him ride it. (*Id.* at 12911-12912.) They discussed Poliespo, appellant's four organizations, and the Cherokee Bicycle Company. (*Id.* at 12911.) Spruth agreed to be a member of the board of directors of the organizations appellant founded and on the board of the Cherokee Bicycle Company. (*Id.* at 12923.)

On December 19, 1985, he met Birgitta Holenstein at the airport in Los Angeles. (62RT 12638.) They drove to Balboa Park in San Diego. (*Id.* at 12639-12640.) Later, when they were in the car, he wrote a dedication to her in Cherokee in a prayer book and on a copy of a Cherokee newspaper and gave them both to her. (*Id.* at 12630; People's Exhibit No. 204D.) They went to Denny's and talked about American Indian autonomy. (*Id.* at 12641.) They looked at documents he had gotten in Oklahoma. (*Id.* at 12642.) Appellant dropped Birgitta off, and went to his sister's house to sleep. (*Id.* at 12683.) The next day he met up with Birgitta. He went to see Fred Tremblett, the AMVET counselor, while Birgitta waited. (*Id.* at 12685-12686.)

They went to a Denny's and then to Imperial Beach. (63RT 12686-12687.) Appellant met Mark Williams, who had previously offered to buy his bicycle, and Birgitta waited. (*Id.* at 12688.) They walked together.[20]

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[20]Appellant asked to put on evidence about what Mark Williams (continued...)

Williams' hair looked greasy. (64RT 13014.) Williams and several other men hit appellant. (63RT 12689.) The other men wore ski masks and shirts with the words "Federal Agent" on them. (*Id.* at 12894.) Someone hit him above the eye with a metal pipe, and someone kicked him in the ribs and back. (*Id.* at 12694-12696.) He went unconscious and later heard curses about Poliespo and his Indian autonomy activities. (*Id.* at 12895.) The men tied him up, and threw him in a van. Appellant was driven around, taken out of the van, chained to a chair and a black plastic hood put over his head, replaced in the van, and driven to many locations. (*Id.* at 12698-12699.) He managed to make a hole in the plastic bag, and got a hold of a notebook binder clip which he used to take off his handcuffs. (*Id.* at 12700.) He opened the back door of the van, ran away, found a place to lay down, and went into a combination of sleep and coma. (*Id.* at 12693-12702.)

After the incidents, appellant lived in a crawl space under the porch of a building near Imperial Beach. (62RT 12472; 12569.) He stayed there for four to six months. (*Id.* at 12570.) He knew he was a fugitive because of an article he read in the newspaper. (63RT 12927.) He did not turn himself in because he did not want to be convicted of crimes of which he was innocent. (63RT 12575.) Since it was cold, he wore a ski mask at

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[20](...continued)
knew about the organizations appellant founded. Over the prosecution's hearsay objection, appellant argued that he needed this evidence to show that he had the state of mind of someone who had been framed which showed that he was innocent. (64RT 12897.) Appellant also wanted to show that Williams had gotten information from other Esperantists about his organizations and that he had gotten appellant's name and number from them. Appellant stated that this information was relevant to the reasonableness of his belief that he was "cointelproed." (*Id.* at 12899.) It also showed Williams' state of mind since he was the one who should have been charged with some of the crimes appellant was charged with. (*Id.* at 12902.)

night. (62RT 12479.) During this period, appellant looked for information on cointelpros so that he could defend himself against the crimes. He already knew that he would not get a fair trial and that a judge would rule that his cointelpro defense was irrelevant. He looked for the book *In the Spirit of Crazy Horse*. (*Id.* at 12575.) He found identification papers for "Stephen Midas" in the dumpster near where he was living, and assumed the name. (*Id.* at 12817-12818.) He used the name to enroll in night school in Del Mar. (*Id.* at 12824.)

On the day appellant was arrested, he was in Imperial Beach. He got food out of a trash dumpster, and met a Hispanic boy. (62RT 12467-12469.) Three men arrived with guns. Appellant recognized one of them as Mark Williams. The other two were wearing ski masks, and appellant recognized one of the ski masks as being the one he was using to sleep in at night. (*Id.* at 12475-12477.) Appellant later recognized one of the ski masks they were wearing present in court. (62RT 12477-12478; People's Exhibit No. 195.) He and the Hispanic boy were under the house. They crawled out, and were handcuffed. (*Id.* at 12481-12482.) They were put in the back seat of a brown Oldsmobile; the boy was ordered out, and then a black plastic bag was put over appellant's head. His legs were chained together, and he was driven around. Something was stuffed in his pocket. (*Id.* at 12485.) He was driven around some more. The car stopped, and the plastic bag, handcuffs, and leg chains were taken off. Williams was holding a gun. A white Mustang was near by. (*Id.* at 12486-12487.)

Williams ordered appellant to get out of the Oldsmobile, and into the Mustang whose engine was running. (62RT 12533.) Williams said that if appellant moved, Willaims would blow him away. (*Ibid.*) Just then, someone shined a flashlight in their direction, and another person yelled: "What's going on?" so appellant was able to drive the Mustang away. (*Id.*

at 12534, 12536.) Appellant discovered that a large gun and a pouch had been stuffed into his pocket. (*Id.* at 12538.) A police car pulled up behind him, and turned on its lights. (*Id.* at 12540.) He threw the gun down, but could not throw the pouch because it was pinned to his clothing. (*Ibid.*)

Appellant gave the police the name "Stephen Midas" because that was the name he had been using. (62RT 12545.) While in jail, he was assaulted. He thought that his attorney had used one of her clients to try to murder him. (*Id.* at 12582.) This was the same attorney who was responsible for letting evidence of his innocence he had in a storage locker get destroyed. (64RT 12918.)

The indentations in the wall of appellant's jail cell were already present when he got there. He found metal items in the vent shaft, including a wrench made out of a plastic spoon. (64RT 12884.) He got a handcuff piece and bolt from another inmate. (*Id.* at 12887.) He used the wrench to loosen the seat, and used the seat to pound the wall. (*Id.* at 12890.) He did not intend to escape. (*Id.* at 12891.)

Appellant testified that he had never seen the computer monitor, the suitcase, the jewelry box, and other items which were found in the Honda. He did not know the Ellermanns. He did not know Erin Lab, and did not rape her. He did not know Gordon Wells, John Copeland, or any of the robbery victims. (64RT 12839-12844.) He always had clean hair, and took showers. (*Id.* at 12958-12959.)

On cross-examination, the prosecution brought out testimony that appellant had applied for conscientious objector status while in the Navy. (65RT 13130.) Appellant admitted that there had been an inquiry when he was in the Navy about overpayment of his Navy allotment, but stated that he thought that the inquiry had been made because he was using his free time on Cherokee autonomy. (*Id.* at 13138.) He admitted that when he was

discharged from the Navy, he was also diagnosed with depression and pseudoephedrine abuse. (*Id.* at 13142.) He admitted that he was disciplined for stealing a magazine at Cal State Long Beach, but stated that the allegations were false. (*Id.* at 13147.) The prosecution also brought out evidence that appellant changed his appearance by shaving immediately before the line-ups in 1986, though appellant denied that he did this to make identification more difficult. (*Id.* at 13216, 13327.) Appellant admitted that a Thomas Brothers map page was found in his car, but denied using it to help him follow Erin Lab. (*Id.* at 13246-13247.) The prosecution brought out evidence of appellant's use of the name "Billy Ray Waldon" on many documents. (*Id.* at 13265.)

Others testified about appellant's activities. Erwin A. Spruth was in the San Diego jail with appellant. (55RT 10611.) He had four felony convictions. (*Id.* at 10656.) He thought that he had been framed for some of the charges against him. (*Id.* at 10668.) Spruth first saw appellant in 1985, on the campus of University of California, San Diego. Appellant was riding a unique bicycle, which had a seat that went up and down and handle bars that went back and forth. (*Id.* at 10633.) The two met again on December 14, 1985, at a Denny's. (*Id.* at 10637-10638.) They discussed appellant's four organizations, and the Cherokee Bicycle Company. (*Id.* at 10638.) Spruth signed a letter of intent to be on the board of directors of appellant's organizations. (*Id.* at 10641.) Appellant also told him about his Indian name. (*Id.* at 10647.) They arranged to meet the next week, but appellant did not show up. (*Id.* at 10645-10646.) A few days after Christmas in 1985, Mark Williams called Spruth. (*Id.* at 10668.)[21]

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[21]Appellant attempted to elicit information that Williams told Spruth that he was on the board of directors for appellant's organizations, but the (continued...)

Birgitta Holenstein Sequoyah testified that she was appellant's wife. She was from Switzerland. (58RT 11464.) She encountered appellant in July, 1985, in San Francisco, and talked to him, after she overheard a conversation appellant was having with Mark Williams about American Indian autonomy. (*Id.* at 11514-11515.) She thought Williams was trying to persuade appellant to go to Nicaragua. (*Id.* at 11516.) Appellant dropped a flyer for the "United Nations of Autonomous Peoples" (UNAP). She wanted to talk with him about it, but he had to go, so she arranged to meet him again. (*Id.* at 11516-11517.) They met on July 13, 1985, and discussed appellant's four organizations. (*Id.* at 11517.) Appellant mentioned that he was Cherokee. (59RT 11652.) He told her about Williams' contact in San Diego, "Karen Eiben." (58RT 11518.) They also discussed some of the Indian tribes in Nicaragua. (*Id.* at 11521.)

She and appellant met again at the Los Angles airport on December 19, 1985. (58RT 11490, 11584.) They drove to San Diego's Balboa Park and kissed. (*Id.* at 11492.) They later went to a Denny's and talked about appellant's organizations and about the Cherokee Bicycle Company. (*Id.* at 11495.) She wanted to become a director, which she later did. (*Ibid*, *Id.* at 11501) They discussed American Indian autonomy. (*Id.* at 11496.) Appellant mentioned Erwin Spruth in the conversation. (*Id.* at 11500.) Appellant proposed, and they made love in the car. (*Id.* at 11502.) He gave her a t-shirt, a copy of the first Cherokee newspaper (*The Cherokee Phoenix*), and a Cherokee prayer book. The newspaper and prayer book had been dedicated to her. She identified the three items from the things

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[21](...continued)
prosecution's hearsay objections were sustained. Appellant also tried to elicit Spruth's testimony that Spruth thought that both he and appellant were the victim of a cointelpro. (55RT 10673.) The prosecution's relevance objections to appellant's questions were sustained. (*Id.* at 10673-10674.)

seized from appellant's Honda. (*Id.* at 11503.) Pat Moss, an expert in Cherokee, testified that the inscriptions on the prayer book and the newspapers were dedications to Birgitta Holenstein in Cherokee. (62RT 12458-12459.)[22]

Holenstein and appellant drove together on Imperial Beach the evening of December 20, 1985. (58RT 11464.) They pulled over and appellant told her he was going to meet Mark Williams. (*Id.* at 11468.) She stayed in the car, but later saw appellant walking with Williams. (*Id.* at 11469-11471.) She followed them to a fenced area, where a van was parked. She saw Williams there with another man. Appellant was on the ground hurt or unconscious. (*Id.* at 11473.) Another man came out of the van. This man and the second men were wearing ski masks. (*Id.* at 11474.) Both had "federal agent" printed on the front and back of their shirts. (*Id.* at 11475.) One man kicked appellant in the ribs and said: "This is for your Cherokee autonomous horse shit." (*Id.* at 11476, 11602.) He said the same thing about Poliespo. (*Ibid.*) She ran away and waited for appellant, but he never returned. Later, she saw Williams drive away in appellant's car. (*Id.* at 11477.) She thought that appellant had been killed. (*Id.* at 11480.)

Holenstein did not see computer equipment or suitcases in appellant's car. (59RT 11715, 11718.) She did not see purses, a switch blade, ski masks, or a gun. (*Id.* at 11733.) She and appellant legalized their marriage on April 4, 1991, while appellant was in jail. (58RT 11506, 11630.) She was the Swiss representative of appellant's defense committee. (*Id.* at 11687.)

Iris Kay Rose testified that the material in appellant's storage shed was important for his defense. She did not think it was important until he

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[22]The prosecution asserted that these inscriptions had been added by appellant. (62RT 12432.)

told her it was for his defense, and then she tried to help him. She called the storage unit, and was told that the material had been auctioned off. (66RT 13394-13396.) Appellant asked her to be on the board of the Cherokee Bicycle Company. (*Id.* at 13368.)

2. Character Evidence

Kenneth Grant was housed with appellant at the San Diego jail. (54RT 10471.) He thought that appellant had a humanitarian character and that he was generous and honest, polite, kind, courteous, non-violent, and religious. (*Id.* at 10475-10480.) This opinion was in part based on the organizations appellant founded. (*Id.* at 10501-10502.) Erwin Spruth thought appellant had a humanitarian character, and that he was generous, truthful, honest, polite, courteous, religious, and non-violent. (55RT 10617-10621, 10632.) Nine people who knew appellant from his Esperanto activities: Eliza Kehlet, Bernice Garrett, John C. Wells, Ruth and Sidney Culbert, William Harmon, Sharon C. Colligan, and Kazuko Kikushimi testified that appellant had a humanitarian character, and that he was kind, polite, gentle, and non-violent. (55RT 10713-10722; 56RT 11035, 11046-11048; 57RT 11126-11127; 58RT 11355-11357, 11375-11376, 11386-11387; 59RT 11755-11757; 60RT 11860, 11868.) Birgitta Holenstein Sequoyah testified that appellant had good characteristics, as did appellant's high school friend from Tahlequah, Oklahoma, Earl Minnemann. (59RT 11542-11544, 60RT 12062-12063, 12067.) Appellant's ex-wife, Keiko Sequoyah, testified that they had two children, Eli and Sequoyah (60RT 11906) and that appellant was a humanitarian, honest, truthful and a non-violent person. (*Id.* at 11910-11911.)

Appellant's sister, Vivian Reimer, testified about appellant's Cherokee background. His grandfather was Cherokee, and appellant got the name " Sequoyah" when he was five years old. (60RT 11961.) She

thought that appellant was humanitarian, which meant to her that he was kind, polite and generous, law-abiding, and non-violent. (*Id.* at 11970-11971, 11976.)

3. Other Evidence Rebutting the Prosecution's Case

Fred Tremblett testified that he was an AMVET service officer at the Veteran's Hospital in La Jolla. On December 20, 1985, appellant came to talk with him. Appellant was clean shaven, had clean clothing and Tremblett did not notice body odor. (54RT 10509-10510.) Kenneth Grant, Bernice Garrett, Keiko Sequoyah, and Kay Rose never noticed that appellant had body odor or bad breath. (*Id.* at 11013; 56RT 11049; 60RT 11913; 66RT 13369.)

William Riker testified that on December 20, 1985, he was on the balcony of his apartment overlooking Park Boulevard. (57RT 11147.) He saw a car drive over the median and blow a tire. (*Id.* at 11150.) The driver got out and jumped over the fence onto a roof. (*Id.* at 11150.) Two female police officers arrived in their car *after* the person jumped. (*Id.* at 11154.)

Louis Sanford, an engineer for the city of San Diego, testified that there were no stop signs at two of the intersections that Karen Phenix stated the driver had not stopped at during her pursuit. (61RT 12054-12055.)

Scott Fraser, an expert on eye-witness identification, testified that when a witness observes a running person, less is recorded for later memory. (61RT 12294.) Cross racial identification affects eyewitness identification. (*Id.* at 12299.) When an observer is highly stressed, the accuracy of memory also goes down. When a person is concerned about their own safety, particularly if a weapon is involved, less information is encoded for memory. (*Id.* at 12302, 12305.) Identifications are difficult when there are few distinctive cues present. (*Id.* at 12310.) A ski mask reduces the number of such cues. (*Id.* at 12311.) Viewing a photograph of

someone after the event can alter memory to produce a new fused memory that is not accurate. (*Id.* at 12317.) When people make more than one identification, they look for the person they previously picked out, not the one that corresponds to the original memory. (*Id.* at 12320-12321.)

C. Prosecution Rebuttal

San Diego Police officers David Williams and Jeffrey M. Johnson testified they arrived at the Glendale Bank parking lot shortly after Officer Phenix. They both saw the suspect vehicle stop and then Phenix's car stop. Johnson did not see the man get out of the car because they arrived after he was out of the car, but did see the suspect running. (67RT 13788-13789.) Williams stated that he saw a man get out of the car, run towards the wall, and then jump over the wall. (*Id.* at 13693.)

Rhonda Renee Watson testified that she married appellant in 1973 and they divorced in 1976. (68RT 13978, 13997.) She did not think that appellant had a character for honesty. Appellant made a game of trying to get away with things, and would steal or lie if he could get away with it. He stole books. (*Id.* at 13978-13979.) He lied if it was in his interests. (*Id.* at 13980.) Appellant wanted Watson to sign something stating that she had gotten an allotment from the Navy after their divorce, when he had actually gotten it. (*Id.* at 13980.)

2. PENALTY PHASE

A. Prosecution's Case in Aggravation

The prosecution presented evidence of crimes in Oklahoma, ballistic evidence tying the Oklahoma and the San Diego crimes together, and evidence of appellant's activities with Kimberly Fair.

1. Bellinger Robbery

Cynthia Bellinger testified that on November 15, 1985, she was visiting her parents in Tulsa, Oklahoma. She was approached by a man

with a gun wearing a dark ski mask and dark clothing, demanding her purse. (72RT 14889-14890; 73RT 15098.) The man put the gun to her head, fired the gun, grabbed the purse, and ran away. (72RT 14891-14892.) Her injury required stitches, though the bullet did not enter her cranial cavity. (*Id.* at 14894.) Appellant appeared to have the same build as her assailant. (73RT 15108.) Sergeant Curtis W. Beard from the Tulsa Police Department collected a .25 caliber shell casing at the scene. (*Id.* at 14910-14912.)

2. Richman Homicide

On the evening of November 17, 1985, Annabelle Richman had dinner with Carol Sitz. (73RT 15056.) When Sitz left at 10:00 p.m., Richman had a Gucci handbag in her possession. (*Id.* at 15057.) On that evening, Julene and George Johnson heard four or five shots outside the apartment building where both they and Richman lived. (74RT 15271.) George looked out the window, and saw a man run away and jump over a fence. (*Id.* at 15288, 15311.) Julene ran outside, and found Annabelle Richman lying on the ground. (*Id.* at 15272, 15283.)

Tulsa police officer David Ashby arrived at the scene later that night. (72RT 14932.) He found Annabelle Richman on her back with two bullet wounds to the head. (*Id.* at 14934.) She was transported to the hospital, and later died. (*Id.* at 14934-14935.) Tulsa police officers Curtis Blake Thompson and Robert Morrison found four .25 caliber casings near the scene. (*Id.* at 14910; 73RT 15037; 74RT 15331; People's Exhibit Nos. 257A, 257B, 257C, 257D.) The casings had the initials "FC" imprinted on them. (72RT 14965.) No purse was recovered. (*Id.* at 14994.)

Dr. Anna Randall examined Richman's body. The cause of death was gunshot wounds to the head and chest. (72RT 15009-15010; 73RT 15027.) Richman had four gunshot wounds, the first to the right arm, the

second to the upper part of the right shoulder, a third to the front part of the left arm, and the fourth to the middle of the back of the head. (72RT 15011-15014.) A bullet removed from Richman's body was recovered by Philip Camblin from the Tulsa Police Department. (*Id.* at 14941; People's Exhibit No. 257E.)

3. Tvedt and Hensley Shooting

Tammy Tvedt testified that on November 23, 1985, she went to a prayer meeting, and then to a restaurant with friends. After the restaurant, she rode along as members of the party were driven home in a car borrowed from a friend of Tvedt's. Frank Hensley was the last to be dropped off. He drove the car. (73RT 15111.) She and Hensley arrived, and parked at Hensley's apartment in Broken Arrow, Oklahoma. They both got out, and she went to the driver's side of the car. (*Id.* at 15112.) As she did so, Hensley and Tvedt were approached by a man wearing a ski mask. The man pointed a gun at them, and said: "Give me your wallets." (*Id.* at 15113.) Hensley told the man they didn't have wallets. After he repeated the demand, both Hensley and Tvedt started to pray loudly. (*Id.* at 15114.) Tvedt looked up when she heard a shot, which she thought struck Hensley, and was then herself struck in the face with a bullet. (*Id.* at 15115.) She heard the man run after Hensley, and shoot him. She lay on her back, and the man rolled her over. Below the man's ski mask, she saw a scruffy black beard with about a week's worth of growth. (*Id.* at 15116-15118, 15133-15134.) Hensley drove her to the hospital. (*Id.* at 15119-15120.) Tvedt was in the hospital for eleven days, and had scars from the shooting, one of them on her neck. (73RT 15121-15122.) Dr. Curtis John Edwards removed a .25 caliber bullet, which he turned over to the police. (74RT 15324, 15326.)

Hensley testified that on the night of November 11, 1985, he drove home with Tvedt. (73RT 15177.) After they arrived at the parking lot, he and Tvedt were approached by a man with a gun. The man pointed the gun at their faces and told them to hand over their wallets. Hensley said he did not have one, and he and Tvedt began to pray. The gunman said: "I don't care," and shot him through his nose. (*Id.* at 15177-15178, 15194-15195.) The bullet lodged itself between his cheek and jaw. (*Id.* at 15178.) He went to his apartment, and asked the woman he was living with to call an ambulance. (*Ibid.*) He went back outside, and saw the man crouching over Tvedt. (*Id.* at 15180.) He picked her up, and drove to the hospital. (*Ibid.*) He stayed at ths hospital, but they did not remove the bullet from his face. (*Id.* at 15182.) One day when he was eating, the bullet plopped out of his mouth. He gave it to Broken Arrow Police Detective Homer Miller. (*Id.* at 15183-15184.) Officer Alfred W. Cross of the Broken Arrow Police recovered two .25 caliber shell casings from the scene. (*Id.* at 15067.)

4. Ballistics Evidence

In December, 1985, Walter Fung examined the ballistics evidence from the Oklahoma and San Diego crime scenes. He testified that the shell casings from the Bellinger and Richman scenes, and those from the scene of the Tvedt and Hensley shooting, were fired from the same gun used in the Wells' crime. The casings from all four scenes had "FB" imprinted on the back. (73RT 15144-15148.) The bullets recovered from Richman's body and those removed from Tvedt were fired from the same weapon. The bullets in the Richman, Tvedt, and Henlsey cases were fired from the same gun as that which fired the bullets recovered from Dawn Ellermann's neck, Wells' body, and from the Wells' garage. (*Id.* at 15143-14144.)

Richard Raska, a Tulsa Police Department firearms expert, testified about ballistics. (74RT 15345.) In November, 1985, he compared the four

casings found at the Richman scene with the casing found at the Bellinger scene. (*Id.* at 15347; People's Exhibit Nos. 257A-D, 256.) All five had been fired from the same gun. (*Id.* at 15348.) He compared the two bullets recovered from Tvedt with that recovered from Richman, and determined that he could not eliminate the possibility that they had been fired from the same weapon. (*Id.* at 15349; People's Exhibit Nos. 258B, 257E.)

Sometime in December, 1985, he learned of the possibility of San Diego cases similar to his. He spoke with Walter Fung, and they compared ballistics evidence. (74RT 15349-15350.) Later, he examined the casings from San Diego, and determined that the casings from the Wells and Ellerman scenes were fired from the same gun as the casings from the Bellinger, Tvedt, and Richman scenes. (*Id.* at 15356.) He compared the bullets recovered from Tvedt, Hensley, and Richman and determined that they were fired from the same gun as the bullets recovered from Wells and Ellermann. (*Id.* at 15355.)

Lance Martini also examined the ballistics evidence. He examined twelve casings from the San Diego and Oklahoma crime scenes. (74RT 15381-15382.) The casings had the same manufacturers mark on them. (*Id.* at 15384.) He compared the bullets from Wells and Ellerman, and compared those bullets to those from Richman, Tvedt, and Hensley. He concluded that the bullets from Wells, Ellerman, Richman, and Tvedt were all fired from the same gun. (*Id.* at 15382.) He could not make a conclusion about the Hensley bullet. He had been informed that this bullet had been in Hensley's body for eight months, and scratches and marks on the bullet had eroded away. (*Id.* at 15383.)

5. Appellant's Meeting With Kimberly Fair

Kimberly Ann Fair stated she met appellant at the Kensington Hotel while attending an American Indian convention in Tulsa, Oklahoma, on

October 11, 1985. (74RT 15225-15226.) She danced with appellant, and then arranged to met him the next day. She told him she was married. (*Id.* at 15226, 15248.) She did not come to the meeting, and appellant called her a few days later. (*Id.* at 15226, 15232.) She agreed to met him for lunch. Appellant picked her up in a blue Honda. In the back of the Honda was a bicycle, clothing, and magazines. (*Id.* at 15228.) He told her he was using the bike for business, and that he was going to Kansas City for business related to the bike. They talked about Indian politics. (*Id.* at 15252.) Appellant asked her to move to California with him, where they would sell bicycles and make a lot of money. (*Id.* at 15265.) They made arrangements to have a second lunch. (*Id.* at 15228.) Later, appellant called, and said that he was not going to make lunch because he was driving back from Kansas City. He asked her to meet at a hotel. (*Id.* at 15255.) She did not go. On November 1, appellant called her and told her he was not mad at her for standing him up, and asked to meet. She said she was not available, and did not talk to him again. On November 8, 1985, she saw him driving around her work parking lot. (*Id.* at 15229, 15256.) In October and November, 1985, appellant told her that he was Cherokee and that his name was "Billy Ray Waldon." Later, he called her from jail and told her he had an Indian name: "N.I. Sequoyah." (*Id.* at 15230.)

6. Travel Times

Investigator Michael Douglas Williams from the San Diego District Attorneys Office testified that he drove from Tulsa to San Diego. It took him 22 hours and forty minutes. (74RT 15386.)

B. Appellant's Mitigation Case

Appellant put on evidence of his involvement in Poliespo, and other Esperanto and Native American Activities.

Bernice Garrett testified about the details of appellant's invented language, Poliespo. Bernice Garrett helped with the printing and publication of appellant's work: *The Fundamentals of Poliespo*. (75RT 15499.) She believed that it was a major work important to humanity. (*Id.* at 15501.) Garrett agreed that if he was sentenced to life without the possibility of parole, appellant could teach Poliespo correspondence courses and publish Poliespo textbooks. (*Id.* at 15517.) Garrett would act as a liaison. (*Id.* at 15521.) Garrett also testified about the goals of appellant's organizations. (*Id.* at 15522-15529.) The World Poliespo organization was created to help those who wished to save the forest by saving trees, to strengthen endangered languages, and to help those who wanted to acquire an Indian way of thinking. (*Id.* at 15532-15533.) Among the goals of the World Humanitarian Church, was exploration of the universe, and the cure of aging and disease. (*Id.* at 15535.)

Birgitta Holenstein stated that she thought that the goals of the World Humanitarian Church were good because it was good to have people from different cultures come together and communicate. The church would help provide jobs for the unemployed, feed the starving, cure disease, and find the cause of aging. (75RT 15563.) The World Poliespo Organization would strengthen endangered languages. (*Id.* at 15564.) Exploring the universe was also good. The goal of autonomy behind the United Nations of Autonomous Peoples (UNAP) was good because every person on earth had a right to autonomy. (*Id.* at 15564.) The goal of this organization, that everyone should be able to travel the world with only two currencies, was also good. (*Id.* at 15566.) Poliespo was good because it was an easy to learn second language for Native Americans. It was good because it used less words, so it would use less paper and make books cheaper for underprivileged people. (*Id.* at 15570.) She would help appellant with

Poliespo and Esperanto correspondence courses. (*Id.* at 15575-15576.) Appellant's execution would be a tragedy for her daughter, Moana, and to appellant's other children, Sequoyah and Eli. (*Id.* at 15579-15580.)

Dietrich Weidmann testified that he met appellant at a Youth Conference in Germany, and that he was a founding member of UNAP in 1985. (75RT 15592.) He believed that the goals of all of appellant's organizations were good. (*Id.* at 15593-15594.) The autonomy goal was good because many small-population ethnic peoples are oppressed. (*Id.* at 15594.) He helped publish the *Fundamentals of Poliespo* with his own money because he thought it was important. (*Id.* at 15595.) He thought that appellant was active, intelligent, and good hearted with a love for humanity. Weidman would help appellant with all of his activities if appellant were sentenced to life. (*Id.* at 15597.) He was working on a book about appellant. (*Id.* at 15598.) Executing appellant would be a crime. (*Ibid.*)

Earl Charles Minneman knew appellant when they were growing up in Oklahoma. (75RT 15660.) They discussed God, religion, politics, and languages. Appellant was always on the side of non-violence. (*Id.* at 15601.) Minneman thought that appellant was intelligent. (*Id.* at 15601.) He thought that Poliespo and Esperanto were good because they helped people communicate. (*Id.* at 15604.) Appellant would try and be a good father if he were sentenced to life without parole. (*Ibid.*) Poliespo would be good for the Cherokee, as it would be for any people whose language was threatened. (*Id.* at 15606.) Minneman would be sad if appellant were executed. (*Id.* at 15607.)

Kathy Carter-White, an attorney from Tahlequah, Oklahoma, knew appellant in 1985 as an acquaintance. (75RT 15627.) Carter-White saw appellant socially; when they got together, he talked about Esperanto, the Cherokee Bicycle Company, and Cherokee autonomy and sovereignty. (*Id.*

at 15642.) She understood from appellant that he wanted to persuade the Cherokee tribal leaders to manufacture a bicycle as an alternative to dependence upon the United States government. (*Id.* at 15647.) She thought appellant was sincere. (*Id.* at 15648.) Carter-White was with appellant on November 18, 1985, when appellant tested his bike. (*Id.* at 15671.) Appellant's appearance was clean, well-groomed, dressed conservatively, and without body odor. (*Id.* at 15672.) He appeared functional, positive, and goal-directed. (*Id.* at 15674.) She thought that the death penalty was not appropriate because appellant had a humanitarian contribution to make to society. He could continue his linguistic work in prison, and be a positive role model. (*Id.* at 15675.) Carter-White thought that appellant was innocent of the Oklahoma crimes. (*Id.* at 15686.) She thought that appellant was a humanitarian, and a well-rounded peaceful person. He was generous, truthful, and courteous. (*Id.* at 15698.)

Janice Atkinson testified that she met appellant at an Esperanto meeting. (75RT 15691.) He lectured on the similarities between Cherokee and Esperanto, and on Cherokee history and culture. His lecture was good, and his Esperanto skills expert. (*Id.* at 156912.) There would be work for an Esperantist to do from prison like writing, translating, and networking. (*Id.* at 15696.) The goals of appellant's organizations were good. (*Id.* at 15700.) He could continue the goals of his organizations in prison. (*Id.* at 15700.) He could research Cherokee and polysynthetic languages. Poliespo would benefit the Cherokee because it would allow them to communicate without going through English. (*Id.* at 15702.)

Ralph Lewin, an Esperantist, testified about the ideals and philosophy that goes along with Esperanto. People interested in Esperanto should also be interested in human fellowship and brotherhood. (75RT 15717.) Sam Neal Preston met appellant through appellant's Esperanto

activities. (*Id.* at 15623-15724.) He was impressed by appellant's ideals, his working towards world peace, and his commitment to non-violence. (*Id.* at 15724-15725.) Appellant was a good writer though Preston found his Poliespo writings hard to read. (*Id.* at 15729.) Appellant could be of value to the community because he was known as a lecturer on Cherokee language and culture. (*Id.* at 15632-15733.)

Ruth Culbert stated that if appellant were sentenced to life without parole he could work for Esperanto by writing. (75RT 15742-15743.) Sidney Culbert testified that he had read *The Fundamentals of Poliespo* and was impressed with its ingenuity, particularly since it was written by a non-linguist. (*Id.* at 15747-15748.) He thought that books appellant wrote about Poliespo would be a humanitarian contribution and scientifically useful. (*Id.* at 15748.) The goals of appellant's organizations were good. (*Id.* at 15751.) Appellant was motivated to engage in humanitarian work. (*Id.* at 15753.)

Sharon Colligan thought that appellant was a kind and gentle person with integrity and desire to help humanity. This was based on the organizations he founded, the kindness he showed her, as well as his insistence that his friends work for world peace and harmony. (75RT 15770-15771.) She thought Poliespo benefitted the world. (*Id.* at 15776.) She was a minister of the World Humanitarian Church. If appellant were sentenced to life without parole, she would help him. (*Id.* at 15778.) She did not think that the death penalty was appropriate because there were doubts about appellant's guilt, and he had a lot to contribute. (*Id.* at 15781.)

Correctional consultant James Park stated that if appellant got life without parole, he would be assigned to a Level IV prison. (75RT 15802.) He could work, write, and engage in religious activities. (*Id.* at 15804-15806.) Park did not review appellant's jail records, but based on

appellant's representations that he had not been written up for assaultive behavior, and on the other documents he reviewed, Park thought appellant would make a good prisoner if sentenced to life without parole. (*Id.* at 15825.) On cross-examination, he agreed that appellant would lose privileges if he were written up for a lot of rules violations. (*Id.* at 15832.) Appellant's possession of contraband, including that which might be used for escape, did not change his opinion. (*Id.* at 15836-15838.)

* * * * *

ARGUMENTS

I.

ERRORS IN JURY INSTRUCTIONS DEFINING COMPETENCE TO STAND TRIAL VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL AND REQUIRE REVERSAL OF THE CONVICTION AND SENTENCE

A. Introduction

In appellant's competency trial, there were multiple errors in the instructions to the jury and the reasons that those errors require reversal of the entire judgment are set forth herein and in other arguments, *post*. Most glaring of these were flaws in the very instruction that defined competency to stand trial. This state's definition of competency to stand trial violates due process under *Dusky v. U.S.* (1960) 362 U.S. 402 because it imposes a requirement that the defendant's incompetence stem from a mental disorder. Even assuming that test passes constitutional muster, however, the competence to stand trial instruction given in appellant's trial was fatally flawed in another respect as well: it failed to include any reference to the "rationality" requirement that is the touchstone of the competency to stand trial standard. These structural errors mandate reversal of the entire judgment because they rendered the determination that appellant was competent to stand trial a nullity, flying in the face of the prohibition against trying incompetent defendants that is fundamental to an adversary system of justice.

B. Legal Background

It is well established that subjecting a mentally incompetent person to a criminal trial violates due process. (*Dusky*, *supra*, 362 U.S. 402; *People v. Lewis* (2006) 39 Cal.4th 970, 1047 [the criminal trial of a mentally incompetent person violates due process]; *Cooper v. Oklahoma*

(1996) 517 U.S. 348, 354; *People v. Dunkle* (2005) 36 Cal.4th 861; *People v. Ramos* (2004) 34 Cal.4th 494; *People v. Samuel* (1981) 29 Cal.3d 489.) Based on this due process right, the United States Constitution also mandates that when a court tries a defendant after a doubt has been declared regarding the defendant's competency, without holding a competency hearing, it violates the defendant's due process right to a fair trial. (*Pate v. Robinson* (1996) 383 U.S. 375; *Drope v. Missouri* (1975) 420 U.S. 162, 171; *Patterson v. New York*, 432 U.S. 197; *Riggins v. Nevada* (1992) 504 U.S. 127.) Declaring a doubt suspends criminal trial proceedings (see Pen. Code, §§ 1367-1369) and requires that a competency proceeding be held. (*People v. Lawley* (2002) 27 Cal.4th 102, 131.) Once the trial court declares a doubt, it lacks jurisdiction to proceed to trial without a competency proceeding and a determination that the defendant is competent; in absence of that, subsequent trial proceedings are "void." (*People v. Hale* (1988) 44 Cal.3d 531, 541; *People v. Marks* (1988) 45 Cal.3d 1335, 1344.)

Even when the trial court does hold a competency proceeding after declaring a doubt and the defendant is determined competent, such hearing may be so deficient that "the effect is the same as if the defendant had been denied his constitutional right to a proper hearing on the competency issue." (*Samuel, supra*, 29 Cal.3d 489, 505 [reversing judgment of conviction]; see also *Pate, supra*, 383 U.S. 375, 385 [the Constitution requires an "adequate hearing" to ensure competence at trial when a sufficient doubt as to the defendant's competency has been raised]; *People v. Pennington* (1967) 66 Cal.2d 508, 521); *People v. Ary* (2004) 118 Cal.App.4th 1016, 1020 [failure of trial court to employ procedures to protect against the trial of an incompetent defendant deprives the defendant of due process right to a fair trial, requiring reversal of conviction].)

In *Dusky*, *supra*, 362 U.S. 402, the Court announced that the test for whether a defendant is competent to stand trial is whether he has a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." In *Drope, supra*, 420 U.S. 162, 171, the Court affirmed the vitality of the *Dusky* test and expanded upon it to include the requirement that the defendant have the capacity to "assist in preparing his defense."

In *Cooper*, *supra*, 517 U.S. 348, the United States Supreme Court recognized that the state generally has the power to establish its own procedures, but that latitude is limited by the Due Process Clause of the Constitution and its protections ensuring that defendants be tried only if they possess the functional abilities identified in *Dusky* and *Drope*:

> Although we found no violation in *Patterson*, we noted that the State's power to regulate procedural burdens was subject to proscription under the Due Process Clause if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *id.*, at 201-202, 97 S.Ct., at 2322-2323 (internal quotation marks omitted). This case involves such a rule. Unlike *Patterson*, which concerned procedures for proving a statutory defense, we consider here whether a State's procedures for guaranteeing a fundamental constitutional right are sufficiently protective of that right. *The deep roots and fundamental character of the defendant's right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel mandate constitutional protection.*

(*Cooper, supra*, 517 U.S. 348, 367-368, emphasis added.) Because Oklahoma's procedural rule establishing a "clear and convincing" evidentiary burden was inadequately protective of that federal due process right of a criminal defendant not to be tried while incompetent, it was held

to itself violate due process. (*Id.* at p. 369) Similarly, in *Pate* the High Court held that even though the state did have an "adequate" procedure in its statutes, the failure to *follow* that procedure denied the defendant his due process right to a fair trial. (*Pate*, *supra*, 383 U.S. 375, 385-386.)

The High Court has repeatedly emphasized that competence to stand trial is fundamental because without it, the defendant cannot access the other trial rights secured to him by the Constitution and statutes. In *Drope* the Court, echoing ancient common law, advised that the prohibition against trying incompetent defendants is "*fundamental to an adversary system of justice*, in part because trying an incapacitated defendant "in reality afford[s him] no opportunity to defend himself." (*Id.* at pp. 171-172, emphasis added.) As Justice Kennedy wrote in *Riggins*, *supra*, 504 U.S. 127:

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. *Drope v. Missouri*, 420 U.S. 162, 171-172, 95 S.Ct. 896, 903-904, 43 L.Ed.2d 103 (1975).

(*Riggins*, *supra*, 504 U.S. 127, 139-140 (Kennedy, J., concurring).)

C. Factual Background

After the conclusion of evidence in appellant's competency trial, counsel discussed jury instructions with the trial judge. As to the standard instruction defining the standard to be applied by the jury in determining competency, CALJIC No. 4.10, the essential element of ability to assist counsel was phrased as one of two alternatives: "If he is able to assist his attorney in conducting his defense in a rational manner." Or, "If he is able to conduct his own defense in a rational manner." The prosecutor suggested that the alternative parenthetical dealing with competency to

represent one's self should not be given. Defense counsel and the trial court agreed. (30ART 1951-1952.)

In the course of deleting the parenthetical regarding self-representation, as agreed, the judge also deleted the following phrase "in a rational manner" which was intended to modify *both* alternatives from the basic instruction itself, thus gutting the instruction of its most essential component.[23] That deletion was not discussed with counsel and it appears to have been inadvertent.

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[23]The proposed instruction read, prior to the court's editing, as follows:

> Ladies and gentlemen of the jury:
>
> In this proceeding you are to decide whether the defendant is mentally competent to be tried for a criminal offense. This proceeding is not in any sense a criminal proceeding, and the innocence or guilt of the defendant of the criminal charge against him is not involved [nor is the question of his legal insanity at the time of the commission of the offense involved].
>
> Although on some subjects his mind may be deranged or unsound, a person charged with a criminal offense is deemed mentally competent to be tried for the crime charged against him:
>
> 1. If he is capable of understanding the nature and purpose of the proceedings against him; and
>
> 2. If he comprehends his own status and condition in reference to such proceedings; and
>
> 3. If he is able [to assist his attorney in conducting his defense] [to conduct his own defense] in a rational manner.
>
> The defendant is presumed to be mentally competent and he has the burden of proving by a preponderance of the evidence that he is mentally incompetent as a result of mental disorder [or] [developmental disability].
>
> Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.

(Reconstructed from the redacted "as given" version which appears at 5CT 925; see, also 7CT 1281.)

The resulting instruction which was in fact given to appellant's competency jury appears at 5CT 925 and, as read to the jury, at 31ART 1095. The written version was sent into the jury room after the reading to the jury. (31ART 1087, 1191.)

At the close of evidence and argument, the trial court instructed the jury on the definition of competency to stand trial, as follows:

> In deciding whether or not the defendant is mentally competent to be tried for a criminal offense, I instruct you as follows:
>
> 1. If such person is capable of understanding the nature and purpose of the proceedings against that person; and
>
> 2. If such person comprehends that person's own status and condition in reference to such proceedings; and
>
> 3. If such person is able to assist an attorney in conducting that person's defense.
>
> In this proceeding, the defendant is presumed to be mentally competent and he has the burden of proving by a preponderance of the evidence that he is mentally incompetent as a result of a mental disorder.

(31ART 1095-1096.)[24]

Thus, the jury in the competency proceeding was instructed that "[a]lthough on some subjects his mind may be deranged or unsound," they must find appellant mentally competent "[i]f he is able to assist his attorney in conducting his defense." They were not instructed *at all* that they should consider whether or not he had the "ability" to assist counsel *rationally*.

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[24]The instruction was taken from CALJIC No. 4.10 verbatim, which comports with the definition of competency to stand trial in Penal Code section 1367, except it omitted the words "in a rational manner" at the end of the third numbered paragraph.

The jury began deliberating on September 21, 1987, and that same day delivered a verdict that appellant was competent to stand trial. (31ART 1193.)

On January 19, 1988, Russell filed a petition for writ of mandate and request for stay ("competency writ"), D007429, in the Court of Appeal, claiming, inter alia, that the trial court's instruction to the jury on the competency standard was erroneous. (56CT 11918-11996.) The Court of Appeal refused to issue a stay, and on February 24, 1988, it denied the competency writ without oral argument. (55CT 1107.) On March 15, 1988, Russell petitioned this Court for review, S004854, raising issues including her challenge to the competency instruction. (55CT 11638-11700.) On May 19, 1988, this Court granted the review in S004854, and transferred the matter to the district court of appeal, "with directions to issue an alternative writ to be heard before that court when the proceeding is ordered on calendar." (62CT 13989.) The alternative writ was issued but never heard, and the Court of Appeal subsequently dismissed it. (62CT 13783.)

D. California's Definition of Competence to Stand Trial Violates Due Process Under *Dusky* Because it Incorporates a Requirement That the Defendant's Incompetence Stem From a Mental Disorder or Defect

1. California's Definition of Competence to Stand Trial Departs From United States Supreme Court Precedent Defining Competence Solely in Terms of the Defendant's Functional Abilities

Comporting with ancient common law tradition, Penal Code section 1367 defined competency to stand trial in terms of legal "insanity," adjudged by the defendant's trial-related capacities, until the code was amended in 1974 and 1977 to require the proof of a medical condition, that is, a "mental disorder or developmental disability." Appellant was

instructed consistent with this definition. (31ART 1095-1096.) However, the United States Supreme Court, in harmony with the common law, hews to a legal definition of competency to stand trial that focuses solely on the defendant's trial-related functioning abilities. California's definition of incompetency as including the proof of a medical condition strays from the core meaning of the term in legal jurisprudence.

At the time of appellant's trial and at present, Penal Code section 1367 states that:

> A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, *as a result of mental disorder or developmental disability*, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

(Pen. Code § 1367, emphasis added.) This definition pays some heed to the question of what the defendant has the capacity to do in a trial setting (asking whether he is "unable to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner"), but it also imposes a prerequisite that such incapacity be "as a result of a mental disorder or developmental disability."

Prior law in this state defined competence to stand trial in terms of legal "sanity." Consistent with the common law, section 1367, as originally enacted in 1872, stated that "a person cannot be tried while he is insane." (Stats. 1872, ch. VI § 1367.) A century later, the Legislature amended section 1367 in 1974 to substitute the term "mentally incompetent" for the term "insane" and to *add* the proviso that such mental incompetence must result from a "mental disorder." Then, in 1977, the Legislature again amended section 1367 and added the words "or developmental disability" immediately after "mental disorder."

The concept of incompetence prior to 1974, based on the term "insanity," was a purely legal one that defined incompetence to stand trial in functional terms, equivalent with the presently-used terms "mentally incompetent." In contrast, the words "mental disorder and developmental disability, which were spliced onto section 1367 in 1974 and 1977, are medical rather than legal terms that lack any root in the definition of "insanity" as equated with competence to stand trial. (*James v. Superior Court* (1978) 77 Cal.App.3d 169, 177 ["the legal pigeonhole of 'mentally disordered' is not identical with the test of mental competency to aid counsel"].) The importation of medical terms fundamentally altered California's definition of incompetence to stand trial. The new definition in section 1367, which is echoed in CALJIC No. 4.10, departs not only from prior state law, but also from long-standing common law definitions and well-settled United States Supreme Court rules about competency.

Under the common law and United States Supreme Court jurisprudence, the prohibition against trying an incompetent person turns solely on whether the defendant has the *functional abilities* necessary to participate meaningfully in his trial, that is, to "make his defense." This protection dates back to at least the early eighteenth century. Sir William Blackstone advised that one who is "mad" should not be arraigned, because "he is not able to plead to it with that advice and caution that he ought," nor tried, because "how can he *make his defence*?" (4 Blackstone's Commentaries 24, emphasis added.) In 1790, in *Frith's Case* (1790) 22 How. St. Tr. 307, the English court found that the trial must be postponed until the defendant "by collecting together his intellects, and having them entire, he shall be able so to *model his defense* and to ward off the punishment of the law." (*Ibid.*, emphasis added.)

Almost a half a century later, in *King v. Pritchard* (1836) 173 Eng. Rep. 135, 304, the court mandated that the defendant's functional abilities governed the competency question; trial courts' duty was to inquire whether the defendant was

> of sufficient intellect to *comprehend the course of proceedings on the trial, so as to make a proper defense* - to know that he might challenge any of you to whom he may object - and to comprehend the details of the evidence. . . . Upon this issue, therefore, if you find there is no certain mode of communicating the details of the trial to the prisoner, *so that he can clearly understand them, and be able to properly make his defense to the charge*, you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters.[25]

(*Ibid.*, emphasis added.)

And in 1899, the United States Court of Appeals, reviewing common law precedent, similarly held that it was "fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial receive judgment, or, after judgment undergo punishment . . . . because he cannot advisedly plead to the indictment . . . . [and] [i]t is not 'due process of law' to subject an insane person to trial upon an indictment involving liberty or life." (*Youtsey v. U.S.* (6th Cir. 1899) 97 F. 937, 940-941.) The court in *Youtsey* continued, stressing the defendant's trial-related capacities, stating that a defendant ought not to be convicted while he is "incapable of understanding," and that trial must stop if it appears the defendant is "probably not capable of making a rational defense." (*Ibid.*, citing *Reg. v. Berry,* 1 QB Div. 447.) In this way, from the Enlightenment to the mid-twentieth century, English and then American law have prohibited the trial

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[25]This very test of competence to stand trial recently has been approved by the English Court of Appeal in *Regina v. M* [2003] EWCA Crim 3452, where the common law definition of competence still applies.

of an incompetent person and defined competence in terms of "sanity" and the defendant's functional abilities. (*People v. Perry* (1939) 14 Cal.2d 387, 397-399, quoting Blackstone's query, with respect to an insane defendant: "how can he make his defence?")

The California courts consistently held before 1974 that the legal definition of "sanity" for competency determinations related solely to a defendant's functional ability to participate meaningfully in his trial. (See *Pennington*, *supra*, 66 Cal.2d 508, 515 [defendant is "sane" within the meaning of section 1368 "if he is able to understand the nature and purpose of the proceedings taken against him and to assist counsel in the conduct of a defense in a rational manner"]; *People v. Laudermilk* (1967) 67 Cal.2d 272, 282 [same]; *People v. Westbrook* (1964) 62 Cal.2d 197, 200 [the type of "insanity" which bars trial is the inability to understand the nature and purpose of proceedings or aid attorney in conducting defense]; *People v. Brock* (1962) 57 Cal.2d 644, 648-649 [if the defendant could assist in his defense, then he was "sane" within the meaning of section 1368].) None of these decisions mentioned the presence of a mental disorder as a prerequisite, nor did they allude at all to how "sanity" would be defined by those in the field of psychiatry.

Insanity in the context of competency to stand trial has a meaning *sui generis*; for example, it clearly means something different than "insanity" as a criminal defense, and "insanity" precluding execution under the Eighth Amendment to the United States Constitution. (See *Dusky*, *supra*, 362 U.S. 402, 403 [noting that the entry of a plea of insanity presupposes that the defendant is competent to stand trial and to enter a plea, but that if the defendant is incompetent, due process requires suspension of the trial]; *Pate*, *supra*, 383 U.S. 375, 384, fn.6 ["Although defense counsel phrased his questions and argument in terms of Robinson's present insanity, we

interpret his language as necessarily placing in issue the question of Robinson's mental competence to stand trial"]; *Medina v. California* (1992) 505 U.S. 437, 448 [in a competency hearing, the "emphasis is on the defendant's capacity to consult with his counsel and to comprehend the proceedings, and . . . this is by no means the same test as those which determine criminal responsibility at the time of the crime"]; *Godinez v. Moran* (1993) 509 U.S. 389, 403 (conc. opn. of Kennedy, J.) [distinguishing "competence to take part in a criminal proceeding and make the decisions throughout its course" from "whether a defendant is absolved of criminal responsibility due to his mental state at the time he committed criminal acts"].)

The United States Supreme Court, in harmony with the common law, hews to a legal definition of competency to stand trial that focuses solely on the defendant's trial-related functioning abilities. In *Dusky*, *supra*, 362 U.S. 402, the Court announced that the standard to determine a defendant's competence to stand trial must be whether the defendant has a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." In *Drope*, *supra*, 420 U.S. 162, 171, the Court affirmed the vitality of the *Dusky* test and expanded upon it to include yet another functional capacity a defendant must possess in order to be trial competent, viz., the capacity to assist in preparing his defense. In more recent times, the United States Supreme Court continues to acknowledge the *Dusky* test as the governing standard. In *Medina*, *supra*, 505 U.S. 437, 449-450, the Court again endorsed the *Dusky* test in holding that the burden of proving incompetence can be placed on the defendant under the "preponderance of the evidence" standard. (*Id.* at p.

450 [citing a defendant's inability to assist counsel as "probative evidence of incompetence"].)

The Court again relied on *Dusky* and *Drope* as defining the standard for competency to stand trial in *Godinez, supra*, 509 U.S. 389, and went further to delineate explicitly how a defendant's competency to stand trial relates to his functional abilities in a trial setting. The Court emphasized that the "rational understanding" a competent defendant is required to possess to stand trial turns on his ability to make the actual decisions he would be called upon to make before and during trial. Specifically, the ability to consult with counsel in a rational manner entails the ability to make important decisions about fundamental trial rights and basic trial tactics, such as whether to assert or waive the privilege against self-incrimination by testifying, whether to assert or waive the right to a jury trial, whether to assert or waive the right to confront and cross-examine prosecution witnesses, whether and how to present a defense including whether to assert any affirmative defenses. (*Id.* at pp. 389, 398-399.)[26] The

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[26]In his concurring opinion, Justice Kennedy, joined by Justice Scalia, questions some of the Court's analysis but concurs with its "operationalized" approach to competence. Explaining his view that the *Dusky* standard applies from the time of arraignment through the return of a verdict, Justice Kennedy asserted:

> Although the *Dusky* standard refers to "ability to consult with [a] lawyer," the crucial component of the inquiry is the defendant's possession of "a reasonable degree of rational understanding." In other words, the focus of the *Dusky* formulation is on a particular level of mental functioning, which the ability to consult counsel helps identify.

(*Godinez, supra*, 509 U.S. 389, 403-404 (conc. opn. of Kennedy, J.) Of course, the level of ability necessary to understand and assist may vary with the charges. The defendant's functional abilities must be considered in the context of the particular case or proceedings. (See Sadock & Sadock, eds., Kaplan & Sadock's Comprehensive Textbook of Psychiatry (8th ed. 2005)

(continued...)

reasoning in *Godinez* highlights how "competency to stand trial" is but shorthand for the defendant's functional ability to do the actual things that due process guarantees shall be done in a fair criminal trial.

Nothing in any United States Supreme Court precedent addressing a defendant's competency – that is, his functional capacity to rationally and factually understand charges and proceedings, to assist counsel, and to confer with counsel with a reasonable degree of rational understanding – suggests that the question of *why* the defendant lacks those requisite abilities is a part of the legal formula. To be sure, medical evidence is relevant to trial courts faced with competency issues. For example, it may illuminate the history and/or etiology of a defendant's functional incapacity, which may bear on medically appropriate treatments likely to restore a defendant's competency and allow trial to proceed. (*Sell v. U.S.* (2003) 539 U.S. 166, 181-182; see also *Ake v. Oklahoma* (1985) 470 U.S. 68, 71-72 [a defendant raising an insanity defense has a right to the assistance of a psychiatric professional to help prepare the defense].) But under the Due Process Clause, a medical diagnosis is not, and never has been, a requirement for proving incompetence to stand trial.[27] Rather, competence

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[26](...continued)
Vol. II, p. 3983 [an individual who is incompetent to stand trial in a complicated tax fraud case may not be incompetent to stand trial on a simple misdemeanor charge].)

[27]The United States Supreme Court's silence on that issue speaks volumes, given that both the federal statute at issue in *Dusky* and the Missouri statute at issue in *Drope* did impose a requirement that the defendant's incompetence stem from a "mental disease or defect." (*Dusky*, *supra*, 362 U.S. 403, 402 [citing 18 U.S.C. § 4244, which like 18 U.S.C. § 4241(d) predicates a finding of incompetence on proof that "the defendant is presently suffering from a mental disease or defect"]; *Drope*, *supra*, 420 U.S. 162, 173 [Missouri Rev. Stat. § 552.020(1) prohibited the trial of a (continued...)

to stand trial rests only on whether the defendant is *able* or *unable* – for whatever reason – to understand the proceedings and to assist defense counsel in a rational manner.[28]

The United States Supreme Court's more recent case law increasingly explicates how a competent defendant's exercise of core functional abilities relates to decision-making throughout trial proceedings and guarantees due process and a fair trial. Appellant sets forth below that developing law and related scientific thought in detail. For purpose of the present discussion, suffice it to say that the presence or absence of a medically verifiable mental disorder holds no place in, and must be excised from, California's test for a defendant's constitutionally-sufficient competency to stand trial.

The existence of a mental disorder is a psychiatric determination, and the High Court often has noted the uncertainty and variability of such psychiatric diagnoses. In *Drope*, *supra*, 420 U.S. 162, the Court noted that a defendant's mental condition may be relevant to the legal issues involved in competency cases, but recognized "the uncertainty of diagnosis" and "the tentativeness of professional judgment" in the psychiatric field. (*Id.* at p. 176, quoting *Greenwood v. U.S.* (1956) 350 U.S. 366, 375.) The High

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[27](...continued)
"person who as a result of mental disease or defect" was incompetent.].) Tellingly, the High Court omitted that element when defining the test for competency required under the United States Constitution. As it explicitly eliminated the "mental disease or defect" attribute from its definition of competency, *Dusky* also implicitly prohibits adding "mental disability" to the test for competence to stand trial.

[28]Just as a defendant can lack a mental disorder and still be incompetent to stand trial, under the protections of the Due Process Clause, a defendant who suffers from significant mental illness or developmental disability can *possess* the competency to stand trial. (See *Sell*, *supra*, 539 U.S. 166, 181; see also *Dunkle*, *supra*, 36 Cal.4th 861, 890.)

Court also has noted that numerous psychiatric conclusions may be reached on the same facts. (See *Ake, supra,* 470 U.S. 68, 81 [psychiatrists "disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms"]; see also *Drope, supra,* 420 U.S. 162, 176 ["it is not surprising that . . . the dispute centers on the inferences that could or should properly have been dawn from the [psychiatrist's] report"]; *Addington v. Texas* (1979) 441 U.S. 418, 430 ["the subtleties and nuances of psychiatric diagnoses are drawn from "subjective analysis"].) More recently in *Indian v. Edwards* (2008) 554 U.S. 164, the High Court emphasized the inconstant nature of mental illness: Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways. (*Id.* at p. 175.) Given that mental illness is variable and its diagnosis is often uncertain, it is not surprising that the United States Supreme Court consistently has ruled that the functional criteria alone, as laid down in *Dusky,* govern a determination that a defendant is trial-competent.

2. The Legislature Materially Altered and Unconstitutionally Narrowed The Definition of Competence to Stand Trial

Notwithstanding the United States Supreme Court's unwavering and unequivocal rule that a competency determination depends solely on whether a defendant has the present ability to understand the proceedings against him and consult with counsel and assist in his defense, in 1974, the California Legislature enacted a requirement that the defendant be diagnosed with a recognized mental disorder or developmental disability in order to prove his incompetence. As discussed above, the term "sane" for competency purposes in the pre-1974 version of the Penal Code and in the common law, was the legal equivalent of the term "competent." However,

the terms "mental disorder" or "developmental disability" are not equivalent terms for legal "incompetence." They are an added element to the definition of incompetence. As a result of the insertion of the words "mental disorder or developmental disability" into Penal Code section 1367, competency determinations in California in large part turn on the existence or nonexistence of a specific medical diagnosis, rather than on the trial-related functional capabilities as required by the Due Process Clause. Because this constitutionally extraneous element is injected into the competency equation, a defendant in California can be found competent to stand trial even though he more likely than not is unable to understand and assist as required by *Dusky*, solely because he lacks a medically cognizable mental disorder. This violates due process under the federal constitution.

Appellant acknowledges that the States have latitude, within the constraints of procedural due process, to establish their own procedures for making a competency determination. Thus, in *Medina*, *supra*, 505 U.S. 437, the High Court, affirming this Court, held that due process was not breached by California's procedural provisions regarding the presumption of competence and the requirement that the defendant carry the burden of proving his incompetence by a preponderance of the evidence, as set forth in section 1369, subdivision (f). (*Id.* at pp. 445-453.) However, unlike the burden of proof or the presumption of competence, the requirement that the defendant have a mental disorder or developmental disability in order to be found incompetent is not a procedural provision. It is a substantive element of the definition of incompetence. Section 1367 sets forth the prohibition against trying a person who is incompetent and the definition of incompetence with its predicate of a mental disorder or developmental disability. The constitution does not permit requiring a state "to adopt one procedure over another on the basis that it may produce results more

favorable to the accused." (*Medina, supra*, 505 U.S. 437, 451.) However, states are not free to constrict the constitutional definition of incompetence as the California Legislature did in 1974.

The 1974 amendment inserted "mental disorder" into section 1367, but did not define the term. Consequently, it is impossible to know what definition of "mental disorder" courts are relying upon in competency determinations. Although the term is used elsewhere in the Penal Code, those provisions also fail to provide a definition applicable in this context.[29] The main source on mental disorders is The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR (2000) [hereafter "DSM"]), which both the United States Supreme Court and this Court have recognized as authoritative. (*Atkins v. Virginia* (2004) 536 U.S. 304, 308, fn.2; *In re Hawthorne* (2005) 35 Cal.4th 40, 48.) The DSM defines a "mental disorder" as:

> a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress. . . or disability. . . or with a significantly increased risk of suffering death, pain, disability or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one.

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[29]For example, a "mental disorder" appears without definition in Penal Code sections 28 and 29 (prohibiting evidence and expert testimony about "mental illness, mental disorder or mental defect" to show or negate the accused's capacity to form any mental state), Penal Code section 261, subdivision (a)(1) (referring to "mental disorder or developmental disability" of victim in definition of rape), Penal Code section 286, subdivisions (g)-(h) (referring to "mental disorder or developmental disability" of victim in definition of sodomy), and Penal Code section 289, subdivisions (b)-(c) (referring to "mental disorder or physical or developmental disability" of victim in definition of forcible sexual penetration).

(DSM-IV-TR, pp. xxxi.) Even a brief survey of the DSM's classification of mental disorders shows that, in departing from the test for competence established by the United States Supreme Court, the 1974 version of section 1367 includes as "competent" defendants who would be "incompetent" under *Dusky* and its progeny.

First, the DSM contains a candid disclaimer that "no definition adequately specifies precise boundaries for the concept of 'mental disorder.'" (DSM-IV-TR, pp. xxx-xxxi.) The DSM recognizes that its classification of mental disorders *excludes* some "conditions for which people may be treated or that may be appropriate topics for research efforts." (*Id.* at p. xxxvii.) And it further cautions that the "clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination and competency." (*Ibid.*) In adopting a legal standard for competence in *Dusky* that looks only at the defendant's trial-related functioning abilities, the United States Supreme Court avoided these problems.

Second, the DSM and its commentators acknowledge problems in its classification system in which persons with clinically significant mental dysfunction or impairment are not considered to have a "mental disorder." Preliminarily, there is a basic problem with the very term "mental disorder," because it excludes mental dysfunction that is primarily caused by a physical medical condition. (DSM-IV-TR, pp. xxx, xxxv; see also Kaplan & Sadock's Comprehensive Textbook of Psychiatry, *supra*, Vol. I, p. 1110.) In addition, the variability of mental illness and unknowns in the field of psychiatry and medicine at times prevent accurate diagnosis. As a result, the DSM provides for a diagnosis of "Not Otherwise Specified" that

denotes significant distress or impairment, which does not meet the criteria for any specific disorder. Like mental dysfunction caused primarily by a physical medical condition, this diagnosis does not amount to a mental disorder. (DSM-IV-TR, p. 4; see Kaplan & Sadock's Comprehensive Textbook of Psychiatry, *supra*, Vol. I, p. 1031.) Similarly, the DSM provides other diagnoses developed to account for conditions which are not "mental disorders," such as "Unspecified Mental Disorder," where diagnosis of a disorder not included in the DSM can be made, and "Other Conditions That May Be A Focus Of Clinical Attention," which includes conditions such as age-related cognitive decline, identity problems, drug-induced disorders, relational problems and problems related to abuse or neglect. (DSM-IV-TR, pp. 731, 743, and Ch. 17.) These conditions, which may produce significant mental symptoms and require clinical attention, are not considered mental disorders within the rubric of the DSM. Thus, under section 1367, individuals impaired by these conditions would be found *competent* to stand trial, even if they lack the functional capacities delineated in *Dusky* and *Drope*.

Third, what is considered a mental disorder is in constant flux, and the DSM runs the risk of becoming increasingly out-of-pace with current knowledge as reflected in the large volume of research published each year. (DSM-IV-TR, Introduction, pp. xxx.) Currently, numerous conditions with significant symptoms that could impair a defendant's functioning at trial are not included as mental disorders in the DSM. (DSM-IV-TR, Appendix B, "Criteria Sets and Axes Provided for Further Study," pp. 759-760.) This reality poses a substantial problem if "mental disorder" in section 1367 is pegged to the DSM (given that there seems to be no alternative definitional source). The DSM's ever-evolving definition of mental disorder renders section 1367's threshold element arbitrary and likely results in inaccurate

and inconsistent competency determinations. A defendant's symptoms of mental distress or dysfunction may not amount to a recognized mental disorder on the date of the competency determination, and thus regardless of a clear inability to understand and assist, he would be found competent and tried. But those very same symptoms may be an accepted mental disorder when the next edition of the DSM is published, and with the same inability to understand and assist, the defendant would be found incompetent. Only the psychiatric definition of "mental disorder" and nothing about the defendant would have changed. Such arbitrariness certainly would offend the Due Process Clause of the Fourteenth Amendment.

The problem posed by the mental-disorder element in section 1367 is real. Although many defendants lacking the functional abilities necessary under *Dusky* and *Drope* for trial competence suffer from an identified, recognized mental disorder or developmental disability, others do not. In dictating that a defendant who is unable to understand and assist in his case, yet lacks a medical condition identified as a mental disorder or developmental disability, has not established legal incompetence to stand trial, the Legislature allows for the trial of some defendants who are, in fact, "incompetent" within the meaning of the United States Constitution.

This Court's holdings mirror the defect in the statute. In *People v. Rodriguez* (1994) 8 Cal.4th 1060, this Court ruled that the defendant did not present substantial evidence of incompetence so as to require a competency hearing. (*Id.* at pp. 1109-1112.) Reciting section 1367's definition of incompetence, the Court emphasized the threshold requirement of a "mental disorder or developmental disability." (*Id.* at p. 1109.) The Court found, inter alia, that evidence the defendant had suffered from migraine headaches all his life and had an epileptic seizure as a child, which one

expert reportedly opined caused brain damage, did not suggest "a mental disorder or developmental disability." (*Ibid.*) Similarly, in *People v. Howard* (1992) 1 Cal.4th 1132, 1163, the Court highlighted the requirement of a "mental disorder" and ruled that nothing about the defendant's report of suffering from uveitis, an inflammation of the eyes which compromised his vision and caused headaches and dizziness, suggested incompetence to stand trial. Often, rather than focusing on *Dusky*'s functional criteria, this state's courts have become ensnared in trying to untangle the difference between a mental disorder and a developmental disability, or in deciding whether the evidence supported a diagnosis of either one. (See, e.g., *People v. Leonard* (2007) 40 Cal.4th 1370, 1392; *People v. Castro* (2002) 78 Cal.App.4th 1402, 1418; *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 487.) Under *Dusky* and its progeny, this medical-classification discussion has no place in a determination of whether a defendant is "competent" such that subjecting him to a criminal trial does not offend due process.

The *raison d'etre* of a competency hearing is to guarantee that a defendant who is unable to participate meaningfully in his or her defense is not tried. (*Godinez, supra*, 509 U.S. 389, 402 ["Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel"]; *Huu Thanh Nguyen v. Garcia* (9th Cir. 2007) 477 F.3d 716, 724, quoting *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465, 469 [the sole purpose of the competency hearing is the "humanitarian desire to assure one who is mentally unable to defend himself not be tried upon a criminal charge"].) A state generally has the power to establish its own procedures to satisfy constitutional mandates for criminal prosecutions, but it must give effect to the ultimate constitutional goal. (See *Atkins, supra*, 536 U.S. 304, 317;

Ford v. Wainwright (1986) 477 U.S. 399, 416-417.) Certainly, the states are free to adopt competency standards that are more protective than the *Dusky* formulation of the defendant's right not to be tried when incompetent (*Godinez, supra,* 509 U.S. 389, 402), but they may not enact standards that are less protective. (See *Simmons v. South Carolina* (1994) 512 U.S. 154, 174 (conc. opn. of Souter, J.).)

In enacting section 1367, California has done just that. Its requirement that a criminal defendant establish that he suffers from a "mental disorder or developmental disability" as a threshold for proving incompetence excludes from protection defendants whom the United States Supreme Court, in *Dusky* and its progeny, has declared cannot be tried. This narrowed definition of incompetence increases the risk of an erroneous determination of competence which not only has dire consequences for the defendant, but also "threatens a fundamental component of our criminal justice system – the basic fairness of the trial itself." (*Cooper, supra,* 517 U.S. 348, 364, 369 [state rule requiring defendant to prove incompetence by clear and convincing evidence is incompatible with due process].) Instructing appellant's jury with the section 1367 definition of incompetence resulted in a fundamentally invalid determination that appellant was competent, in violation of the Due Process Clause of the Fourteenth Amendment.

E. California's Definition of Competence to Stand Trial Misstates the Test Under *Dusky* in Other Significant Ways as Well

In addition to grafting on an additional element, beyond those proscribed in *Dusky* and *Drope*, to the test for trial competency, California's test mischaracterizes and diminishes the key functional abilities a defendant must possess as identified by federal constitutional precedent. Section 1367 and CALJIC No. 4.10, as applied in appellant's trial, omit two key elements

of the definition of competence enunciated in *Dusky* and reiterated in subsequent United States Supreme Court decisions: (1) they fail to inform the jury that the defendant's understanding of the proceedings must be both "rational as well as factual,"and (2) they do not specify that the defendant must have a sufficient "present" ability to understand the proceedings and consult with counsel and assist in the defense. (See *Dusky*, *supra*, 362 U.S. 402; *Cooper*, *supra*, 517 U.S. 348, 354.)[30] Each of these parts of the *Dusky* formulation is significant and must be adjudicated in a competency determination. But they are not included in a competency decision under 1367, which requires only that the defendant "is capable of understanding the nature and purpose of the proceedings against him" and "is able to assist his attorney in conducting his defense in a rational manner." (31ART 1095-1096; CALJIC No. 4.10.)

In its decisions, this Court has recited both the California standard and the *Dusky* test for competence. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 401.) While noting the separate standards, the Court has treated them as substantially the same:

> It is true the language of section 1367 does not match, word for word, that of *Dusky*. But as the Court of Appeal noted in *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 177 [143 Cal.Rptr. 398], "To anyone but a hairsplitting semanticist, the two tests are identical."

(*Stanley, supra,* 10 Cal.4th 764, 816; accord, *Jablonski, supra*, 37 Cal.4th 774, 808; see *Dunkle*, *supra*, 36 Cal.4th 861, 893.) This conclusion is not warranted with regard to the "mental disorder or developmental disability" requirement, as shown above, nor with regard to the defects in section 1367

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[30]This Court has heard and rejected other challenges to the statutory language and jury instructions. (See, e.g., *People v. Jablonski* (2006) 37 Cal.4th 774, 807-808; *Dunkle, supra*, 36 Cal.4th 861, 864; *People v. Stanley* (1995) 10 Cal.4th 764, 816-817)

that appellant raises here – the "rational as well as factual understanding" showing, and the defendant's "present ability" showing that *Dusky* demands. These components of the *Dusky* standard are substantive, and their omission cannot be brushed aside as de minimis.

As the authors of Psychological Evaluations for the Courts explain, "understanding must be factual *and* rational; factual understanding alone is not enough." (Melton, et al., Psychological Evaluations for the Courts (3d ed. 2007), p.128.) "Rational" and "factual" have discrete meanings, and the California definition of incompetence stated in CALJIC No. 4.10 is constitutionally deficient in not requiring both with regard to the defendant's understanding of the proceedings.[31]

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[31]While some jurisdictions, like California, pay little heed to the requirement that the defendant's understanding of the proceedings be *both* factual and rational, many others take the United States Supreme Court at its word and employ a competency definition hewing close to *Dusky*'s literal requirements. (See *Howard v. U.S.* (D.C. 2008) 954 A.2d 415 [requiring only that the defendant have a factual understanding of the nature of the proceedings against him]; *Lambert v. State* (Okla. 1995) [test assessing the defendant's generic ability to "understand the nature of the charges and proceedings brought against him" is adequate under *Dusky*]; *State v. Holmes* (La. 2008) 5 So. 3d 42 [defendant required to have the capacity to understand the nature of the proceedings against him]; *Hernandez v. State* (Nev. 2008) 194 P.3d 1235 [the defendant must be of sufficient mentality to be able to understand the nature of the criminal charges against him]; *Velazquez v. State* (Ga. 2008) 655 S.E.2d 806 [a defendant is competent if he is capable of understanding the nature and the object of the criminal proceedings]; compare *State v. Davis* (Ind. 2008) 898 N.E. 2d 281 [the defendant must have a rational as well as factual understanding of the proceedings against him]; *State v. Were* (2008) 890 N.E.2d 263 [defendant must have a rational and factual understanding of proceedings]; *Com. v. Wooten* (Ky. 2008) 269 S.W.3d 857 [defendant must have a rational and factual understanding of the proceedings against him]; *In re Heidnik* (3d Cir. 1997) 112 F.3d 105 [to be competent a defendant must have both a rational and factual understanding of the charges and

(continued...)

The distinction between factual and rational understanding, and the requirement that the defendant possess both, really does matter. To have a "factual" understanding, the defendant must be able to grasp the facts of what is going on. To have a "rational" understanding, a defendant must have an understanding of the proceedings that is based on reason, as opposed to delusion, fantasy or some other non-reality based perception. The Supreme Court of New Hampshire explained this very well in *State v. Champagne* (N.H. 1985) 497 A.2d 1242, when it found error in the trial court's competency determination and reversed the conviction:

> The defendant . . . has demonstrated a factual understanding of the proceedings. He can articulate what the roles of the judge, jury, prosecutor, and defense counsel are supposed to be. He stated that he understands that he is charged with murder . . . He is oriented as to time, place, and person. If this were the extent of the test for competency, the record would support the trial court's ruling. However merely a factual understanding, whereby the defendant can recite, civics-class style, the cast of characters, their roles and the object of the proceedings, and can recall some events, is not enough. The defendant must also have a rational understanding of the nature of the charges brought against him and the purpose of the trial proceedings based upon those charges.

(*Id.* at p. 1245.)

An incompetent defendant lacks rational understanding when his "mental condition precludes him from perceiving accurately, interpreting, and/or responding appropriately to the world around him." (*Lafferty v. Cook* (10th Cir. 1992) 949 F.2d 1546, 1551.) A "sufficient contact with

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[31](...continued)
proceedings]; *Dennis ex rel. Butko v. Budge* (9th Cir. 2004) 378 F.3d 880; *State v. Haycock* (N.H. 2001) 766 A.2d 720, 722 [test is whether the defendant has both a rational and factual understanding of the proceedings].

reality [is] the touchstone for ascertaining the existence of a rational understanding." (*Ibid.*, citing, inter alia, *Coleman v. Saffle* (10th Cir. 1990) 912 F.2d 1217, 1224, *Balfour v. Haws* (7th Cir. 1989) 892 F.2d 556, 561, *Strickland v. Francis* (11th Cir. 1984) 738 F.2d 1542, *Dennis ex rel. Butko v. Budge, supra*, 378 F.3d 880, 894; see also *Bryan v. Gibson* (10th Cir. 2001) 276 F.3d 1163, 1170, aff'd in part and vacated in part by *Bryan v. Mullin* (10th Cir. 2003) 335 F.3d 1207 [finding that "sufficient contact with reality" is "the touchstone for ascertaining the existence of rational understanding" and affirming the jury's factual determination that the defendant was competent to stand trial]; *U.S. v. Housh* (D. Kan. 2000) 89 F.Supp.2d 1227, 1230-1231 [finding that the defendant met the Dusky "rational understanding" standard, in part because his mental deficits did not affect his perception of reality to a great extent]; *Haycock, supra*, (N.H. 2001) 766 A.2d 720, 722 [adopting *Lafferty*'s "sufficient contact with reality" standard of rational understanding]; *Wilcoxson v. State* (Tenn. Crim. App. 1999) 22 S.W.3d 289, 305 [requiring the defendant to have sufficient contact with reality to be found competent]; *In re Heidnik, supra*, 112 F.3d 105, 109-111 [death row inmate incompetent to abandon appeals because his decisions were based on a flawed "perception of reality," including "fixed false beliefs" that his victims had killed themselves and that his execution would lead to the end of capital punishment].) The concept of rational understanding is of key importance in cases where the defendant suffers paranoid delusions of conspiracy by counsel and court personnel and or religious delusions. (*Ibid.*; see *State v. Hawkins* (Idaho 2009) 229 P.3d 379, 383; *People v. Mondragon* (Colo. 2009) 217 P.3d 936, 940; *Lafferty supra*, 949 F.2d 1546, 1552-1555.)

The decision in *Lafferty* is illustrative. (*Lafferty, supra*, 949 F.2d 1546.) Therein, the defendant was diagnosed as being in a paranoid

delusional state, but deemed competent by the trial court. (*Id.* at p. 1552.) Lafferty's delusions included the strong belief that all those involved in his case – including his lawyer – "were part of a corrupt man-made order" against which he was required by God to rebel. (*Ibid.*) The defendant did display factual understanding of the proceedings, but the turning issue on appeal was the meaning of *Dusky*'s rational understanding requirement. (*Id.* at p. 1550 ["The aspect of the *Dusky* standard that is the critical focus of attention in this case is the requirement that a defendant have a rational as well as factual understanding of the proceedings against him."].) After examining the trial record in *Dusky,* the court in *Lafferty* held that "a defendant lacks the requisite rational understanding if his mental condition precludes him from perceiving accurately, interpreting, and/or responding appropriately to the world around him." (*Id.* at p. 1551.) Thus, it concluded, "sufficient contact with reality" is the "touchstone for ascertaining the existence of a rational understanding." (*Ibid.*) Similarly, the Second Circuit Court of Appeals has noted that where a defendant's "impaired sense of reality" prevents him from "focusing on his legal needs and from acting effectively on his intellectual understanding" of his position, it can prevent him from being able to "make any rational decisions regarding the defense." (*U.S. v. Hemsi* (2d Cir. 1990) 901 F.2d 293, 296.)

California's definition of competency does not require that the defendant have both a rational and a factual understanding of the proceedings against him. Appellant's jury never learned of the importance of the rational understanding concept, and thus the competency proceeding failed to satisfy due process under the United States Constitution.

The trial court's competency instruction erred also in omitting the *Dusky* requirement that the defendant have a "present" ability to consult

with and assist his lawyer. This requirement is significant because, unlike the test for criminal responsibility with its retrospective inquiry and civil commitment proceedings with its predictive inquiry, competence to stand trial is firmly grounded in the present. The competency determination must turn only on the defendant's present ability to function at his trial. (See *In re Ricky S.* (2008) 166 Cal.App.4th 232, 236 [reversing finding of competence because "the question is not can the [defendant] become competent in the future with assistance; rather the question is whether he is presently competent"].) The lack of the "present ability" language in CALJIC No. 4.10 as given at appellant's trial is all the more problematic given the erroneous requirement of the medical diagnosis of a mental disorder in the instruction's definition of incompetence. Such a diagnosis may suggest that a static mental condition is required, but in reality mental illness often is variable and episodic in nature. Whether the defendant suffers from a mental disorder, permanent or otherwise, is irrelevant because the pertinent inquiry under *Dusky* is whether *at present* the defendant possesses adequate functioning abilities to participate effectively in his trial. Thus, omitting the temporal aspect of the defendant's capability was a significant constitutional defect in the definition of competence given to appellant's jury.

F. The Version of CALJIC No. 4.10 Given to the Jury in Appellant's Trial was Even More Deficient in Meeting Federal Due Process Requirements, Because it Also Failed to State That the Defendant Must Possess the Capacity to Assist Counsel in a Rational Manner

In *Stanley, supra*, 10 Cal.4th 764, 816-817, this Court rejected a claim that CALJIC No. 4.10 was deficient under *Dusky* by failing to connote that *both* the defendant's "understanding of proceedings"and his "ability to assist counsel" bear the hallmark of rationality. This Court

insisted that a single iteration of the term "rational" in the competency instruction was enough: "Finally, defendant contends in essence the instruction given was deficient because it used the word 'rational' only once, rather than twice, as did the *Dusky* formulation. Because defendant does not explain the significance of this asserted deficiency, and because none appears, we reject the contention." (*Ibid.*) In *Dunkle, supra*, 36 Cal.4th 861, 893, this Court again rejected a challenge that the wording of CALJIC No. 4.10 failed to convey the full meaning of Dusky's emphasis upon rationality. This Court in *Stanley* and *Dunkle* held that CALJIC No. 4.10 adequately conveys the "rational" requirement of the federal due process test enunciated in *Dusky*, so much so that this Court deems the tests to be identical. (*Stanley, supra*, 10 Cal.4th 764, 816; *Dunkle, supra*, 36 Cal.4th 861, 893; see also *Jablonski, supra*, 37 Cal.4th 774, 808 [same].) But that holding rests on the premise that the instruction is read correctly, and the jury is informed that a competent defendant must be able to assist his attorney in conducting his defense "in a rational manner." (*Stanley, supra*, 10 Cal.4th 764, 816; *Dunkle, supra*, 36 Cal.4th 861, 893.) In this case, however, the version of CALJIC No. 4.10 given to the jury included not a single reference to "rationality."

The principle of rationality is the fulcrum about which the lever of trial competency pivots. Rationality is the heart of the constitutional standard, as courts including the United States Supreme Court repeatedly have emphasized. (See *Maynard v. Boone* (10th Cir. 2006) 468 F.3d 665, 673 [competency instruction omitting reference to "factual" understanding satisfied *Godinez* and *Dusky*, so long as the "concept of rationality [was] presented squarely in the instruction"].) The United States Supreme Court has never wavered from *Dusky's* emphasis on rationality as the key to the constitutional test. (See, e.g., *Godinez, supra*, 509 U.S. 389, 396-397;

Cooper, *supra*, 517 U.S. 348, 354.) Most recently, in *Edwards*, *supra*, 554 U.S. 164, the High Court reaffirmed that the constitution's mental competency standard set forth in *Dusky* and *Drope* forbade the trial of an individual lacking a "*rational* and factual understanding" of the proceedings and sufficient ability to consult with his lawyer with a "*reasonable degree of rational understanding*." (*Edwards, supra,* 554 U.S. 164, 170, emphasis added.)

The California Legislature included that same element of ability to "assist counsel in the conduct of a defense in a *rational* manner" in enacting section 1367; in section 1369 it established that court appointed experts in competency proceedings should assess "the defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense *in a rational manner*." (Pen. Code § 1369, emphasis added.) This Court has, on innumerable occasions, described the applicable standard, without exception acknowledging the key element of rationality. (See, e.g., *Brock, supra,* 57 Cal.2d 644, 648-649; *Laudermilk, supra*, 67 Cal.2d 272, 282; *Samuel, supra,* 29 Cal.3d 489, 497, 500; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1110; *Stanley, supra,* 10 Cal.4th 764, 816-817; *Lawley, supra*, 27 Cal.4th 102, 131; *Dunkle, supra,* 36 Cal.4th 861, 885; *Jablonski, supra,* 37 Cal.4th 774, 807-808.)

Appellant has discussed the importance of rationality in connection with his argument about the constitutional deficiencies of CALJIC No. 4.10 in Section E immediately above. "Rationality" in a defendant's consultation with and assistance of counsel is even more critical. It is essential so that such communication and assistance can be effective. In *Cooper*, *supra*, 517 U.S. 348, the Court emphasized that the capacity to communicate *effectively* with counsel is the key to the *Dusky* competency standard and its focus upon rational communication: "The deep roots and

fundamental character of the defendant's right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel mandate constitutional protection." (*Id.* at p.368, emphasis added.) The Court continued, linking effective communication with counsel to the need for competency as related to the defendant's decision-making during trial:

> For the defendant, the consequences of an erroneous determination of competence are dire. Because he lacks the ability to communicate effectively with counsel, he may be unable to exercise other "rights deemed essential to a fair trial." *Riggins v. Nevada*, 504 U.S., at 139, 112 S.Ct., at 1817 (Kennedy, J., concurring in judgment). After making the "profound" choice whether to plead guilty, *Godinez v. Moran*, 509 U.S. 389, 398, 113 S.Ct. 2680, 2686, 125 L.Ed.2d 321 (1993), the defendant who proceeds to trial "will ordinarily have to decide whether to waive his 'privilege against compulsory self-incrimination,' *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969), by taking the witness stand; if the option is available, he may have to decide whether to waive his 'right to trial by jury,' ibid.; and, in consultation with counsel, he may have to decide whether to waive his 'right to confront [his] accusers,' *ibid.*, by declining to cross-examine witnesses for the prosecution." *Ibid.* [¶] With the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense. The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a "fundamental component of our criminal justice system" - the basic fairness of the trial itself.

(*Id.* at p. 364; footnote omitted.)

The New Hampshire Court in *Champagne* grasped the significance of the defendant's rationality as related to his ability to communicate with and assist counsel:

> [The defendant must] have the ability to communicate *meaningfully* with his lawyer so as to be able to make informed choices regarding trial strategy. This often involves

> decisions of constitutional moment such as whether to waive the right against self-incrimination by taking the stand to testify. *See generally, Schade v. State*, 512 P.2d 907, 913-14 (Alaska (1973); *State v. Cook, supra*, 104 R.I. at 446-47, 244 A.2d at 835-836.

(*Champagne, supra*, 497 A.2d 1242, 1245.)

The defendant's ability to communicate with and assist counsel in preparing the defense *in a rational manner* is essential in order to carry out the "decision making" that the United States Supreme Court increasingly recognizes to be a fundamental aspect of competency. In *Godinez, supra*, 509 U.S. 389, the Court stressed the connection between competency and decision-making. In his majority opinion Justice Thomas observed that all defendants make important decisions in the course of a trial, decisions such as whether to waive the privilege against self-incrimination, to waive his right to a jury trial, and the right to confront witnesses through cross-examination. (*Id.* at pp. 398-399.) "[A]ll criminal defendants – not merely those who plead guilty – may be required to make important decisions once criminal proceedings have been initiated." (*Ibid.*) Because the decision to plead guilty is "no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial," those decisions which a defendant makes in choosing to waive the right to counsel require a similar level of mental functioning as do those which a defendant must make if he is to stand trial. (*Id.* at pp. 398-400.) In his concurrence, Justice Kennedy reinforced the notion that competency to stand trial under *Dusky* entails the ability to make rational decisions pertaining to the criminal proceedings, stating: "What is at issue here is whether the defendant has sufficient competence to take part in a criminal proceeding and to *make the decisions* throughout its course." (*Id.* at p. 403, emphasis added; see also *Cooper, supra,* 517 U.S. 348, 398 [the defendant

who proceeds to trial has to make a "myriad of smaller decisions concerning the course of his defense" emphasizing that the defendant must make these decisions with "the assistance of counsel"]; Grisso, Evaluating Competencies: Forensic Assessments and Instruments (2d ed. 2003) p. 73 [an essential component of a defendant's competency to stand trial is his "ability to make far-reaching decisions"]; see Maroney, *Emotional Competence, Rational Understanding and the Criminal Defendant* (2006) 43 Amer. Crim. L. Rev. 1375 [assessment of the ability to meaningfully participate in trial requires assessment of emotional and cognitive influences on the defendant's rational decision making].)

"Decisional competency," which can mean the capacity to weigh rationally a choice such as whether to assist and communicate with counsel, is an acknowledged component of competency to stand trial. This concept was emphasized by psychiatrist Richard Bonnie in his seminal work *The Competence of Criminal Defendants: a Theoretical Reformulation* (1992) 10 Behav. Sci. Law 291-316.[32] As described by Bonnie:

> A defendant who is able to understand information relevant to a decision and is able to appreciate the "meaning" of the decision in his or her situation may nonetheless lack the capacity to use logical processes to compare the risks and benefits of the decisional options. Applebaum and Grisso use the phrase *rational manipulation of information* to refer to the

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[32] Thomas Grisso relies upon Bonnie's notion of "decisional competence" in his recent book on the forensic evaluation of competency to stand trial. (Grisso, Evaluating Competencies: Forensic Assessments and Instruments (2d ed. 2003) pp.72-73, 93.) Gary Melton also acknowledges Bonnie's concept of "decisional competence" as the foundation for the MACcatCA (MacArthur Competence Assessment Tool - Criminal Adjudication), a new assessment tool developed by the MacArthur Foundation and the National Institute of Mental Health. (Melton et al, Psychological Evaluations For The Courts: A Handbook For Mental Health Professionals and Lawyers, *supra*, p. 149.)

> process of weighing information to reach a decision. What is important here is the decisional *process*, not its *outcome*, although an outcome considered by others to be irrational obviously may signal a problem with the defendant's reasoning process. A defendant's capacity to weigh information in order to make rational choices, consistent with starting premises and assigned values, may be impaired by psychotic thought disorder, delirium and dementia, extreme phobia or panic, anxiety, euphoria and depression.

(*Id.* at pp. 305-306; footnotes omitted, emphasis in original.) Under Bonnie's construct, "decisional competency" is a domain of competency separate and apart from rudimentary ability to assist counsel, and where the two intersect, at the client's decision whether to cooperate with counsel and heed counsel's advice, is a question of decisional competency to make a rational choice whether to do so. (*Id.* at p. 308.)

Modern treatises and forensic instruments have incorporated Bonnie's concept of "decisional competence," especially after the High Court emphasized decision-making in *Godinez*, *supra*, 509 U.S. 389, for example, Melton et al, Psychological Evaluations For The Courts: A Handbook For Mental Health Professionals and Lawyers, *supra*, p. 149 ("Melton"). Melton describes a defendant's capacity to relate to counsel and the possibility of mental illness impairing the decision not to do so:

> . . . [T]he test emphasizes the defendant's *capacity*, as opposed to willingness, to relate to counsel . . . The defendant who refuses to talk to the attorney even though capable of doing so is making a rational choice, knowing the consequences. Unless the lack of motivation is due to psychopathology (e.g. hopelessness associated with depression, irrational thinking), thereby calling into question the defendant's capacity to assist in his or her defense, it is not ground for an incompetency finding. . . . [Rationality is paramount]; [a] defendant who understands that a particular prison term is associated with his charges but believes for irrational reasons that he will never serve any time in prison may be incompetent.

(*Id.* at p. 128, original emphasis.)

In *Indiana v. Edwards*, the High Court cites Bonnie as a leading authority, and implicitly acknowledges that the defendant's "decisional" or "adjudicative" competence, as related to his "functional legal ability," is at the core of *Dusky* inquiry and its due process floor with respect to competency to stand trial. (*Edwards, supra*, 554 U.S. 164, 176, quoting N. Poythress, R. Bonnie, J. Monahan, R. Otto, S. Hoge, Adjudicative Competence: The MacArthur Studies (2002), p. 103 ("Adjudicative Competence").)

In Adjudicative Competence, *supra*, the authors emphasize the incapacity which results if a defendant does not rationally appreciate the need to communicate with counsel:

> [A] mentally impaired defendant might be unfairly convicted if he alone has knowledge of certain facts but does not appreciate the value of such facts, or the propriety of communicating them to his counsel.

(Adjudicative Competence, p. 44, internal quotation marks omitted.) The authors explain that "[t]he most plausible extrapolation of the *Dusky* standard, as applied to decisionmaking, would require the capacity to (1) understand information relevant to the specific decision at issue (understanding), (2) appreciate the significance of the decisions as applied to one's own situation (appreciation), (3) think rationally (logically) about the alternative courses of action (reasoning), and (4) express a choice among alternatives (choice). Taken together, these four criteria operationalize the "rationality" requirement to which the Supreme Court referred in *Godinez v. Moran*. (Adjudicative Competence, p. 48.)

The American Academy of Psychiatry and the Law (AAPL) has adopted guidelines which urge forensic practitioners to be watchful for the possibility of decisional incompetence due to mental illness rendering the

defendant incapable of rationally evaluating whether to assist counsel. (Mossman, et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial* (2007) J. Am. Acad. Psychiatry Law 35: Supplement 4:S3-S72.) This text states:

> In cases in which the psychiatrist has learned that a defendant has had problems in collaborating with defense counsel, the psychiatrist should . . . analyze the rationality of the defendants' beliefs about how they expect the case to proceed, how they perceive their relationship with their attorneys, and how they anticipate being treated by the legal system. . . . The defendant's description of events often provides information about whether he or she rationally perceives the reasons for the prosecution and can realistically appraise available defenses (including the insanity defense). . . . A defendant who refuses to speak with his attorney because he delusionally believes his attorney is an undercover FBI agent working for the prosecution provides an example of how a psychiatric symptom can impede collaboration with defense counsel. The psychiatrist may have to determine whether a defendant's refusal to assist counsel is a result of voluntary noncooperation or an impaired ability to cooperate caused by a mental disorder. [¶] The psychiatrist should also assess the defendant's capacity to make legal decisions in collaboration with defense counsel and to participate in other activities that counsel may require. Examples of such activities include the defendant's ability to plea bargain, to waive a jury trial, and to testify. The psychiatrist should focus on how well the defendant can appreciate the situation, manipulate information related to the trial process, and work with counsel in making rational decisions. . . . If, for example, a defendant does not cooperate with his attorney because he irrationally perceives the attorney as plotting against him . . . [taking into consideration] that the defendant has paranoid schizophrenia helps [one] understand that the defendant's fears stem from a well-known form of mental illness and not from quirkiness or unwillingness to cooperate.

(*Id.* at pp. S34-S35, S46, S49.) A defendant's delusions might be pertinent to the *Dusky* prong concerning ability to rationally assist counsel as well;

for example, a defendant may properly be found to be incompetent to stand trial where, even if capable of understanding the nature and purpose of the proceedings, he refuses to assist in his or her defense as a direct result of his mental illness. (*U.S. v. Friedman* (9th Cir. 2004) 366 F.3d 975, 981-982.)

By failing to include any reference to rationality in the instruction given to appellant's jury, the jury never learned the importance of rationality in the definition of competence to stand trial. As such, the instruction did not comport with *Dusky*, *Drope* and *Pate* and denied appellant his right to due process and a fair trial.

G. Use of the Unconstitutional Competence Instruction was Structural Error and Requires Reversal

As shown above, the instruction read to appellant's jury was flawed by (1) predicating a finding of incompetence upon a finding of mental disorder, (2) failing to require a factual and rational understanding of the proceedings and a "present" ability to assist counsel, and (3) omitting the decisive word "rational" entirely from the instruction. The error in instructing the jury with this fundamentally flawed instruction was a violation of appellant's rights to due process and a fair trial. The error was so central to the fairness of the competency trial, that it requires reversal without a consideration of prejudice. This Court's recent holdings in *People v. Aranda* (2012) 55 Cal.4th 342 and *People v. Lightsey* (2012) 54 Cal.4th 668 reinforce these conclusions.

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1. Instructional Errors at a Competency Trial Related to the Definition of Competence and the Standard of Proof Must be Assessed as Federal Constitutional Error

Although the right to a jury trial in a competency proceeding, and the concomitant right to a properly instructed jury, may be only statutory (§ 1369; *Samuel, supra,* 29 Cal.3d 489, 505), a defendant's right not to be put to trial when he or she is more likely than not incompetent is constitutional. (*Cooper, supra,* 517 U.S. 348, 369.) The "fundamental character of the defendant's right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel mandate constitutional protection." (*Id.* at p. 368.) As such, a defendant is protected in his or her competency trial by principles of due process and right to a fair trial as articulated in the Fifth and Fourteenth Amendments to the United States Constitution.

These Amendments to the constitution protect a defendant's right to a properly instructed competency jury, and, in particular, protect a defendant from instructions which improperly increase the burden of proof on the defendant. As the Supreme Court noted in *Cooper*: "'The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." [Citation.]'" (*Cooper, supra,* 517 U.S. 348, 362-363, quoting *Addington, supra*, 441 U.S. 418, 423; see also *Sandstrom v. Montana* (1979) 442 U.S. 510, 526.) Where a presumption of competence and the standard of proof affect "only the narrow class of cases in which the evidence on either side [is] equally balanced" – as where the defendant need only demonstrate his

or her incompetence by a preponderance of the evidence – there is no "significant risk of an erroneous determination that the defendant is competent." (*Id.* at p. 363.)

Placing a more onerous burden on the defendant, however, instead of "jealously guard[ing] an incompetent criminal defendant's fundamental right not to stand trial," imposes just such a risk. (*Cooper*, *supra*, 517 U.S. 348, 363 [quotation and citation].) An erroneous determination of competence threatens a "fundamental component of our criminal justice system—the basic fairness of the trial itself." (*Id.* at p. 364 [quotation and citation].) "More fundamentally, while the difficulty of ascertaining where the truth lies may make it appropriate to place the burden of proof on the proponent of an issue, it does not justify the additional onus of an especially high standard of proof." (*Id.* at p. 366; see also *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1276-1278.) Under *Cooper*, the error in the competency instruction in appellant's section 1368 hearing was federal constitutional error.

2. Core Constitutional Principles Require That the Errors in the *Dusky* Instruction be Analyzed as Structural

In this case, not only was the trial court's error in incorrectly instructing the jury on the *Dusky/Drope* standard federal constitutional error, it was error requiring reversal of the competency verdict without a consideration of prejudice. This is so for three reasons: First, the error unconstitutionally increased the burden of proof on appellant, creating a substantial likelihood that appellant was tried while incompetent. (*Cooper*, *supra*, 517 U.S. 348, 354.) Second, the erroneous instruction provided the jury with an unconstitutional theory for finding appellant competent to stand trial without reaching the constitutionally mandated questions dictated in *Dusky* and *Drope* which rendered the trial fundamentally unfair and an

unreliable vehicle for determining appellant's competence (*Neder v. U.S.* (1999) 527 U.S. 1, 9), and which created an unquantifiable and indeterminate error and vitiated all the jury's findings (*Sullivan v. Louisiana* (1993) 508 US. 275, 281- 282). Third, the erroneous instruction led to a proceeding which denied appellant the reasonable opportunity to demonstrate that he was incompetent (*Medina, supra*, 505 U.S. 437, 451) and failed to provide adequate state procedures protecting against the trial of an incompetent person (*Pate, supra,* 383 U.S. 375, 386-387; *In re Dennis* (1959) 51 Cal.2d 666, 674).

Most constitutional errors can be subject to harmless-error review under *Chapman v. California* (1967) 386 U.S. 18. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306.) However, some constitutional errors defy harmless-error analysis; these "structural" errors affect "the framework within which the trial proceeds" (*id.* at pp. 309-310) and, therefore, require automatic reversal. Instructional errors that omit, misdescribe or presume only one element of an offense are not considered structural because they do "not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (*Neder, supra*, 527 U.S. 1, 9, citing *Rose v. Clark* (1993) 478 U.S. 570, 577-578, original emphasis.) Their harm can be judged by harmless-error review. (*Ibid.*) However, the instruction in appellant's case cannot be so judged.

First, the United States Supreme Court's decision in *Cooper v. Oklahoma* provides direct and binding precedent that a competency instruction that increases the burden of proof in a competency trial beyond requiring the defendant to show he or she is incompetent by a preponderance of the evidence violates due process, and that giving such instruction is structural error. In *Cooper, supra*, 517 U.S. 348, 366-367, 369, the Supreme Court held that a state procedural rule which

impermissibly heightens defendant's burden on competency violates due process, resulting in reversal *without* inquiry into prejudice. Thus, the Court in *Cooper*, upon finding a due process violation, invalidated the finding of competency and remanded for further proceedings employing the constitutionally required test, rather than turning to the specific evidence in the record to assess whether it appeared the defendant would have been found competent even under the correct test.

Here, as in *Cooper*, the erroneous instruction unconstitutionally heightened appellant's burden of proof by requiring a finding that appellant have a mental disorder, when as shown above, the constitution makes no such requirement. (*Cooper*, *supra*, 517 U.S. 348, 369.) This unconstitutional supernumerary to the *Dusky/Drope* standard impermissibly increased the burden on defendant to show that he was incompetent in violation of *Cooper*, requiring reversal of the verdict without a showing of prejudice. Similarly, the failure to read the word "rational" in the CALJIC No. 4.10 instruction increased appellant's burden of proof by placing on appellant the burden of showing that he could never assist counsel, when the law requires only that he show that he was unable to *rationally* assist counsel. This unconstitutional modification of the instruction made it more difficult for appellant to prove incompetence, increasing the probability that appellant would be tried as incompetent.

Second, giving the defective competency instruction was structural error because it gave the jury an unconstitutional theory for finding appellant competent to stand trial without reaching the constitutionally mandated questions stated in *Dusky* and *Drope*, which rendered the trial fundamentally unfair and an unreliable vehicle for testing appellant's competence (*Neder*, *supra*, 527 U.S. 1, 9), and created "unmeasurable"

error and vitiated all of the jury's findings. (*Sullivan, supra*, 508 U.S. 275, 281-282.)

In *Sullivan*, the stress was on the jury as factfinder, which in *Sullivan* was a Sixth Amendment jury: What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. (*Sullivan, supra*, 508 U.S. 275, 277.) This would be true, of course, in a criminal case, whether trial was by jury or by judge. In the case of competency, constitutionally the factfinder must determine incompetence by a burden of proof no greater than that of preponderance of the evidence. (*Cooper, supra*, 517 U.S. 348.) Thus, if a factfinder has not rendered such a finding, then as in *Sullivan,* there is no finding over which a harmless error analysis would make legal or logical sense. (*Sullivan, supra*, 508 U.S. 275, 280.) When a reviewing court substitutes its view based on a hypothetical factfinder, it has deprived the appellant of his Fourteenth Amendment right to a factual determination pegged at a specific burden of proof.

In the context of a criminal trial, an instruction that lowers the prosecution's burden of proving guilt beyond a reasonable doubt is structural error because it "vitiates *all* the jury's findings," and its effect on the verdict is necessarily unquantifiable and indeterminate. (*Sullivan, supra*, 508 U.S. 275, 281-282, original emphasis; see *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 61 ["harmless error analysis applies to instructional errors so long as the error at issue does not categorically vitiat[e] *all* the jury's findings"][quotation and citation, original emphasis].) So, in *Sullivan*, the United States Supreme Court explained that the Due Process clause itself requires a prosecutor in a criminal case to persuade the factfinder "beyond a reasonable doubt" of all facts necessary to establish each element of each charged offense. The burden lowering instruction thus vitiates the jury's finding, which has constitutional consequences –

viz., it violates due process. (*Sullivan, supra*, 508 U.S. 275, 277; *Carella v. California* (1989) 491, 265.)[33]

Similarly, a competency trial has its own due process requirements for what the factfinder must do: it must find that the defendant is competent to stand trial because he or she has a factual and rational understanding of the charges and proceedings and the ability to confer with counsel in a rational manner. It matters not that the burden of proof is different (beyond a reasonable doubt in a criminal trial; preponderance of the evidence in a competency trial), or placed on a different party (the prosecutor in a criminal trial; the defendant in a competency trial). What does matter is whether the due process minimum for fact finding is met in each constitutional scenario (the finding of guilt in a criminal trial; the finding of competency to stand trial in a competency trial). The instructional error in this case categorically vitiated the finding that appellant was competent, because the very definition of competency was changed, so that due process protections under *Dusky* and *Drope* were eradicated. The effect on the verdict that appellant was competent indeed was "immeasurable."

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[33]The Court in *Sullivan* further stated that in a second "mode of analysis" structural error also would apply under the Sixth Amendment right to trial by jury. (*Sullivan, supra*, 508 U.S. 275, 282-283.) Although the second "mode of analysis" employed in *Sullivan* is inapposite here because a California defendant's right to a jury in a competency proceeding is based only on statute (*Samuel, supra*, 29 Cal.3d 489, 505), that does not lessen the pertinence of the *Sullivan* Court's first basis for its holding, viz., violation of due process. Moreover, although there is not a Sixth Amendment right to trial by jury for competency, the state confers a statutory right to one, which, in turn, becomes an element of federal due process in that the right cannot be denied without denying federal due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

The erroneous instruction provided the jury with an unconstitutional theory for finding appellant competent by permitting a verdict of incompetence without the jury ever reaching the constitutionally-mandated questions of *Dusky* and *Drope*. If the jury in this case concluded that appellant did not suffer from a mental disorder, then it was instructed to find the defendant competent – when, as shown, incompetence does not require a finding of mental disorder. If appellant's jury found that appellant could "assist counsel," it could find appellant competent without consideration of the constitutionally-mandated question of *Dusky* and *Drope*, i.e., could appellant *rationally* assist counsel? In both instances, the jury would have to return a verdict of competence because appellant failed to prove incompetence under the incorrect instructions the jury was given. Appellant would have failed to carry his burden of proof, even if the jury believed the evidence proved him unable to assist his attorney in a *rational* manner. Equally, a negative finding on the mental disorder element barred the jury from even reaching *Dusky*'s constitutionally-required analysis. Thus, errors in the court's instruction created a significant likelihood that trial of the constitutionally significant question – whether appellant had the functional abilities set forth under *Dusky* and *Drope* – never took place at all.

In *Sullivan, supra*, 508 U.S. 275, the Court held that *Chapman* did not apply to an instruction that unconstitutionally lowered the prosecution's burden of proof. In assessing *Chapman* error, the task of the reviewing court is to assess "the basis on which 'the jury *actually rested* its verdict.'" (*Sullivan, supra*, 508 U.S. 275, 279, citing *Yates v. Evatt* (1991) 500 U.S. 391, 404, original emphasis.) *Sullivan* held that the task for a court reviewing an unconstitutional instruction "is not to assess what the effect of the error would have been on a hypothetical jury, but to determine whether

the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Ibid*, original emphasis.) Where there has never been a verdict of guilt beyond a reasonable doubt, there can be no analysis of the effect of the error on that verdict and the premise of *Chapman* review is absent: "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object,* so to speak, upon which harmless-error scrutiny can operate." (*Id.* at p. 280.) Analogously, there having been no finding that appellant was competent to stand trial according to constitutional principles, there is no object upon which *Chapman* can operate. The reviewing court can only speculate what a properly instructed jury would have found. This is insufficient. As such, reversal is required without a showing of prejudice.

Third, *Pate* and its progeny require reversal without any consideration of prejudice. In *Pate,* the Court held that the Constitution requires an "adequate hearing" to ensure competence. (*Pate*, *supra*, 383 U.S. 375, 385.) An "adequate hearing" surely comprehends a hearing in which the constitutional standard is applied. For the foregoing reasons the butchered instruction given in this case does not satisfy *Dusky.* As in *Pate*, the state's failure to follow its own supposedly adequate procedure denied appellant his due process right to a fair trial.

In *Neder, supra,* 527 U.S. 1, the Supreme Court held in a criminal case that the omission of an *element* of a *crime* from the instructions was not structural error.

> The error at issue here - a jury instruction that omits an element of the offense - differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a "defect

> affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, *supra*, at 310, 111 S.Ct. 1246. Such errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and "necessarily render a trial fundamentally unfair," *Rose*, 478 U.S., at 577, 106 S.Ct. 3101. *Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." Id.*, at 577-578, 106 S.Ct. 3101.

(*Neder*, *supra*, 527 U.S. 1, 8-9, emphasis added.)

However, the failure to correctly measure a criminal defendant's competency against the fundamental core of the *Dusky* standard – that the defendant must have not only a factual understanding, but also a *rational* one – is not interchangeable with the omission of an element of a charged offense in the criminal case. Nor is the addition of a superfluous requirement that appellant show a mental disorder to be found incompetent. The very *purpose* of a competency trial is to measure the evidence against the constitutional "floor" of competency articulated in *Dusky* and *Drope*. *Pate* requires that states adopt adequate procedures to implement the Due Process guarantee against being tried while incompetent under the *Dusky/Drope* standard. (*Pate*, *supra*, 383 U.S. 375, 385-386.) That protection is, to paraphrase *Rose v. Clark*, a "basic protection" without which " a [competency] trial cannot reliably serve its function as a vehicle for determination of [competency satisfying the Due Process Clause] and no [competency determination thus reached] may be regarded as fundamentally fair." (See *Rose*, *supra*, 478 U.S. 570, 577-578.) Appellant simply did not receive his constitutionally mandated competency determination.

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3. *Aranda* and *Lightsey* Support the Analysis

This Court's recent opinion in *Aranda*, *supra*, 55 Cal.4th 342, supports a structural analysis of the error in this case. Aranda was charged with two crimes, murder (§187, subd. (a)) and active participation in a street criminal street gang (§ 186.22, sudb. (A)), as well as enhancements related to the murder charge (§§ 186.22, subd. (b), 12022.5, subd.(a), 12022.53, subd. (d)). (*Id.* at p. 351.) With regard to both crimes, the trial court failed during predeliberation instructions to read the standard instruction on the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt (CALJIC No. 2.90). (*Id.* at p. 352.) Predeliberation instructions addressed the prosecution's burden of guilt vis a vis the homicide and several instructions addressed the reasonable doubt standard vis a vis the homicide enhancements. One instruction addressed the prosecution's burden of proof in connection with the sufficiency of circumstantial evidence to prove guilt (CALJIC No. 2.01). (*Id.* at p. 351.) No instruction directly addressed the burden of proof for the gang offense. (*Ibid.*) Aranda was convicted of voluntary manslaughter and the gang offense. (*Id.* at pp. 351-352.)

This Court cited United States Supreme Court precedent and its own precedent holding that both the Due Process clause of the federal constitution and state law require that a jury be instructed that the prosecution has a duty to prove guilt beyond a reasonable doubt. (*Aranda*, *supra*, 55 Cal.4th 342, 356, citing *Victor v. Nebraska* (1994) 511 U.S. 1, 5, *In re Winship* (1970) 397 U.S. 358, 364.) The Court stated that in *People v. Vann,* (1974) 12 Cal.3d 220, 225, it had held that "the trial court's state law duty to instruct the jurors on the principles of law that govern their deliberation and decision included the obligation to instruct that a defendant is presumed to be innocent and that the prosecution had the burden of

proving his or her guilt beyond a reasonable doubt." (*Ibid.*) It also noted that "*Vann* also recognized the federal constitutional implications of that rule, observing that "[t]he reasonable-doubt standard of proof in criminal proceedings is . . . rooted in the federal Constitution." (*Id.* at p. 227, 115 Cal.Rptr. 352, 524 P.2d 824.)" (*Id.* at pp. 356-357.) However, this Court held that failing to instruct on the burden of proof was not always federal constitutional error. Rather, this Court adopted the principle it had previously articulated in *Vann, supra*, 12 Cal.3d 220, that:

> the omission of the standard reasonable doubt instruction will amount to a federal due process violation when the instructions that were given by the court failed to explain that the defendants could not be convicted "unless each element of the crimes charged was proved to the jurors satisfaction beyond a reasonable doubt." (*Vann, supra,* 12 Cal.3d at p. 227, 115 Cal.Rptr. 352, 524 P.2d 824.) When the trial court's *instructions otherwise cover this constitutional principle, the failure to instruct with the standard reasonable doubt instruction does not constitute federal constitutional error.*

(*Id.* at p. 358, emphasis added.) Turning to the record before it, this Court held that the error in failing to give the standard predeliberation instruction did not amount to federal constitutional error as to the homicide charge, because other instructions in the case covered the principle of proof beyond a reasonable doubt that related to that charge.

In contrast, because no other instructions given in the case covered the beyond a reasonable doubt principle as to the gang charge, the omission of the standard deliberation charge was federal constitutional error. This Court in *Aranda* held that the federal constitutional error was not structural, but rather was subject to harmless error review under the *Chapman* standard. It recapitulated United States Supreme Court precedent that the touchstone for determining the appropriateness of harmless error review is the ability to ascertain the effect of the constitutional violation, emphasizing

that structural errors were those where the consequences of the error were "'necessarily unquantifiable and indeterminate.'" (*Aranda, supra*, 55 Cal.4th 342, 364, citing *U.S. v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150; *Sullivan, supra*, 508 U.S. 275, 282.) This Court also took note of the holding in *Sullivan* that the *misdescription* of the burden of proof (as compared to the omission of the standard predeliberation instruction on the burden of proof, as in the case before it) "vitiate[d] *all* the jury's findings." (*Id.* at p. 365, citing *Sullivan, supra*, 508 U.S. 275, 281, original emphasis). It further explained *Sullivan's* holding that the premise of *Chapman* was "simply absent" in that case, because there was "'no jury verdict of guilty-beyond-a-reasonable doubt . . . upon which harmless-error scrutiny [could] operate.'" (*Ibid.*, quoting *Sullivan, supra*, 508 U.S. 275, 280.)

In this case, the trial court gave an instruction that *misdescribed* the burden of proof with respect to competency to stand trial. As *Aranda* recognized, and appellant has argued immediately above, *Sullivan* held that where the issue is the misdescription of the burden of proof, there is no jury finding upon which an analysis of harm can operate, so the error is structural. In *Aranda*, this Court reaffirmed the principle that an error was a structural defect where there was "'not simply an error in the trial process,'" but rather an error "'affecting the framework within which the trial proceeds.'" (*Aranda, supra*, 55 Cal.4th 342, 363, quoting *Fulminante, supra*, 449 U.S. 279, 310 and citing *Brecht v. Abrahamson* (1993) 507 U.S. 619, 630 [structural errors require automatic reversal because "they infect the entire trial process"].) This Court also reiterated the principle that structural errors "deprive defendants of basic protections" (*Aranda, supra*, 55 Cal.4th 342, 364, citing *Neder, supra,* 527 U.S. 1, 8 [quotations omitted]) and "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (*Ibid,* citing *Neder*,

supra, 527 U.S. 1, 9; *Washington v. Recuenco* (2006) 548 U.S. 212, 218-219; *Rose*, *supra*, 478 U.S. 570, 577, omitting original emphasis.) Here, misinstruction on the *Dusky* requirement "affected the framework" of appellant's competency trial, deprived him of a basic protection and rendered his trial unfair. As such, *Aranda* supports the argument that the error was structural.

Similarly, this Court's recent opinion in *Lightsey*, *supra*, 54 Cal.4th 668, reenforces a conclusion that the error was structural and not subject to harmless error review. In *Lightsey*, this Court held that the trial court violated Penal Code section 1368, subdivision (a) in allowing a defendant to represent himself during mental competency proceedings after the trial court declared a doubt regarding the defendant's competency to stand trial. (*Id.* at pp. 692-693.) The Court then considered the appropriate prejudice standard. It noted that where a defendant was completely deprived of counsel *at trial* (*id.* at p. 699, citing *Holloway v. Arkansas* (1978) 435 U.S. 475, 489) a court presumes the violation of the right was prejudicial and reverses automatically without conducting harmless error review under *Chapman*. (*Ibid.*, citing *Mickens v. Taylor* (2002) 535 U.S. 162, 166.)

The error where counsel has been completely denied must be contrasted with one where there was a denial only for a discrete period. The *Lightsey* Court cited *Satterwhite v. Texas* (1988) 486 U.S. 249 as an example. In that case, the defendant was deprived counsel at an examination by a psychiatrist whose testimony was later used at trial. In *Satterwhite*, harmless error review did apply because "'a reviewing court can make an intelligent judgment about whether the erroneous admission of [the evidence] might have affected [the jury].'" (*Lightsey*, *supra*, 54 Cal.4th 668, 700, citing *Satterwhite, supra*, 486 U.S. 249, 258.) This Court noted the contrast drawn in *Arizona v. Fulminante* between "trial errors"

and errors with "constitutional deprivations [constituting a] structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. 'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" (*Id.* at pp. 700-701, citing *Fulminante*, *supra*, 449 U.S. 279, 310.)

This Court then applied the principles in *Holloway*, *Minkens,* and *Fulminante* to a competency trial. It held that the error in Lightsey's case, the violation of the statute requiring counsel at a competency hearing, was akin to a pervasive Sixth Amendment violation and it could not be likened to "trial error" like the error in *Satterwhite*. This Court could not excise some item of evidence in order to "make an intelligent judgment" (*Lightsey*, *supra*, 54 Cal.4th 668, 700 citing *Satterwhite*, *supra*, 486 U.S. 249, 258) "about *whether the competency determination* might have been affected by the absence of counsel to represent defendant." (*Id.* at p. 701, original emphasis.) In applying structural error to the competency trial, this Court cited the holding in *Rose*, *supra*, 478 U.S. 570, 597, that structural errors affect the very composition of the record and the holding in *Neder, supra*, 527 U.S. 1, 8–9, that structural errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" (*Ibid.*)[34]

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[34]In *Lightsey*, *supra*, this Court also rejected the prosecution's assertion that subsequent competency proceedings rendered the error harmless. (*Lightsey*, *supra*. 54 Cal.4th 668, 701.) In rejecting the argument, this Court reiterated that the error in allowing the defendant to represent himself in competency proceedings was structural, rendering the

(continued...)

Comparing the rationale in *Lightsey* to the present case, here also the error claimed by appellant was not limited to a "discrete period" or related only to a single item of evidence. Rather, the misdescription of the test for competency cut to the core of the proceeding and its *raison d'etre*: to assess whether the defendant was competent to stand trial. The effect of the error – the jury's consideration of the evidence under an unconstitutional standard – cannot be compartmentalized, just as the deprivation of counsel in Lightsey's competency trial had a wholesale effect and required reversal without consideration of prejudice.

In *Lightsey,* this Court also held that even assuming that subsequent proceedings during a trial *could* in some circumstances remedy this type of error, they did not do so in Lightsey's case. This Court noted that the trial court did not again declare a doubt about the defendant's competency and begin formal competency proceedings. In *Lightsey*, although there were subsequent proceedings pertaining to the defendant's competence to represent himself, there were none regarding his competence to stand trial. (*Lightsey*, *supra*, 54 Cal.4th 668, 702.) It also pointed out that given that the defendant represented himself in the subsequent proceedings, "to the extent the hearing shed any light on defendant's competence to stand trial,

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[34](...continued)
"finding that the defendant was mentally competent to stand trial – unreliable." (*Ibid.*) *Aranda* further suggests that it is inappropriate to look at later evidence of competency in evaluating the effect of instructional error at a competency trial. (See *Aranda*, *supra*, 55 Cal.4th 342, 368 ["In sum a reviewing court applying the *Chapman* standard to determine the prejudicial effect of the erroneous omission of the standard reasonable doubt instruction should evaluate the record as a whole – but not rely upon its view of the overwhelming weight of the evidence supporting the verdict – to assess how the trial court's failure to satisfy its constitutional obligation to instruct on the prosecution's burden of proof beyond a reasonable doubt affected the jury's determination of guilt."])

any finding on that subject would have been as unreliable as the tainted section 1368 proceeding." (*Ibid.*)

Lightsey is on all fours with this case. Here the instructional error was structural and rendered the finding that appellant was mentally competent to stand trial unreliable – so any appeal to subsequent proceedings – or to any proceedings at all – is inappropriate. Even if other proceedings could possibly rectify the error, they do not do so in this case. Just as in *Lightsey,* in appellant's case there were subsequent proceedings about appellant's competence to represent himself, but none pertaining to appellant's competence to stand trial. Moreover, appellant represented himself during most of the subsequent proceedings pertaining to his competence to represent himself, so that these proceedings are as tainted as the section 1368 trial.

H. The Claim is Cognizable on Appeal, Even Though There was no Objection to the Competency Instruction at Trial

Appellant's claim is cognizable on appeal, although he did not raise it in the trial court. To be sure, the forfeiture doctrine holds that "'an appellate court will not consider claims of error that could have been – but were not – raised in the trial court.'" (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113, quoting *People v. Vera* (1997) 15 Cal.4th 269, 275.) However, there are two exceptions to this general rule that permit appellant to assert, and allow this Court to adjudicate, his constitutional challenge to the competency instruction given at his trial.

First, section 1259 specifically provides that a legally erroneous instruction affecting the defendant's substantial rights is reviewable without the requirement of objection at trial, and this Court regularly has decided the merits of such claims. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1134; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.) Appellant's

claim clearly qualifies for consideration under section 1259. Because he "had the right to [constitutionally sufficient] instructions on the elements of" competence and incompetence to stand trial, and because the instructional errors affected his substantial rights, he did not forfeit the errors by failing to object to CALJIC No. 4.10 as given. (*People v. Prieto* (2003) 30 Cal.4th 226, 268.)

Second, this Court has discretion to review legal claims in the absence of an objection at trial, even when an objection usually is required to preserve an issue for appeal. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) The Court has held "that a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts" and has recognized that California courts have "examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved . . ., the asserted error fundamentally affects the validity of the judgment . . ., or important issues of public policy are at issue . . . ." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394, citations omitted; see *Vera, surpa*,15 Cal.4th 269, 276 ["[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights"], abrogated in part on other grounds, *People v. French* (2008) 43 Cal.4th 36, 47, fn. 3.)

Appellant's challenges meet this test. It presents a pure question of law requiring no factual development below, involves enforcement of a penal statute, and affects the validity of a capital judgment and significant policy concerns. Not only can an appellate court review a question of law that arises on undisputed facts (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742), but the court should do so when there is an important question (*Fisher v. City of Berkeley* (1984) 37 Cal.App.3d 644, 654). The definition of

incompetence goes to the heart of authority to prosecute those accused of committing crimes. As such, this Court should review the errors.

I. Remedy

1. *Lightsey* and *Ary* Delineate That Remedies for State Statutory Errors in the Competency Trial can Include a Limited Remand if Appropriate on the Facts of the Case

In *Lightsey*, *supra*, 54 Cal.4th 668, this Court considered what aspect of the judgement against a defendant must be reversed when the trial court erred and failed to appoint counsel to represent the defendant at a competency proceeding in violation of Penal Code section 1368: "Must it be the entire judgement, requiring a new trial of the charges (if defendant presently is competent to stand trial), or may reversal be limited to the trial court's competency finding?" (*Id.* at p. 703.) This Court explicitly noted that the error in *Lightsey* did not involve a "procedural constitutional due process violation of the type in which the trial court has failed to hold a hearing despite sufficient triggering evidence showing the defendant might be mentally incompetent" in violation of *Pate*, *supra*, 383 U.S. 375, 386-387. (*Id.* at p. 704.) It then concluded that in the case before it, where there had been some competency proceedings, albeit defective ones:

> [W]e cannot be sure defendant in fact was mentally incompetent to stand trial, which, of course, means he may have been *competent,* and if so there is no infirmity in the judgment against him. An automatic full reversal with a remand for a new trial on the criminal charges would impose severe costs on the justice system in remedying a violation that, while considered a miscarriage of justice in the context of the competency proceedings, might not have affected the guilt and penalty verdicts.

(*Id.* at p. 707, original emphasis.) This Court concluded that there would be no reason to question the fundamental fairness of the trial verdicts

"if placing defendant in a position comparable to the one he would have been in had the violation not occurred is possible." (*Ibid.*)

Apparently assuming that placing a defendant in such a position might be possible, at least in some cases, the remedy in *Lightsey* was to remand to the trial court with orders for holding a special hearing (which this Court denominated a "feasibility hearing") where the issue would be: "[the] availability of sufficient evidence to reliably determine the defendant's mental competence when tried earlier." (*Lightsey, supra,* 54 Cal.4th 668, 710.) Citing its earlier case, *People v. Ary* (2011) 51 Cal.4th 510, the Court emphasized that at the feasibility hearing the court should consider

> (1) [t]he passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with [the] defendant before and during trial (*Ary,* at p. 520, fn. 3, 120 Cal.Rptr.3d 431, 246 P.3d 322), as well as any other facts the court deems relevant.

(*Id.* at p. 710, internal quotations omitted.)

Lightsey stressed that the focus of the feasibility determination must be on whether a retrospective competency hearing would provide the defendant a *fair opportunity* to prove incompetence, not merely whether some evidence existed by which the trier of fact might reach a decision on the subject. It held that the parameters of the "feasibility hearing" were determined by Due Process:

> In making its feasibility determination, the court must consider the fairness of requiring defendant, who has already established a reversible statutory violation, to prove his incompetence to stand trial in 1994 with the now 18–year–old evidence of his prior mental condition still available to him

> today. As the United States Supreme Court stated in an analogous situation in *Swenson v. Stidham* (1972) 409 U.S. 224, 229, 93 S.Ct. 359, 34 L.Ed.2d 431, regarding the process to rectify a constitutional violation retroactively (the failure to provide a judicial determination of the voluntariness of a confession under *Jackson v. Denno, supra,* 378 U.S. 368, 84 S.Ct. 1774), the remedy provided must be "procedurally adequate and substantively acceptable under the Due Process Clause." (See also *de Kaplany v. Enomoto* (9th Cir.1976) 540 F.2d 975, 986, fn. 11 ["The threshold question is whether the circumstances surrounding the case permit a fair retrospective determination of the defendant's competency at the time of trial."].)

(*Id.* at p. 710.) The burden is on the prosecution:

> Because of the inherent difficulties in attempting to look back to the defendant's past mental state (see *Pate, supra,* 383 U.S. at p. 387, 86 S.Ct. 836), the burden of persuasion will be on the People to convince the trial court by a preponderance of the evidence that a retrospective competency hearing is feasible in this case. [Citations omitted.]

(*Id.* at pp. 710-711.)

In another case, this Court considered what the procedure is if and when the prosecution has shown that a retrospective competency determination is feasible. In *Ary,* cited immediately above, this Court held that after it is determined that a retrospective competency proceeding is feasible, the *defendant* bears the burden of proof of showing "at a retrospective mental competency hearing that he was incompetent when tried earlier," just as a defendant bears the burden at a contemporaneous proceeding. (*Ary, supra,* 51 Cal.4th 510, 520-521.) The Court in *Ary* held that this procedure was required by Penal Code section 1369, subdivision (f), which states in part: "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." (*Id.* at p. 518.) Furthermore, *Ary*

stated that such a procedure did not burden a defendant's right to due process. (*Id.* at pp. 520-521.)

2. The Facts of This Case, Where Appellant Represented Himself at Trial, Make the Limited Remand Remedy Inappropriate Under *Lightsey*, Even for State Statutory Violations

In *Lightsey*, the holding rested on a violation of section 1368 constituting a reversible miscarriage of justice under article VI, section 13 of the state Constitution, and this Court held that under the facts of the case the "appropriate and permissible" remedy was a limited remand for consideration of whether a retrospective competency determination was feasible. (*Lightsey, supra*, 54 Cal.4th 668, 702, 706.) This Court stated, "In so concluding, we agree with the Court of appeal's decision in *People v. Robinson* [(2007)] 151 Cal.App.4th [606,] 617-618, 60 Cal.Rptr.3d 102, to order a limited remand in similar circumstances." (*Id.* at p. 706.) Tellingly, the "similar circumstances" present in both *Lightsey* and *Robinson* were that the defendant in each case *did* have the protection of representation by counsel *at trial.* (*Lightsey, supra*, 54 Cal.4th 668, 688 [attorneys Dougherty and Gillis continued to represent defendant through the trial]; *Robinson, supra,* 151.Cal.App. 4th 606, 617-618 ["the absence of counsel at a competency hearing does not require speculation about future proceedings because defendant was represented at trial by an attorney"].)

The circumstances in this case are far different, because appellant represented *himself* at trial and no defense counsel was present to assure due process protections at trial. As explained elsewhere, appellant was granted pro se status under *Faretta* and was unrepresented by counsel at trial. And as shown below, appellant while acting pro se sought to present a defense grounded on delusion and surpassing the strictures of rationality. Thus, while the presence of defense counsel representing the defendant at

trial made "speculation" that the flawed competency trial tainted future proceedings in *Lightsey* and *Robinson*, in this case where appellant represented himself at trial, that the flawed competency trial tainted the guilt and penalty trials is *beyond* speculation – it is downright likely. While judicial economy and efficiency might justify using the "feasibility hearing/retrospective competency determination" procedure in a case where the trial and its outcome seem sound, they do not justify using the same procedure here, where the self-representation at trial by a defendant whose mental capacity was in question make it dubious that the trial and its outcome *were* sound.

Thus, even when considering the remedy for state statutory errors in appellant's competency trial, then, *Lightsey* is instructive, but not dispositive.

3. The Remedy for the Federal Constitutional Errors in Appellant's Case is Reversal of all the Verdicts

Furthermore, in appellant's case, there was not only a violation of state statutory rights. Rather, as appellant has shown immediately above, there were numerous federal constitutional errors that denied appellant his right to an adequate competency determination under *Pate*. The United States Supreme Court has never allowed a *Pate* violation to be cured by a retrospective determination. (*Pate*, *supra*, 383 U.S. 375, 385-86; *Drope*, *supra*, 420 U.S. 162, 172.) The only appropriate remedy for the *Pate* violations in appellant's case is the only remedy that the Supreme Court has ever granted: reversal of the conviction and remand for new trial.[35] *Pate*

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[35]This Court in *Lightsey* noted that *People v. Kaplan* (2007) 149 Cal.App.4th 372, 388-389, held that upon a showing of feasibility, a limited remand for a retrospective competency hearing can be an adequate remedy for a federal constitutional violation under *Pate*, but that *People v. Murdoch* (continued...)

guarantees adequate procedures, and the retrospective competency hearing scenario adopted by this Court is not an "adequate procedure" under the federal constitution, for reasons explained below.

In the "feasibility hearing" outlined in *Lightsey*, the prosecution would bear the burden of proof by a preponderance of the evidence to show that a retrospective competency hearing is feasible on the facts of appellant's case, and the trial court would be required to consider the availability of trial witnesses, the passage of time and the availability of contemporaneous evidence, as well as appellant's statements in the trial record. (*Lightsey*, *supra*, 54 Cal.4th 668, 710.) Then, should the prosecution prove that a hearing is feasible, a retrospective competency hearing would be required wherein appellant would bear the burden of proof of showing that he was incompetent when he was tried earlier. (*Ary*, *supra*, 51 Cal.4th 510, 520-521.)

These procedures as set up by this Court are not adequate to pass constitutional muster within the meaning of *Pate* and *Dusky* for two reasons. First, it is fundamentally unfair to allow the conviction of a possibly incompetent defendant to stand when the state has failed to observe constitutionally mandated procedures in the first instance. Remedying a *Pate* violation by employing the limited remand/feasibility hearing procedure vitiates the rights guaranteed by *Pate* because they can lead to affirmance of a conviction without a procedurally adequate competency trial ever having been held. The conviction should be reversed and the case remanded in full, for the state to hold a new competency trial

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[35](...continued)
(2011) 194 Cal.App.4th 230, 239 held to the contrary. (*Lightsey, supra*, 54 Cal.4th 668, 706 & fn. 17.) *Ary* did not reach the issue but followed the premise in *Kaplan* as law of the case. (*Ibid.*) This Court has not reached the issue.

to assess whether appellant is now competent and able to receive a fair trial that comports with due process. Any other remedy is inadequate to protect the right not to stand trial while incompetent, under the United States Constitution.

Second, the procedure outlined in *Lightsey* is not a constitutionally "adequate procedure" for determining competency because the burden of proof is too low at the first step and is misallocated and too low at the second step. As the United States Supreme Court affirmed in *Chapman*, *supra*, 386 U.S. 18, 21:

> [w]hether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.

Accordingly, it is the Due Process Clause, not state statute or case law, which controls whether appellant or the prosecution must shoulder the burden of persuasion at a retrospective competency hearing after a Fourteenth Amendment violation has been found. So, too, the Due Process Clause controls what the burden of proof should be at the feasibility hearing. The United States Supreme Court's view has consistently been that it is the state, not the defendant, who should bear the burden where a federal constitutional right has been violated. There are simply no cases in which a federal constitutional error is found, and the burden of persuasion was imposed on the *defendant* to establish that he or she was actually prejudiced as a result. Hence, the burden of proof at any retrospective competency hearing is required to be on the prosecution – not on the defendant. Moreover, since *Chapman* is the lodestar, the state should be required to prove that a retrospective determination that appellant was

competent when tried is *feasible*, beyond a reasonable doubt, and also to prove he was indeed competent when tried, beyond a reasonable doubt.

The procedure set up by this Court in *Lightsey* and *Ary* is effectively a kind of ersatz harmless error analysis. (See *James v. Singletary* (11th Cir. 1992) 957 F.2d 1562, 1571 ["Once the petitioner has established this, he or she has made out a federal constitutional violation. At this point, the state has the opportunity to establish before the federal district court the petitioner's competency at the time of trial. In effect, the state thereby may demonstrate that the state trial court's failure to hold a competency hearing constituted harmless error."], & p. 1574 fn. 14 ["However, the *nunc pro tunc* hearing is nothing but a harmless error determination in disguise."].) Appellant has shown that there were numerous structural errors requiring reversal of the competency proceeding in this matter without a showing of prejudice under *Sullivan*, *supra*, 508 US. 275; *Cooper*, *supra*, 517 U.S. 348; *Pate*, *supra*, 383 U.S. 375; and *Neder*, *supra*, 527 U.S. 1. Harmless error analysis, or the equivalent in the procedures set up by this Court, is not permissible. Under the Due Process Clause the only remedy for the structural errors appellant has shown, errors in violation of *Pate*, *Sullivan, Neder*, and *Cooper*, is reversal of the conviction and a remand for a new trial.

Finally, as appellant will show in the following argument, there were additional errors during the competency proceeding that denied appellant the constructive assistance of counsel under the Sixth Amendment in the competency trial itself, which demand reversal under *U.S. v. Cronic* (1984) 466 U.S. 648. From this it follows that there is an inadequate record to conduct a feasibility hearing in appellant's case. As this Court noted in *Lightsey*, any retrospective competency determination must be limited to evidence in the trial record or that existed at the time of trial. (See *Lightsey,*

supra, 54 Cal.4th 668, 705, citing *Pate*, *supra*, 383 U.S. 385, 387 [at any retrospective competency hearing, "expert witnesses would have to testify solely from information contained in the printed record"]; see also *People v. Ary* (2004) 118 Cal.App.4th 1016, 1028 [retrospective competency determination is limited to record evidence and defendant's behavior and mental state at time of trial]; *People v. Robinson* (2007) 151 Cal.App.4th 606, 617, citing *U.S. v. Collins* (10th Cir. 2005) 430 F.3d 1260, 1267; *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 962-963; *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1089-1090.) This Court has stated that in determining the feasibility of a retrospective hearing the trial court should rely on *contemporaneous* records (*Lightsey*, *supra*, 54 Cal.4th 668, 710, quoted above); here, the contemporaneous record is defective.

Where a defendant has been denied the constructive assistance of counsel, the prosecution's evidence has not been "subjected to meaningful adversarial testing" and "a denial of Sixth Amendment rights has made the adversary process itself presumptively unreliable." (*Cronic, supra*, 466 U.S. 648, 659.) The record of a presumptively unreliable competency proceeding is simply inadequate to serve as the basis for assessing whether there can be additional competency proceedings that guarantee appellant his rights under *Pate, Dusky*, and *Drope* not to be tried while he is incompetent. As the third circuit pointed out in *Appel v. Horn* (3d Cir. 2001) 250 F.3d 203, 218:

> The right to assistance of counsel is "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Johnson v. Zerbst,* 304 U.S. 458, 462, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). It follows that we agree with the District Court that "[t]he unconstitutional deprivation of counsel at Appel's competency hearing infected all later stages of his prosecution and rendered all subsequent proceedings against him void."

In *Appel*, the court vacated the trial verdict following a competency proceeding where the defendant's Sixth Amendment right to counsel therein was denied. (*Ibid.*) The same is appropriate here.

Finally, because this is a capital case, the Eighth and Fourteenth Amendments demand a heightened degree of reliability in all stages of the proceedings. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 732 citing *Strickland v. Washington* (1984) 446 U.S. 688, 704 (conc. & dis. opin. of Brennan, J.) ["'we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding'"]; accord, *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Spaziano v. Florida* (1984) 468 U.S. 447, 456; *People v. Coffman* (2004) 34 Cal.4th 1, 44; *Beck* v. *Alabama* (1980) 447 U.S. 625, 637-638; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340].) Thus, the question is not merely whether a retrospective competency determination is possible, but whether a *highly reliable* determination that appellant was competent to stand trial was made. A *highly reliable* retrospective competency determination is simply not possible, and reversal of all the verdicts is required.

J. Conclusion

For all the foregoing reasons, this Court should adjudicate appellant's claim on the merits, and should hold (1) that section 1367's requirement of proof of a mental disorder or developmental disability to establish incompetence to stand trial is unconstitutional; (2) that section 1367's failure to require both a rational as well as factual understanding of the proceedings and a present ability to assist counsel in a rational manner, to establish competence to stand trial, is unconstitutional; (3) that the trial court's provision of a jury instruction omitting any reference to the terms "rational" or "rationality" rendered the competency determination a nullity

and deprived appellant of the adequate competency determination procedure guaranteed in *Pate*; (4) that these defects, individually and together, violated appellant's right to due process under the Fourteenth Amendment.

* * * * *

II.

STRUCTURAL ERRORS SO INFECTED THE COMPETENCY TRIAL THAT REVERSAL IS REQUIRED WITHOUT A SHOWING OF PREJUDICE

A. Introduction

Other errors at appellant's competency trial require the reversal of the competency verdict without a showing of prejudice. These errors are: (1) the trial court's refusal to hear appellant's motion for substitute counsel under *People v. Marsden* (1970) 2 Cal.3d 118, both before and after a doubt as to competency was declared, and its denial of *Marsden* relief in September, 1987, without a hearing; and (2) erroneous instruction to the jury, through the prosecutor's expert witness, on appellant's rights under *Marsden, Faretta v. California* (1975) 422 U.S. 806, and *People v. Frierson* (1985) 39 Cal.3d 803. These errors denied appellant the constructive assistance of counsel and demand reversal under *U.S. v. Cronic* (1984) 466 U.S. 648. They are structural, so reversal is required without a showing of prejudice.

B. The Trial Court's Failure to Rule on Appellant's *Marsden* Motion Requires Reversal

1. Judge Zumwalt Refused to Hear Appellant's *Marsden* Motion Prior to Declaring a Doubt as to Appellant's Competence to Stand Trial

Appellant moved many times for substitute counsel starting in March 1987, repeatedly invoking *Marsden* and demanding a hearing on a conflict between himself and his lawyers, Geraldine Russell and Charles Khoury, and whether they were representing him effectively. When appellant first raised the issue of dismissing counsel, he simultaneously moved the court for leave to represent himself. The trial court neglected to hear the *Marsden* question initially, perhaps at first believing that the former question was subsumed within the latter. However, in the course of

proceedings on the motion pursuant to *Faretta*, appellant made clear that, as a separate matter, he sought *Marsden* relief because he believed counsel's representation was ineffective. Judge Zumwalt unequivocally refused to hear the *Marsden* motion and insisted that the only question she would address was whether appellant was competent to waive counsel in connection with deciding to represent himself. The factual history related to this error follows.

On March 10, 1987, appellant filed a motion to dismiss his attorneys of record (Russell and Khoury) and represent himself in propria persona.[36] (73CT 15715.) The motion reads:

> On . . . defendant Billy Ray Waldon will move the court to dismiss Geraldine Russell and any other attorney(s) of record for the defendant in her office for the cases Nos. CR 82986, DA 895507, CR82985, DA 810953. This defendant will at that time move that he be allowed to represent himself in propria persona status. This motion will be made on the grounds that: Billy Waldon, being of sufficiently competent mind; having believed that numerous problems with his attorney(s) would resolve with time; and having waited plenty of time for these problems to resolve; and having found himself to still be suffering most of these numerous problems; and having not believed but now believing that he has the legal right to represent himself in propria persona; and he that, seeing no other way of acquiring the legal research, legwork, advice, cooperation, and investigation necessary for his defense: moves the court to grant such status to him.

(73CT 15716.) Thus, the motion on its face focused on "problems" with appellant's "attorneys" that failed to "resolve with time," and emphasized the lack of "advice" and "cooperation" appellant was experiencing through his relationship with counsel. The motion cited neither *Faretta* nor

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[36]The motion was dated February 20, 1987, but not filed until March. At many points in the record, the motion is referred to as the "February motion." (See, e.g., 14ART 38.)

Marsden, but the parties often refer to it as either a *Faretta* motion or a *Marsden* motion. (See, e.g,. 3CT 483, 3CT 508, 14ART 78.)

In court on March 13, 1987, Judge Richard Haden said he had received and read appellant's motion. (9A-1ART 5.) The prosecutor asked both counsel be permitted to respond in writing. (*Id.* at 7.) Russell objected to appellant's request, for reasons having to do with appellant's state of mind and whether he was "capable" of going pro per. (*Id.* at 8.) Appellant requested the court appoint advisory counsel, to which Russell objected (*Id.* at 9), and requested leave to present argument. (*Id.* at 10.) The court declined to appoint advisory counsel, and set the matter for hearing on March 27 before a new judge. (*Id.* at 11.)

In documents filed on March 20 and March 23, 1987, defense counsel and the prosecutor briefed the question of whether appellant should be permitted to represent himself, but said nothing about appellant's request for *Marsden* relief.[37] (1CT 126, 152.)

The trial court set a hearing on the motion for self-representation while ignoring the request for substitution. On March 27, 1987, the case came again before Judge Haden, who stated that he would send it to Judge

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[37] Russell's "Memorandum of Case Law Re: Defendant's Request for Pro Per Status" attached a 24-page index of legal citations; Penal Code section 401 proscribing the aiding, "assisting, or encouraging" of suicide; and listed several cases addressing "pertinent issues which may have to be ruled upon." (1CT 126-151.) The prosecutor's "Points and Authorities in Response to Motion to Proceed In Propria Persona" argued that a defendant – even one accused of a capital offense – has a constitutional right to proceed without counsel and that the only relevant inquiry the court could make was "whether the defendant has the mental capacity to make a knowing and intelligent waiver." (1CT 153-155.) The prosecutor encouraged the court to consider appointing co-counsel, advisory counsel, or standby counsel if it granted the request for self-representation. (1CT 155-157.)

Malkus to hear appellant's motion to proceed pro per. (9A-2ART 14.) The case was sent to Malkus, who granted appellant's request for advisory counsel, and ordered the appointment of an "appropriate" attorney to assist appellant with his decision to represent himself. (*Id.* at 15-16.) The matter was put over to March 31. (*Id.* at 16.) That date, the trial court said Alex Landon had been appointed to assist appellant in his decision whether to go pro per, advised appellant to listen to Landon carefully, and continued the hearing to April 2, 1987. (10ART 17-18.) On April 2, appellant stated that he would require a hearing longer than a half day to argue his motion; the case was continued to April 10. (10ART 23-24.)

On April 6, appellant wrote a letter to "Judge Gill"[38] requesting a *Marsden* hearing be scheduled and complaining of the representation offered by Landon and Russell. (67CT 14971.) He complained that Landon had brought in a psychiatrist to see appellant without his permission, and that Landon "used to live" with Russell, who had "threatened to have me thrown in an insane asylum if I pushed this pro per initiative." (*Ibid.*) Appellant asserted that getting either Landon or Russell to act "against the other" was like "getting Reagan to act against Casey." (*Ibid.*) The letter requested the court schedule appellant for a "*Marsden* hearing." (*Id.* at 14972.) A fair reading of the letter shows appellant wanted *Marsden* relief as to Russell, as trial counsel, and Landon, as advisory counsel.

On April 7, 1987, the case was assigned to Judge Zumwalt to hear and decide appellant's self-representation motion. (11A-1ART 27, 30.) The motion came on for hearing on April 10, 1987. (12ART 1.) Zumwalt

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[38]The letter initially had the name "Honorable Richard Haden" in the salutation. The name "Haden" was struck through and the name "Gill" added. (67CT 14971.)

first addressed a motion by reporters for media coverage (12ART 1), to which Russell objected. (*Id.* at 4.) Defense counsel put the court on notice that the *Faretta* motion hinged on the question of her representation. Russell explained to the court that during hearing on appellant's motion to go pro per, she would "be requesting" the exclusion of the prosecutors because she would be "going into attorney/client confidential matters and the fact that [appellant] has raised those issues," to wit, "confidential communications." (*Id.* at 6-7.) Khoury argued that the press should be excluded because "the attorney/client relationship is going to possibly be exposed, and attorney/client relationships should not be open to the public." (*Id.* at 11.) He said the hearing would go into the "delicate nature of the attorney/client relationship," and that the press should be excluded "during this very sensitive hearing on whether or not Mr. Waldon is going to represent himself, who is going to represent him, who is going to help him, what's going to happen." (*Id.* at 12.)

Judge Zumwalt seemed to concede that the *Marsden* issues would be heard; she said the hearing would involve the "incompetency of counsel" and whether appellant was "ably represented," which were issues in which the public had an interest. (12ART 14.) The prosecutor argued that appellant's reasons "for wishing to go pro per" were "totally irrelevant," and that there would be no need to bring out confidential communications. (*Id.* at 16.) Zumwalt granted media access. (*Id.* at 17.)

Turning to the substance of appellant's motion, the court stated that it had the papers from Russell and the district attorney. (12ART 18.) Russell added the citation of another case into the record: *Evans v. Raines* as reflected in decisions at (9th Cir. 1986) 800 F.2d 884 and (9th Cir. 1986) 705 F.2d 1479 [regarding competency to stand trial and to waive counsel]. (*Ibid.*) Zumwalt said she wanted a psychiatric exam of appellant, stating

that although no "necessity" for such exam had been shown, the court nevertheless could order the examination to assist it in deciding whether appellant's mental capacity was "questionable" as related to his "ability to make" his request to represent himself. (*Id.* at 20-22.) At the prosecutor's request, Zumwalt asked appellant whether he objected to the psychiatric examination; he said that he did object. (*Id.* at 22-23.) Russell asked for an in camera conference, with the prosecutor excluded and appellant, Russell, and Landon included, related to the purpose of the psychiatric inquiry, stating that attorney/client matters required discussion. (*Id.* at 23.) The court agreed. (*Id.* at 24.)

During the confidential discussion in chambers, Russell explained that appellant's dissatisfaction with counsel stemmed from the intended defense strategy. Russell said if the court asked appellant his feelings about a psychiatric exam, it inevitably would lead to "comment about defense strategy" and "attorney/client privileged communication." (12BRT 26.) Apparently deterred by the privilege and swayed by the prosecutor's view that she could turn to *Faretta* issues and ignore those under *Marsden*, Judge Zumwalt admonished appellant that she would not at that time "listen to anything against Miss Russell or in any way dealing with your relationship." (*Id.* at 26-27.)[39] Appellant requested Zumwalt to review his college

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[39]The court overlooked that the attorney-client privilege could be preserved so long as the prosecutor was excluded during discussion of appellant's complaints. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1052 [*Marsden* hearings are held outside the presence of the prosecutor to preserve privilege and avoid disclosure of defense strategy]; *People v. Henning* (2009) 178 Cal.App.4th 388, 404 [clearing the courtroom for a *Marsden* hearing allowed the trial court to hear from the defendant and defense counsel in a manner that preserved attorney-client privilege and avoided revealing tactics to the prosecution].)

transcripts and records from his Naval service before deciding whether to order the psychiatric examination; Zumwalt refused. (*Id.* at 28-29.)

Back in court with the prosecutor present, Judge Zumwalt reiterated that she wanted the psychiatric evaluation "for her own use," but assured appellant that his "request to represent himself" was in no way "conditioned upon his being examined by a psychiatrist." (12ART 33.) Zumwalt appointed Dr. Kalish to conduct the examination. (2CT 389-397.)

In court on April 17, 1987, Judge Zumwalt ruled, at the urging of the prosecutor, that appellant lacked standing to file documents with the court, other than his motion to proceed pro per, because he was represented by counsel. (13ART 17-21.) Therefore, various motions and letters submitted by appellant, including his April 6, 1987, letter to Judge Haden, would not be included as part of the court file at that juncture.[40] (*Ibid.*)

On April 30, 1987, Judge Zumwalt convened court to hear the self-representation issue. Appellant objected to Russell's appearance on his behalf, stating that she did "not represent [him] any more." (14ART 1.) Zumwalt mentioned that advisory counsel Landon was absent, and appellant said Landon did not represent him either, nor did he want Landon there to advise him. (*Id.* at 2-3.) A bit later, during a discussion of whether appellant would use court clothing provided for him by Russell, appellant stated, "I object to the proceedings. I've requested a *Marsden* hearing, and I'm not receiving effective counsel." (*Id.* at 37.) Zumwalt refused to consider anything other than the *Faretta* request, stating, "[a]ll right sir. Right now we have one issue before the court, and let's stick to that issue. Okay?" (*Id.* at 37-38.)

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[40]This ruling was error. A pro per *Marsden* motion must be filed, made part of the record, and considered by the court. (*People v. Clark* (1992) 3 Cal.4th 41, 173.)

The court held a conference in chambers with Russell, Khoury, defense counsel's mental status consultant (Dr. Abrams) and law clerk (James Fife), and appellant present. (14ART 40-43.) Russell asked the court to read a 1983 psychiatric record provided by Russell and consider whether the document should be provided to Kalish. (*Id.* at 40-43.) Appellant asked to be heard and Judge Zumwalt insisted that he communicate through counsel; appellant requested that Landon be present. (*Id.* at 43.) Appellant submitted a written motion challenging the propriety of Zumwalt hearing the proceedings. (*Id.* at 45.) The court ruled that the objection was untimely and lodged the written motion, refusing to file it on the ground that he was represented. (*Id.* at 45-46.) Landon joined the conference, and Zumwalt permitted appellant to speak confidentially with Landon. (*Id.* at 54-55.)

Back in open court, Russell requested that the document she had provided to Judge Zumwalt in chambers be marked as Defense Exhibit A, and requested that it be provided to Kalish but kept confidential from the prosecutor. (14ART 58.) The prosecutor argued to the court that appellant had the right to speak for himself in the proceeding, rather than through Russell. (*Id.* at 59-60.) Swerving from his prior tack that the court avoid discussing representation issues, the prosecutor said, "I very strongly believe the defendant has a right to make a presentation himself to the court, without having to go through the attorney that he's trying to have relieved by the court." (*Id.* at 59.) Zumwalt indicated that she was "trying to get to that presentation," and the prosecutor insisted that "[h]e's raised an issue that bears on the representation, and I think he has a right to argue that issue." (*Id.* at 59.)

Russell complained that it was not the prosecutor's "place" to opine on whether appellant should be allowed to speak on his own behalf. (14ART 59.) The prosecutor countered:

> I disagree with Ms. Russell saying I don't have a place here in this, because my place is to make sure that Mr. Waldon's rights are protected so that years down the road, I don't have to retry this case because an incorrect decision was made now; and I very strongly feel Mr. Waldon has the right to present to the court what he wishes to present on the issue of his representation.

(*Id.* at 59-60.)

Still in open court, Russell objected to the prosecutor's contentions, and described three issues over which, she believed, appellant was dissatisfied with her conduct related to the 1983 psychiatric evaluation (viz., that the documents were obtained through family members over appellant's objection, that appellant did not consent to their disclosure, and that counsel had promised not to disclose them). (*Id.* at 60.) Judge Zumwalt asked appellant to comment, and he replied that Russell's account stated his "objections that have sort of gone through a filter, and when they come out, they're not really correct anymore." (*Id.* at 61.) He explained that against his instructions, Russell had obtained documents from his family members and then had promised she would not use them in any way -- a promise she was breaking in court. (*Ibid.*) Zumwalt said she would not order the documents released to Kalish at that time. (*Id.* at 62.)

After Russell extensively questioned Kalish, she brought to Judge Zumwalt's attention that appellant requested leave to ask Kalish some questions himself. Russell explained:

> I've advised him that I don't think that is a particularly good idea because I don't think he's trained to do it, which is why he has counsel, and I am concerned that the question itself may be something he can later be impeached with or

> something that would have a bearing on him in later court proceedings, and that that is why he has counsel.

(14ART 96.) Zumwalt stated, "[a]t this time you represent him, ma'am," to which Russell replied that she would ask questions from a list provided to her by appellant. (*Ibid.*) Russell asked a few questions from appellant's list, which she had marked as Defense Exhibit B, and then resumed asking Kalish questions of her own design. (*Id.* at 98.) Appellant stated, "I object, your Honor," and Zumwalt replied, "Sir, you have counsel, and I cannot allow you to disrupt the proceedings." (*Id.* at 98-99.) Appellant again objected, and Zumwalt said, "Mr. Waldon, I'm going to have to ask that you speak through your counsel." (*Id.* at 99.)

The prosecution objected and championed appellant's right to question Kalish himself. (14ART 99-100.) The court disagreed, reasoning as follows:

> Right now, in the interests of presenting this as being a motion, I know of no way, without making the determination that Mr. Waldon is competent to represent himself, to allow him to represent himself for just such reasons as had previously been expressed, because if he isn't competent and he does, indeed, present various things that are inappropriate, improper, which may, indeed, add to his burden of a defense in this case, if not incriminate himself, I'd be between a rock and a hard place. It is one of those, damned if you do and damned if you don't [situations].

(*Id.* at 101.) The court remained blind to the obvious alternative, viz., taking up the *Marsden* request, and considering whether substituting another attorney to represent appellant would alleviate the dilemma.

On May 8, 1987, the case came before Judge Haden on the request of counsel to continue the June 1, 1987, trial date. (15ART 1.) Haden denied the continuance on the ground that until Judge Zumwalt resolved the matter pending before her he could not enter time waivers at any rate.

(15ART 3.) Appellant stated "I object, judge, I am not receiving affective [*sic*] assistance of counsel." (*Id.* at 4.) Haden replied, "Judge Zumwalt is hearing you on that issue." Appellant sought to enlighten Haden, stating "[s]he's *not* hearing me on that issue." (*Ibid.*, emphasis added.)

Later the same date, the case came before Judge Zumwalt regarding whether certain documents would be provided to Kalish for review. (16ART 1-5.) The prosecutor said he had received a letter from appellant dated May 2, and provided the court with a copy. (*Id.* at 6; 20ART 14 [giving date of letter].) Without reading the letter, Zumwalt ruled that a copy of it would go to Kalish. (16ART 8.) Zumwalt requested, but did not order, the prosecutor to hold, unread, any letters he received from appellant. (16ART 11.) Further, she told appellant that it was "ill-advised" for him to write letters to the prosecutor. (*Ibid.*) Appellant asked for the opportunity to respond, but Zumwalt did not allow it. (*Ibid.*) Zumwalt informed counsel that she had received a letter from appellant requesting transcripts; she then denied the request on the ground that appellant was represented by counsel, without permitting him to be heard. (*Id.* at 13.)

On May 13, 1987, the case came before Judge Zumwalt for entry of a stipulation concerning the provision of documents to Kalish. (17ART 1.) Khoury appeared on behalf of appellant, to which appellant stated "I object, your Honor. Mr. Khoury does not represent me." Zumwalt stated that Khoury indeed was representing appellant. (*Ibid.*)

On May 18, 1987, Russell filed a "Declaration in Support of Segregation Order and Order for Showers Every 24 Hours," stating that appellant had been housed in an isolation cell after being attacked by other inmates in July or August of 1986, and requesting that the court order his

continued assignment to protective housing and that he receive showers every 48 hours. (3CT 548-551.)[41]

On May 18, 1987, appellant filed a notice of appeal in the Fourth District Court of Appeal, D006251, relating to Judge Zumwalt's rulings. (47CT 10425.) Appellant stated that he wished to appeal Zumwalt's decisions relating to his motion to remove her from the hearing. (*Ibid.*) The Court of Appeal treated the document as a petition for writ of mandate, and denied it for failure to allege grounds for relief. (8CT 1425.)

At the beginning of court proceedings on May 22, 1987, Russell told Judge Zumwalt that appellant was "preoccupied with his safety" in the jail and that he felt that Russell was "trying to apparently kill him because [she was] not taking adequate precautions to help him remain safe." (20ART 9-10.) Zumwalt told counsel about the document she received from appellant on May 19, entitled "Re Defendant's Motion of February 20th, 1987, to Dismiss Attorney in Pro Per." (*Id.* at 12; 67CT 14975.[42]) Zumwalt

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[41]Attached to Russell's motion was a copy of a news article stating that John Maier had been one of appellant's attackers. (3CT 550-551.) John Maier was also represented by Russell. (39ART 10.)

[42]This filing sought an immediate *Marsden* hearing with respect to the representation of Russell and Khoury. (67CT 14975.) It read, in part:

> THE DEFENDANT RESPECTFULLY REQUESTS A COURT ORDER – for an immediate *Marsden* hearing since defendant is not receiving effective assistance of counsel; and, since defendant has fired attorneys of record (and sent a copy of the firing letter to the court); and, since these attorneys have grave conflicts of interest in these matters; and, since these attorneys have broken attorney-client confidentiality (to the court, to Alex Landon, and to Mark Kalish (to name only some)); and, since the attorney of record has made untruthful statements to the court regarding matters of said motion; and, since no communication of an acceptable valid nature exists nor will ever exist between these attorneys

(continued...)

admitted that this document unequivocally demanded a *Marsden* hearing at once on substituting new counsel for Russell and Khoury. (20ART 12.) Zumwalt said she had read the document, but not "carefully," and that she did not file it because she believed it was "not something to be dealt with" at that juncture. (*Ibid.*) Addressing Russell's concerns about the document's filing, Zumwalt continued, "well, I'll seal it for now, but it's a matter that has to be filed. If Mr. Waldon presents it, I think it has to be filed. You [Ms. Russell] may withdraw it later on, but I think it has to somehow go into the record." (*Id.* at 13.) Russell said that the filing "pertain[ed] potentially to confidential matters," and that she would want to review it before it was filed. (*Ibid.*)

Russell insisted that any *Marsden* motion was "not the topic of this hearing," and Judge Zumwalt agreed. The court explained that the hearing that day related solely to appellant's competency to waive counsel, and it was "not where" a *Marsden* request would be considered. (20ART 14.) Appellant countered that it was "very appropriate" to consider the *Marsden* request at that time. (*Ibid.*) Zumwalt asked Russell to review the document

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[42](...continued)

> and the defendant; and, since a fair hearing is impossible with these attorneys recognized by the court as defendant's counsel; and, since the representation forced upon the defendant by counsel and the court has been a sham. The defendant first requested this in the form of said motion of 20FEB87. . .

(67CT 14975.) It continued, "The defendant believed that the court would so champion and cherish [his right to the effective assistance of counsel, and] halt all other proceedings until the grave issue of ineffective counsel had been resolved." (*Ibid.*) It expressed appellant's dismay that the court had turned to the "second and later half" of his February 20, 1987, motion, that is, the motion to proceed pro se, without first hearing the predicate *Marsden* issue of whether appellant was receiving the effective assistance of counsel. (*Ibid.*)

and assert whether any portion of it was subject to the attorney/client privilege, so that she could "make a decision" on the privilege issue and file the document. (*Ibid.*) No *Marsden* hearing was held.

The prosecutor mentioned appellant's May 2, 1987, letter to him, in which appellant referred to his prior April 8, 1987, request for a *Marsden* hearing and also requested different advisory counsel than Landon. (20ART 14; 67CT 14973.) Judge Zumwalt discussed the matter with appellant outside the presence of the prosecutor. (20ART 15.) Zumwalt discussed with appellant his letter to Judge Gill, a copy of which was attached as an exhibit to his April 30, 1987, motion to remove Zumwalt. (20A-1RT 16-17.) The document set forth appellant's desire for a different advisory counsel than Landon, or one who would be given a broader "mandate" to assist him with mechanics and procedures of pursuing his motion to represent himself. (*Id.* at 17.) Appellant said that he had spoken with attorney, Ben Sanchez, and had written to the court requesting that Sanchez be appointed in lieu of Landon. (*Id.* at 17-18.) Zumwalt said that there was no ground, based on what was before her, to grant the requested relief. (*Id.* at 18.) She indicated her plan to address solely the question of whether appellant would represent himself; hearing on matters not "pertinent to [that] particular motion" would be postponed. (*Ibid.*)

Back in open court, all counsel announced their presence; of Russell and Khoury, appellant reiterated, "I object, your Honor. They do not represent me." (20ART 20.) Judge Zumwalt said that appellant's April 30, 1987, motion to remove her, which she construed as a peremptory challenge under section 170.6, was untimely and would be lodged rather than filed. (*Id.* at 22.) The prosecutor pressed the court to give him a copy of the motion. (*Id.* at 23.) Zumwalt refused, stating that the document had not been filed and was not yet a matter of public record, and that the content of

the document presented "complexities" and defense counsel planned to look into issues of "confidentiality." (*Ibid.*) The prosecutor asked when the matters raised in appellant's submission would be addressed, but Zumwalt would not answer; she insisted: "I would like to get through Dr. Kalish's testimony. I feel at – that, we have to do right now." (*Ibid.*)

Kalish's testimony then resumed, with Russell questioning the witness. (20ART 24.) Russell ascertained that Kalish was familiar with the criteria for proceedings under Penal Code 1368, and then asked whether, in Kalish's opinion, such proceedings should be initiated in the case. (*Id.* at 27-28.) Kalish said that he had "grave and significant doubts" about appellant's competency, although a re-examination would be required before he could give a conclusive opinion. (*Id.* at 30.) Russell moved the court to recess proceedings pending a subsequent examination by Kalish. (*Ibid.*)

The prosecutor objected to the change of direction of the proceedings, arguing that appellant had been trying to get rid of his lawyer since drafting his pro per motion in February 1987, and it was inappropriate to suspend proceedings for a 1368 mental competence examination at the behest of Russell, an attorney appellant had requested to have removed under *Marsden*. (20ART 32-34.) He said appellant had "stated in his letters that I have received that he has a great conflict of interest with Ms. Russell," and that he had, both in letters and statements to the court, requested *Marsden* hearings to attempt to have Ms. Russell relieved. (*Id.* at 34.) He continued, "I just think it's extremely inappropriate at this time for Ms. Russell, this attorney who he's been trying to get rid of for three months, to have proceedings suspended under 1368 for a mental competence exam." (*Ibid.*) The court noted that it was Dr. Kalish who was expressing the doubt, although concededly it was Russell who was

"presenting this." (*Ibid.*) Russell questioned whether the prosecutor had standing to speak on the subject at all. (*Id.* at 34.) Zumwalt ruled that the prosecutor could speak, but it was "another thing" whether she would take his comments into consideration. (*Id.* at 32.) Russell interjected her "concern that Dr. Kalish [had] expressed a doubt," and Zumwalt said "I don't want you arguing the motion." (*Id.* at 35.) Zumwalt then declared a doubt as to appellant's competence under 1368, suspended proceedings, and ordered that appellant be further examined by psychiatric staff. (*Id.* at 35-36.)

2. Judge Zumwalt's Refusal to Conduct a *Marsden* Hearing Prior to Consideration of Appellant's *Faretta* Motion was Error

When a defendant moves for substitution of counsel under *Marsden*, the trial court "cannot discharge its duty without hearing the reasons for the defendant's belief that his or her attorney has not afforded adequate representation." (*People v. Martinez* (2009) 47 Cal.4th 399, 417, citing *Marsden, supra*, 2 Cal.3d 118, 123-124.) A trial court errs under *Marsden* if it fails to give the defendant the opportunity to explain all of his reasons for dissatisfaction with his appointed attorney. (*People v. Vera* (2004) 122 Cal.App.4th 970, 980; *People v. Hidalgo* (1978) 22 Cal.3d 826, 827; *People v. Bean* (1988) 46 Cal.3d 919, 947-948; *People v. Lewis* (1978) 20 Cal.3d 496, 497.)

Judge Zumwalt violated the rules set forth in *Marsden*, *Lewis*, and other cases and breached her duty to hear the substance of appellant's *Marsden* complaints. By ignoring the competent representation and attorney-client conflict questions, and turning to the *Faretta* question first, Judge Zumwalt sacrificed appellant's right to counsel by giving it *lesser* protection than she afforded to his rights under *Faretta*. The decision in

People v. Marshall (1997) 15 Cal.4th 1 explains why Zumwalt's actions were error.

In *Marshall*, the defendant raised the possibility of removing counsel soon after arraignment by making a motion under *Marsden* or by making a motion under *Faretta*. (*Marshall, supra,* 15 Cal.4th 1, 15.) The trial court examined the defendant regarding his dissatisfaction with counsel and denied the *Marsden* motion, and only then turned to advising the defendant of the risks and dangers of self-representation. (*Ibid.*) The defendant withdrew the motion for self-representation, but renewed it five months later and the court granted it. (*Ibid.*) Months later, appellant requested to give up his pro per status and have counsel appointed, and the court granted the motion and appointed counsel from the panel. (*Id.* at p. 16.)

Still later, appellant stated that he would like to fire his attorney and "go pro per"; the trial court asked for the reasons behind appellant's request. (*Marshall, supra*, 15 Cal.4th 1, 18-19.) After hearing appellant at length, the court denied both the motion to relieve counsel, and the motion to proceed pro per. (*Ibid.*) At the request of defense counsel, the court held a second section1368 proceeding and the jury determined the defendant was competent to stand trial. (*Ibid.*) Shortly thereafter, counsel moved to withdraw on the ground that he was moving out of the county; the court granted the motion and appointed substitute counsel. (*Id.* at p. 19.) Four months later, during jury selection, appellant moved again for substitute counsel, explaining that he did "not want" substitute counsel as his lawyer and that he had "two billion dollars in the bank" and hoped to hire somebody that would "pay more close attention to this case." (*Ibid.*) The court denied the motion and trial proceeded, without any further motions related to the defendant's representation by counsel. (*Ibid.*) The defendant was convicted and sentenced to death. (*Id.* at p. 11.)

On appeal, the defendant challenged the trial court's denial of his motion to represent himself. In affirming the conviction, this Court explained that a defendant in a criminal cases has two separate constitutional rights with respect to representation, and the two rights are "mutually exclusive." (*Marshall, supra*, 15 Cal.4th 1, 20.)

> A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself.

(*Ibid.*) This Court further explained that the former right is afforded a greater constitutional protection than the latter:

> The United States Supreme Court has concluded in numerous cases and a variety of contexts that the federal Constitution requires assiduous protection of the right to counsel. The right to counsel is self-executing; the defendant need make no request for counsel in order to be entitled to legal representation. (*Carnley v. Cochran* (1962) 369 U.S. 506, 513, 82 S.Ct. 884, 888-889, 8 L.Ed.2d 90.) The right to counsel persists unless the defendant affirmatively waives that right. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464-465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461.) Courts must indulge every reasonable inference against waiver of the right to counsel. (*Brewer v. Williams* (1977) 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 41 L.Ed.2d 424.)

(*Ibid.*)

This Court explained that the right to self-representation is treated differently:

> The high court has not extended the same kind of protection to the right of self-representation. In *Faretta* itself the court noted that a trial court may appoint advisory counsel for a pro se defendant even over objection [citation], and advisory counsel's unsolicited intervention at trial does not necessarily violate the defendant's right to present his or her own defense. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 187-188, 104

> S.Ct. 944, 955-956, 79 L.Ed.2d 122.) The court also warned that the right of self-representation is not a license to abuse the dignity of the courtroom, but a right that can be lost through deliberate, serious misconduct. [Citation.] Furthermore, unlike the right to be represented by counsel, the right of self-representation is not self-executing.

(*Marshall, supra,* 15 Cal.4th 1, 21.) Most courts, like this one, "required expressly" that the defendant's assertion of the right of self-representation be both timely and unequivocal. (*Ibid.*, citing *People v. Windham* (1977) 19 Cal.3d 121, 127-128, inter alia.)

The right to counsel is paramount over the right to self-representation because the right to counsel "secures the protection of many other constitutional rights as well." (*Marshall, supra,* 15 Cal.4th 1, 23, citing *Jackson v. Ylst* (1990 9th Cir.) 921 F.2d 882, 889; *Adams v. Carroll* (9th Cir. 1989) 875 F.2d 1441, 1444; *U.S. v. Weisz* (D.C. Cir. 1983) 718 F.2d 413, 425-426; *Hodge v. Henderson* (S.D.N.Y. 1990) 761 F. Supp. 993, 1001.) Yet, here the trial court subjugated appellant's right to counsel to his *Faretta* rights, by refusing to hear his motion for substitute counsel until after the question of his competency to waive counsel was resolved.

The trial court's duty to inquire into the reasons the defendant believes his or her attorney is incompetent arises when the defendant provides "'at least some clear indication'" that he or she wishes to substitute counsel. (*Martinez, supra,* 47 Cal.4th 399, 418, citing *People v. Dickey* (2005) 35 Cal.4th 884, 920; *People v. Valdez* (2004) 32 Cal.4th 73, 97; *People v. Mendoza* (2000) 24 Cal.4th 130, 157.) Here, appellant clearly requested that the court appoint a new attorney, invoking *Marsden* by name on several separate occasions. Nevertheless, Judge Zumwalt issued a blanket refusal to hear the *Marsden* motion at that juncture.

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3. Judge Levitt Gave Appellant's *Marsden* Request Short Shrift

After Judge Zumwalt declared a doubt on May 22, 1987, and criminal proceedings were stayed pending a competency trial, appellant moved three more times to substitute counsel under *Marsden*. Judge Levitt, like Zumwalt, refused to hear the basis for appellant's request. When he finally did address the request, on September 16, 1987 (when the competency trial was underway), Levitt did not permit appellant to air his grievances, and denied the request based on technicalities and his subjective impression that Khoury's representation was adequate. This too was error.

On July 15, the case came before Judge Levitt in Department 33. When Russell and Khoury stated their appearances, appellant said "I object, your Honor. These attorneys don't represent me. I've requested a *Marsden* hearing several times. [¶] I'm in bad need of an attorney to represent me in these hearings. May I please have an attorney to do so? " (24ART 1.) Levitt replied, "Mr. Waldon, at the moment, they are counsel of record, and unless there is some change made in Department 9, I'm going to proceed with them." (*Ibid.*) The prosecutor argued it was necessary to learn whether Russell or appellant contended that appellant was competent, in which case the court was required to appoint two psychiatrists. (*Id.* at 2.) Russell stated her position that appellant was not competent. (*Id.* at 3.) Asked whether he himself contended that he was competent, appellant said that he hadn't "had an attorney now for months[,]" and that he could not answer the court's questions until he "[got] an attorney[.]" (*Id.* at 2-5.)

When the competency trial commenced before Judge Levitt on August 17, 1987, appellant submitted a written pro se "Motion For a Fair Trial," requesting new counsel and other relief, which the court ordered filed. (25ART 10-11; 5CT 847 [showing filing date].) The court inquired

why appellant was not wearing civilian clothes. (25ART 17.) Appellant said he desired to dress out properly, but that he had "fired" his lawyer and no longer would either talk to her or accept any clothing she provided. (*Id.* at 17.) Appellant continued, "The Constitution says that I should have the right to effective assistance of counsel, but I haven't had that effective assistance now for months and months. I ask to be heard on why the assistance of counsel is not effective." (*Id.* at 17.) The court did not respond to appellant's request for a hearing on the effectiveness of counsel. (*Id.* at 17-18.) A few minutes later, appellant insisted that he "did not have an attorney" with whom he could discuss the question of his courtroom attire. (*Id.* at 21-22.) Judge Levitt said that appellant was "playing" a "childish game," and that he would grant the prosecutor's motion to advise the jury appellant had been offered civilian clothing but refused to wear it. (*Id.* at 22.)

Evidence was taken in the competency trial on August 18, 19, and 20, 1987, and court then recessed to await an appellate ruling on an evidentiary matter. (26ART 75-324; 27ART 325-500; 28ART 501-599; 54ACT 11385.)[43]

On August 24, 1987, appellant filed an "Urgent and Emergency Petition for Writ of Mandamus," D006737, in the Court of Appeal, complaining of the trial court's failure to act on his "Motion For a Fair Trial." (5CT 860.) This petition was denied as premature because it appeared "the request by petitioner had not yet been ruled on" by the trial court. (*Id.* at 875.)

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[43]The disputed issue was Judge Levitt's ruling that appellant could be called by the prosecution as a witness in the trial. (See 26ART 76.) Khoury and Russell filed a petition for writ of mandate, D006718, challenging this order (54ACT 11482), which was denied on September 16, 1987. (5CT 877.)

The competency trial reconvened on September 16, 1987. (29ART 800.) The prosecutor said he had received notice that the Court of Appeal had denied a petition for a writ (apparently D006737) that alleged appellant was receiving ineffective assistance of counsel. (*Id.* at 803.) He quoted language from the appellate order that appellant's request "had not yet been ruled on." (*Ibid.*) The prosecutor argued the appellate order suggested that allegations by appellant of ineffective assistance might be pending before the trial court and require a hearing:

> I think that even though this is a proceeding to determine his competence, that nevertheless he should be afforded a hearing by the court to be allowed to attempt to show whatever it is that he feels is ineffective so that this court can then rule on it; therefore, that some other court some other time can rule on whether or not something should have been done. [¶] So I would make that request, that, in any event, before we proceed again with the trial that the court afford some type of hearing to Mr. Waldon to determine what he is talking about.

(29ART 803-804.)

Khoury disagreed: "Your Honor, criminal proceedings have been suspended. I don't – we cannot, without injecting grave error into the proceedings, recommence the criminal proceedings, and that's what [the prosecutor] is proposing to do." (29ART 904.) Judge Levitt agreed with Khoury:

> I understand. I don't understand [the prosecutor's] request either. There is absolutely nothing before me, nothing whatever. Why I should institute some proceedings because [the prosecutor] is concerned is beyond my comprehension. There is nothing before me pending with regard to inability of counsel or anything else. I'm not going to do a thing unless it's appropriately presented to me.

(*Ibid.*)

Shortly thereafter, appellant requested to be heard on the subject of ineffective assistance. (29ART 807.) Appellant said that he had "informed

the court that [he] had not been receiving effective assistance of counsel" and had "asked to be heard on the issue." (*Id.* at 808.) He said that the court's comment to the prosecutor indicated that appellant's request was "inappropriate," and asked the court how he could "change it to make it appropriate." (*Ibid.*) Judge Levitt said the only request it recalled had been an oral request, which the judge had denied because he "felt Mr. Khoury was highly competent." (*Ibid.*) Appellant said he had filed a motion on July 17 for effective assistance of counsel, and the court said "I believe that was denied." (*Id.* at 809.) Appellant said, "if it was denied, I was never informed of it." (*Ibid.*) Khoury interjected that criminal proceedings were suspended after a doubt was declared, and that the court should not "rule on any requests . . . [regarding] effective assistance of counsel unless" the court's own observations of ineffective representation by Khoury made consideration of the question "necessary." (*Ibid.*)

The prosecutor countered that the claimed ineffective assistance of counsel was not inextricably related to the stayed criminal case, and that appellant "should have the opportunity to articulate to the court what he finds to be ineffective so that the court can determine from that record whether or not" the request was well-founded. (29ART 810.) The prosecutor offered to step out of the courtroom for that purpose, but Levitt ignored that offer and turned instead to the question of whether appellant had filed anything in "writing" either in July or August. (*Id.* at 810-811.)

Khoury and appellant addressed some of appellant's complaints (that is, regarding Khoury's failure to visit appellant in jail) and Judge Levitt said that they were not under oath and he did not want to listen to them complain. (29ART 815.) The court stressed that it did not see a written motion regarding effective assistance of counsel in the file, but then proceeded to consider a document drafted by appellant, which appellant had

with him in court, and treat it as appellant's motion. (*Id.* at 815.) The court ruled that the request therein to file criminal charges against Russell and Khoury before the competency trial commenced was moot; that the request therein for advisory counsel to assist appellant and have witnesses appear at the competency trial was denied because it was beyond the "purpose" of an advisory counsel; and that a request for advisory counsel to assist appellant in preparing a brief concerning Kalish was moot. (*Id.* at 816.) Levitt noted that the filing also requested the court to accept all motions appellant "previously filed" regarding various matters; he did not rule on that request. (*Ibid.*)

Levitt asked counsel their views on whether the court should proceed on "this motion." (29ART 817.) Both counsel posited that the motion appeared to be a request to proceed pro se in the competency proceeding, although appellant stated "that's not my request, your Honor." (*Id.* at 817.) The court said, "well, that's certainly the way it reads," and ignored appellant's request to be heard on "the issue of effective assistance of counsel." (*Ibid.*) Levitt ruled that the motion did not set out any basis for determining that Khoury was "incompetent"; he filed it as Exhibit G and stated the "motion set forth therein is denied." (*Id.* at 817-818.)

The same date, September 16, 1987, appellant filed an "Urgent and Emergency Petition for Writ of Mandamus" in the court of appeal, D006849, complaining that the competency proceeding was nearly over and he still had not received a hearing on his motion for substitution of counsel. (62CT 14035-14036.) The Court of Appeal denied this writ on September 19, 1987, stating: "This court is reluctant to intervene in an ongoing trial. If at the conclusion of the trial, petitioner still believes the court has erred, he should present those issues to this court in an appeal." (*Id.* at 14034.)

4. Judge Levitt's Off-Hand Treatment of Appellant's *Marsden* Requests was Error

Judge Levitt erred in refusing to hear appellant's request for substitution, and then in denying the motion based on procedural niceties and subjective impressions, without giving appellant an opportunity to explain his complaints. A motion for substitute counsel for a criminal defendant must be heard and addressed at any stage of the proceedings -- indeed, the court must hear a *Marsden* motion even if made *after* it has declared a doubt regarding the defendant's competency and before section 1368 proceedings are completed. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 87 (*Stankewitz II*)[44]; *People v. Taylor* (2010) 48 Cal.4th 574, 600-601 [trial court erred when it brushed aside request for substitution of counsel in the belief that the question of defendant's competence to stand trial first had to be resolved, citing *Stankewitz II*]; *People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1069; *People v. Govea* (2009) 175 Cal.App.4th 57, 59.) In *Stankewitz II*, this Court explicitly stated that a *Marsden* motion must be heard even after a trial court has declared a doubt as to whether the defendant is competent to stand trial. (*Stankewitz II*, *supra*, 51 Cal.3d 72, 88.) This Court resoundingly repeated that rule in its recent holding in *Taylor*, *supra,* 48 Cal.4th 574, 600-601

As this Court stated in *Marsden*:

> [A] judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney. A judicial decision made without

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[44]In *Stankewitz II*, this Court explained that its holding was implicit in its prior treatment of the case, and the decision published in *People v. Stankewitz* (1982) 32 Cal.3d 80 (*Stankewitz I*). (*Stankewitz II*, *supra*, 51 Cal.3d 72, 88.)

> giving a party an opportunity to present argument or evidence in support of his contention "is lacking in all the attributes of a judicial determination." (*Spector v. Superior Court* (1961) 55 Cal.2d 839, 843 [13 Cal.Rptr. 189, 361 P.2d 909].)

(*Marsden, supra*, 2 Cal.3d 118, 124.)

Judge Levitt refused to grant a *Marsden* hearing at which appellant could have explained his problems with counsel, instead resting on technicalities: first, that the motion was not written; then, that the written motion showed no basis for substitution; and third, that the judge's own in-court observations proved counsel's representation adequate. The trial court abused its discretion because, by any definition, it simply refused to hear appellant's *Marsden* motion. As this Court explained in *Marsden*:

> [A] trial court cannot thoughtfully exercise its discretion in this matter without listening to his reasons for requesting a change of attorneys. A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom. Indeed, "[w]hen inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record: whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choice of trial tactics and strategy." (*Brubaker v. Dickson* (9th Cir. 1962) 310 F.2d 30, 32.)

(*Marsden, supra*, 2 Cal.3d 118, 124.)

While Judge Levitt did not affirm, explicitly, Khoury's erroneous contention that the court lacked jurisdiction to hear the *Marsden* complaint (see *Stankewitz II, supra*, 51 Cal.3d 72, 87 and *Taylor, supra*, 48 Cal.4th 574, 600-601), his out-of-hand disregard for the substitution request based

on procedural technicalities and subjective impressions suggests that he believed Khoury was correct. After appellant complained again and again that counsel was not representing him, or at least not effectively, Levitt refused any meaningful hearing and continued to insist, "[t]here is nothing before me pending with regard to inability of counsel or anything else. I'm not going to do a thing unless it's appropriately presented to me." (29ART 804.) When appellant asked the judge how to make his request more "appropriate," Levitt switched tracks and focused on whether the July request had been written or oral, stating that it was "only" oral and that he had denied it based on his opinion that Khoury was "highly competent." (29ART 808-809.) The trial court rested on procedural niceties, while sending the message that it was legally precluded from advising the defendant of procedural requirements.

A *Marsden* motion is not required to be in writing. (See, e.g., *Taylor*, *supra*, 48 Cal.4th 574, 596, 600 [trial court erred in brushing aside the defendant's oral complaints about counsel and his claim to have "fired" her, rather than hearing the *Marsden* issue].) Judge Levitt could have helped appellant correct any procedural defects in his request for substitution. There is "no statute or authority which precludes a judge from advising a defendant as to the procedures for effectively challenging the competence of his attorney . . ." (*Marsden*, *supra*, 2 Cal.3d 118, 125.) This Court continued:

> To the contrary . . . this court [has] commended judges who consider it part of the judicial function to aid and advise defendants appearing before them without counsel. "Although a trial judge may not be required to aid a defendant who represents himself, it is a common practice in both civil and criminal cases for trial judges, by advice and suggestion, to assist persons who represent themselves . . . . It is in the highest tradition of American jurisprudence for the trial judge to assist a person who represents himself as to the

> presentation of evidence, the rules of substantive law, and legal procedure, and judges who undertake to assist, in order to assure that there is no miscarriage of justice due to litigants' shortcomings in representing themselves, are to be highly commended.

(*Id.* at pp. 125-126.) Here, as in *Marsden*, "although defendant was represented by counsel, he was groping for the proper manner in which to demonstrate the alleged lack of competence of his attorney, and the trial judge would have been well within the bounds of judicial propriety in giving any helpful suggestion which might have aided defendant in the presentation of his complaint." Also, here, as in *Marsden*, "the judge was not being called upon to offer advice, but only to listen to defendant's reasons for requesting different counsel." (*Ibid.*)

C. Because of the Unheard *Marsden* Motion, Appellant was Constructively Denied Counsel under the Sixth Amendment and the Due Process Clause of the Federal Constitution

1. Law on the Constructive Denial of Counsel

United States Supreme Court has made clear that problems with counsel in a criminal case can be the basis for structural error. The Sixth Amendment gives grounds for a finding of structural error when the circumstances – i.e., the actual or constructive denial of counsel to assist the defendant – are so extreme as to warrant presuming prejudice.

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."

(*Cronic, supra,* 466 U.S. 648, 653-654, footnote omitted.)

Prejudice is presumed where there is a complete denial of counsel at any critical stage of the trial (*Cronic, supra,* 466 U.S. 648, 659), and a competency proceeding is such a critical stage. (*Appel v. Horn* (3d Cir. 2001) 250 F.3d 203, 210.) In contrast, where the defendant did indeed have counsel yet claims the assistance of counsel was inadequate under the federal constitution, the *Strickland* standard, and its requirement that prejudice be shown, typically applies. As a general rule, because a lawyer, once appointed, is presumed competent to "provide the guiding hand that the defendant needs," the Sixth Amendment is not implicated absent a showing that the attorney's conduct had some "effect" on the "reliability of the trial process." (*Cronic, supra,* 466 U.S. 648, 658, citing *Michel v. Louisiana* (1955) 350 U.S. 91, 100-101, inter alia.)

"There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." (*Cronic, supra,* 466 U.S. 648, 658 & fn. 24, citing *Flanagan v. U.S.* (1984) 465 U.S. 259, 267-268; *Estelle v. Williams* (1976) 425 U.S. 501, 504; *Murphy v. Florida* (1975) 421 U.S. 794; *Bruton v. U.S.* (1968) 391 U.S. 123, 136-137; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 351-352; *Jackson v. Denno* (1964) 378 U.S. 368, 389-391; *Payne v. Arkansas* (1958) 356 U.S. 560, 567-568; *In re Murchison* (1955) 349 U.S. 133, 136.)

As the United States Supreme Court states:

> *Cronic* held that a Sixth Amendment violation may be found "without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial," *Bell v. Cone*, 535 U.S. 685, 695, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), when "circumstances [exist] that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," *Cronic*, supra, at 658, 104 S.Ct. 2039. *Cronic*, not *Strickland*, applies "when . . . the

> likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial," 466 U.S., at 659-660, 104 S.Ct. 2039 . . .

(*Wright v. Van Patten* (2008) 552 U.S. 120, 124 [complete denial of counsel is but one circumstance warranting the presumption of prejudice].) While *Strickland* claims challenge the *effective assistance* of counsel, *Cronic* claims allege the *constructive denial* of counsel. (*Appel, supra*, 250 F.3d 203, 210, emphasis added.)

The Sixth Amendment requires not merely the provision of counsel to the accused, but rather "assistance" of counsel "for his defense." (*Cronic, supra,* 466 U.S. 648, 654, quoting *U.S. v. Ash* (1973) 413 U.S. 300, 309; *Avery v. Alabama* (1940) 308 U.S. 444, 446 [mere formal appointment does not satisfy the constitutional guarantee of assistance of counsel].) The right to be heard that is at the core of due process under the federal constitution is of "little avail" unless it "comprehend[s] the right to be heard *by counsel.*" (*Cronic, supra,* 466 U.S. 648, 654, fn. 8, emphasis added, quoting *Powell v. Alabama* (1932) 287 U.S. 45, 68-69.) "'If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.'" (*Ibid.*, quoting *Powell, supra*, 287 U.S. 45, 68-69.)

"The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused, during a critical stage of the proceeding." (*Cronic, supra,* 466 U.S. 648, 659, fn. 25, citing *Geders v. U.S.* (1976) 425 U.S. 80; *Herring v. New York* (1975) 422 U.S. 853; *Brooks v. Tennessee* (1972) 406 U.S. 605, 612-613; *Hamilton v. Alabama* (1961) 368 U.S. 52,

55; *White v. Maryland* (1963) (per curiam) 373 U.S. 59, 60; *Ferguson v. Georgia* (1961) 365 U.S. 570; *Williams v. Kaiser* (1945) 323 U.S. 471, 475-476.) For example, when counsel's efforts are so impeded that there is a "breakdown in the adversarial process," a constructive denial of counsel under *Cronic* has occurred. (*Wright v. Van Patten* (2008) 552 U.S. 120, 125 fn.) In some instances, the hastening of trial without giving the defense a chance to investigate and prepare the defense can amount to the constructive denial of counsel. (*Powell supra*, 287 U.S. 45, 58.) Similarly, some circumstances can create such doubt that any lawyer, even a competent one, could provide effective assistance that reversal is required without inquiry into the actual conduct of the trial.

The constructive denial of counsel doctrine applies to cases where the defendant has an irreconcilable conflict with his counsel, and the trial court refuses to grant a motion for substitution of counsel. (*Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1197, citing *U.S. v. Nguyen* (9th Cir. 2001) 262 F.3d 998, 1003-1004; *U.S. v. Adelzo-Gonzalez* (9th Cir. 2001) 268 F.3d 772, 778-779.) The test for determining whether the trial judge should have granted a substitution motion is the same as the test for determining whether an irreconcilable conflict existed. (*U.S. v. Moore* (9th Cir. 1998) 159 F.3d 1154, 1159, fn. 3; *Daniels, supra*, 428 F.3d 1181, 1198.) The court must consider: (1) the extent of the conflict; (2) whether the trial judge made an appropriate inquiry into the extent of the conflict; and (3) the timeliness of the motion to substitute counsel. (*Moore, supra*, 159 F.3d 1154, 1158-1159.)

Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel. (*Adelzo-Gonzalez, supra*, 268 F.3d 772, 779.) This is true even where the breakdown is a result of the

defendant's refusal to speak to counsel, unless the defendant's refusal to cooperate demonstrates "unreasonable contumacy." (*Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1169; see also *Nguyen, supra*, 262 F.3d 998, 1003-1004 [quoting and applying *Brown*]; *Adelzo-Gonzalez, supra*, 268 F.3d 772, 780 [same].) "Even if [trial] counsel is competent, a serious breakdown in communications can result in an inadequate defense." (*Nguyen, supra*, 262 F.3d 998, 1003; citing *U.S. v. Musa* (9th Cir. 2000) 220 F.3d 1096, 1102); *see also U.S. v. D'Amore* (9th Cir. 1995) 56 F.3d 1202, 1206, disapproved on another ground in *U.S. v. Garrett* (9th Cir. 1999) 179 F.3d 1143 ["[A] court may not deny a substitution motion simply because [it] thinks current counsel's representation is adequate."])

2. Appellant's Unheard *Marsden* Motion Became the Focus of the Competence Trial, Causing a Breakdown in the Adversarial Process That Denied Appellant the Constructive Assistance of Counsel

Kalish, who had originally been engaged by the trial court as its expert to evaluate appellant for competency to represent himself (27ART 340), became the defense's main witness at appellant's competency trial. Kalish testified that appellant wanted to represent himself and believed that his attorney was inadequate, while also admitting that his attorney was the "best" in the criminal defense field. (27ART 345.) Kalish agreed that appellant would have "problems relating and cooperating with any attorney." (*Ibid.*) Appellant's mental disorder, which included depression, paranoia, and impairment of the thinking process would "severely impair his ability to relate to his attorney and did impair his ability to think clearly and assess the proceedings against him." (*Id.* at 347.) Appellant's interaction with attorneys in the area of exploration of appellant's psychiatric condition was especially problematic. (*Id.* at 359-360.) Appellant was very upset about his attorney having obtained his psychiatric

records, and his feelings about that had expanded into a general distrust of the court itself. (*Id.* at 360.) Kalish testified that his conclusion based on his evaluations was that appellant did not "have the capacity to assist counsel in his defense and to cooperate with counsel in the preparation of that defense." (*Id.* at 362.)

On cross-examination, the prosecutor attacked Kalish's conclusions about appellant's capacity to assist counsel in his defense by pointing up the unresolved *Marsden* motions as evidence that appellant's general capacity to assist and cooperate with any lawyer had not been shown. (28ART 555-556.) The prosecutor forced Kalish to concede that "other than the Russell/Khoury defense team, no subsequent attorney has been appointed to represent Mr. Waldon on the criminal case to see if he could get along with that attorney[.]" (*Id.* at 558.) Kalish admitted that appellant's later "paranoia toward the court," emerged when the court insisted that he speak only through Russell, "the attorney he was trying to get rid of[.]" (*Id.* at 559.)

The prosecutor became even more explicit about the unheard *Marsden* motions:

> Q. [By the prosecutor]: Now yesterday . . . . [didn't you reference appellant's letters to me requesting] a *Marsden* hearing?
>
> Q. You indicated that as some indication in your mind of a possible revelation of defense strategy or whatever?
>
> A. Yes.
>
> Q. Do you know what a *Marsden* hearing is?
>
> A. No.
>
> Q. If I were to tell you that a *Marsden* hearing refers to the hearing that is afforded a defendant to state to the court his reasons for wanting to get rid of the attorney who represents him, would that change your opinion?

A. I don't think so.

Q. Wouldn't it change your opinion as to whether or not it revealed the defense strategy?

A. Well, it would change the reality of what he was conveying, but it doesn't change the impropriety in my view of his revealing that to the district attorney whose job it is to get him convicted and punished.

Q. Well, was his attorney listening to him in his efforts to get rid of her?

A. I believe she was.

[¶] . . . [¶]

I think that she was doing what she was required to do by having the pro per hearing, bringing that matter to the attention of the court.

(28ART 561-562.)

The prosecutor probed deeper into Kalish's view of duties of an attorney concerning the efforts of a mentally ill client to gain self-representation:

Q. [By the prosecutor] Didn't you hear [Russell] in court opposing his pro per motion?

A. [By Kalish] Yes.

Q. So how does this assist him in getting rid of her?

A: She assisted him by filing the appropriate papers as she is required to do by the law and as she is ethically bound to do, to bring the papers to the court and have a hearing, which is where I got involved.

Q. To your knowledge has Ms. Russell ever offered to resign from this case or asked to be relieved and another attorney appointed?

[¶] . . . [¶]

A. I am not aware of any.

(28ART 563-564.)

The drumbeat continued:

> Q. [By the prosecutor] So, all we know from the surface then is that as of February the 20th, he was requesting that she be relieved and he be allowed to represent himself. And as of today she still represents him; is that correct, sir?
>
> A. [By Kalish] That is correct.
>
> Q. All right. [¶] Insofar as the requests he had filed with the court to be given that status, again he wrote it February 20, here we are August the 20th, I think and that has not been acted upon, to your knowledge, is that correct, has not been terminated, not concluded?
>
> A. It is in process, that is correct.
>
> Q. Okay. [¶] Other than the D.D.A. prosecuting the case, who else can a person in Mr. Waldon's situation go to if the attorney hasn't accomplished what he wants and the court hasn't accomplished what he wants? [Objection sustained.]

(28ART 564-565.)

The prosecutor next delved into the question of whether the defendant or his attorney controlled a decision to "bring forth evidence of a possible psychological or psychiatric defense." (28ART 565.) The prosecutor sought Kalish's agreement that a psychiatric defense, unlike other defenses, would only "mitigate the possible degree of guilt" or the "possible punishment," rather than letting a defendant "off the hook." (28ART 566.) The prosecutor asked Kalish whether his views on appellant's opposition to counsel working up a potential psychiatric defense, as related to his mental capacity to assist an attorney in preparing a defense, might vary depending on whether "in the assessment of the defendant and/or his attorney, a psychological defense would be inappropriate." (28ART 568.) Kalish said that they would not. (28ART 569.)

Thus, the trial court's errors in failing to hear appellant's *Marsden* requests cast a long shadow over the entire competency trial. Had the court heard the motion and granted it along the lines of *Stankewitz II* on the theory that substitution of counsel might have restored competency (see *Stankewitz II, supra*, 51 Cal.3d 72, 88), Khoury and Russell would have been replaced with different counsel and the jury would not have been misled by conjecture that appellant's beef was with Russell and Khoury only. Had the court heard the motion and denied it on the ground that counsel was providing effective assistance, the prosecution would not have been able to assert that appellant's desire for substitution of counsel was legitimate and then the defense could have countered the inference that appellant's objections to his present representation were rational.

However, the trial court did not rule on the motion, and thereby permitted the unheard motion to take the spotlight during the competency trial. Under the circumstances of the unheard *Marsden* motion becoming the centerpiece of the prosecution's case, it was entirely unlikely that any lawyer, however competent, could have provided appellant with effective representation on the competency question. Defense counsel obviously could not counter the prosecution's contention that appellant's request to have defense counsel removed was reasonable, with evidence that appellant's request was *not* reasonable without presenting evidence regarding his own competence, or presenting evidence that appellant was embroiled in such a conflict with counsel that ineffective assistance of counsel was highly likely. Evidence that counsel was providing effective assistance of counsel would have meant putting evidence on about counsel's trial strategies, making counsel themselves witnesses in appellant's competency trial, which is forbidden. (*People v. Donaldson* (2001) 93 Cal.App.4th 916, 929, quoting *U.S. v. Morris* (7th Cir.1983) 714

F.2d 669, 671 ["That counsel should avoid appearing both as advocate and witness except under special circumstances is beyond question."]; see ABA Model Rules of Prof. Conduct, rule 3.7 [A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness].)

Moreover, in putting on evidence about the conflicts counsel was or was not having with appellant, Khoury would have had to violate the attorney client privilege by testifying about confidential aspects of defense counsel's communications with appellant, also forbidden. (ABA Model Rules of Prof. Conduct, rule 1.6 ["A lawyer shall not reveal information relating to the representation of a client, unless the client gives informed consent. . ."].) In this case, no attorney could have represented a client where one of the issues was the competency of the attorney's representation. Because no attorney could have acted competently under such circumstance, appellant was denied the constructive assistance of counsel. (*Cronic, supra,* 466 U.S. 648, 659-660.)

Further, there is no question that by the time of the competency trial there was a complete breakdown of the attorney-client relationship. By the time of the competency hearing, appellant had stated many times that he and his counsel were not communicating. In fact, he insisted many times during the competency trial that he had no counsel whatsoever. (See, e.g., 24ART 5.) Russell and Khoury also acknowledged that they were not able to discuss the case with appellant. As noted, even where counsel is competent, a breakdown in communication can result in an inadequate defense. Where the breakdown has prevented the presentation of an adequate defense, another attorney must be appointed so that a new proceeding can be conducted. (See *U.S. v. Musa, supra*, 220 F.3d 1096 [if error in failing to inquire into attorney breakdown prevented an adequate defense, new hearing was required].) Here, it is clear that appellant was

denied an adequate inquiry into competence as a consequence of the breakdown with his counsel, not the least because his attorneys could not counter the prosecution's claims that his desire to remove his attorneys was reasonable without calling into question their own effectiveness.

3. Appellant's Subsequent Withdrawal of his Motion Does not Change the Result

That appellant much later, in the spring of 1988, "withdrew" his request for substitute counsel (42ART 212) is not relevant to this discussion. (See *Vera, supra*, 122 Cal.App.4th 970, 980-982.) The inquiry is not only whether the trial court's errors in treating the *Marsden* request warrant reversal in and of themselves, but also how those errors combined with other errors during the competency proceeding amount to the constructive denial of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. (*Cronic, supra,* 466 U.S. 648, 653-654; *Pate, supra,* 383 U.S. 375; *Cooper, supra,* 517 U.S. 348; *Medina, supra,* 505 U.S. 437.) If the trial court had heard the motion, it next would have either decided to substitute counsel if appellant's complaints were valid, or explained to appellant that his complaints were invalid because counsel acted in compliance with her duty under the Sixth Amendment and was providing constitutionally effective representation. In either event, the prosecution would have been unable to make appellant's dissatisfaction with counsel the centerpiece of its argument for counsel. For reasons discussed above, by refusing to hear, consider and address appellant's concerns, the trial court stood squarely in the way of the assistance counsel could have provided to the defense at the competency trial.

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D. The Trial Court Permitted the Competency Jury to Receive Erroneous Instruction, From a District Attorney Testifying as an Expert Witness, on the Respective Roles of a Defendant and his Counsel, Which Nullified the Defense Case on Competency and Prevented Counsel from Providing Effective Assistance

1. Legal Background

A criminal defendant holds certain specified rights in his personal capacity and these rights, termed as "fundamental," are his to control contrary to his attorney's advice, and even over the objection of counsel. Thus, while an attorney representing a criminal defendant has power to control most aspects of the court proceedings, including the decision whether to call witnesses, present evidence, and fashion a defense, that power does not circumscribe a defendant's personal right to testify on his own behalf, to enter or withdraw a plea, to trial by jury, or to present a defense that is supported by credible evidence that is the sole defense at the guilt/special circumstance phase of a capital trial. (*People v. Brown* (1986) 179 Cal.App.3d 207, 215 [withdraw guilty plea]; *People v. Holmes* (1960) 54 Cal.2d 442, 442 [right to trial by jury]; *People v. Gauze* (1975) 15 Cal.3d 709, 717-718 [plea of not guilty by reason of insanity]; *People v. Robles* (1970) 2 Cal.3d 205, 214-215 [right to testify]; *Frierson* (1985) 39 Cal.3d 803; *People v. Milner* (1988) 45 Cal.3d 227, 246 [*Frierson* stands for the limited rule that a defense counsel's traditional power to control the conduct of a case does not include authority to withhold the presentation of any defense at the guilt/special circumstance stage of a capital case, where the defendant expresses a desire to present a defense at that stage and when there exists credible evidence to support the defense].)

These principles, limited as they are, have no play whatsoever in the context of a competency trial. After a court has declared a doubt as to a

defendant's competency to stand trial, the defendant's exercise of those personal fundamental rights is held in abeyance until a competency proceeding that comports with due process has been carried out and the defendant has been found competent. (*Shephard v. Superior Court* (1986) 180 Cal.App.3d 23, 31; *People v. Hill* (1967) 67 Cal.2d 105, 115, fn. 4; *People v. Masterson* (1994) 8 Cal.4th 965, 974; *People v. Mickle* (1991) 54 Cal.3d 140, 183; *Samuel, supra*, 29 Cal.3d 489, 495.)

Thus, this Court's decision in *Frierson* does not stand for a broad right of a defendant to control and guide decisions in a criminal case. Even within its limited terms (i,e., the withholding of a defendant's sole defense in the guilt/special circumstance stage of a capital trial), it has no sway unless it has been established that the defendant's wished-for defense has credible evidentiary support. (*People v. Carter* (2005) 36 Cal.4th 1114, 1197; *People v. Jones* (1991) 53 Cal.3d 1115, 1139.) And *Frierson* does not pertain at all where a doubt has been declared as to the defendant's competency to stand trial. (*Shephard, supra*, 180 Cal.App.3d 23, 31; *Masterson, supra*, 8 Cal.4th 965, 974; *People v. Bolden* (1979) 99 Cal.App.3d 375, 379.)

Nevertheless, the trial court allowed the prosecutor to call, as an expert witness, Deputy District Attorney Michael Ebert, who gave the competency jury the misapprehension that the "law" (e.g., *Frierson*) gives a defendant the broad power to control his case, even if the defendant is represented by counsel. The court then barred defense counsel from showing that *Frierson* had no such meaning in context, and from advising the jury on the correct law on the respective roles of counsel and the defendant as related to the competency inquiry. This gross error subverted the defense Khoury sought to present and combined with other errors to block Khoury's assistance of appellant in appellant's defense, thus

constructively denying appellant counsel during the competency proceeding, in violation of the Sixth and Fourteenth Amendments.

2. Factual Background

Kalish was questioned by the prosecution about *Faretta*. Kalish asserted that the standard for evaluation in assessing whether a defendant can exercise his *Faretta* rights is whether the defendant can make a decision to give up his right to counsel in a reasoned and rational way. He testified that he understood that a defendant in a death penalty case also has a right to represent himself. (27ART 406.) Kalish stated that the fact that appellant wanted to represent himself was one factor in making the competency determination. (*Id.* at 412.) He stated that he believed that the level of competency is different in representing oneself in a traffic ticket versus a misdemeanor versus a death penalty prosecution. (*Id.* at 413.) Kalish also stated that he was not certain if his opinion about appellant representing himself would be different if appellant were charged with growing marijuana plants. (*Id.* at 414.)

The prosecutor requested a jury instruction on *Faretta*, arguing that Kalish had given an incorrect statement of the *Faretta* rules and that the jury needed accurate instructions on that score to determine the validity of Kalish's testimony. (29ART 915.) Khoury argued that the *Faretta* issue was relevant only as background to the case; the prosecutor countered that Kalish also gave incorrect testimony that there was a different standard applicable to different charges. (*Id.* at 916.) Khoury contended the jury needed only CALJIC No. 4.10 on the issue, that instructing the jury on the standards to go pro per would confuse it, and that the issue should be addressed in argument. (*Id.* at 916-917.) The prosecutor said that if the instruction were refused he would need to put on a witness; Levitt said that would be preferable. (*Id.* at 917.)

The prosecutor called Deputy District Attorney D. Michael Ebert to the witness stand. (30ART 1024.) Khoury asked for an offer of proof and the prosecutor said Ebert would testify on the law, from *Frierson,*[45] regarding a defendant's ultimate control of fundamental decisions in his case; *Marsden* motions and hearings; the law of *Faretta*; and that the test for competency is the same irrespective of the charge. (*Id.* at 1025.)

Khoury objected to testimony on the *Frierson* issue, arguing that if Ebert testified on that, Khoury would need to bring in *Bolden*, *supra*, 99

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[45]In *Frierson*, *supra*, 39 Cal.3d 803, the defendant in a capital case filed a motion to substitute counsel, stating that there had been a breakdown in the attorney-client relationship, and the trial court denied the motion on the ground that the conflict was insufficient to warrant the requested relief. (*Id.* at p. 810.) The attorney then conferred with the defendant on whether he agreed to the attorney's continued representation; the defendant stated his agreement on the record. (*Ibid.*) Nothing further on the subject took place until defense counsel indicated that the defense would rest without putting on any evidence. (*Ibid.*) Counsel requested an in camera conference, at which he stated that the defendant strongly wished him to present a diminished capacity defense but counsel held the opposite opinion. (*Id.* at p. 811.) The court ruled that it was within defense counsel's authority to decline to present the defense, despite the defendant's wishes. (*Ibid.*) The next day, after closing arguments had been made and the guilt case had been submitted to the jury, the defendant requested another in camera session wherein he said that he had wanted, all along, to present a diminished capacity defense and that his attorney should have "disqualified" himself if not willing to present the defense. (*Ibid.*) The trial court rejected the defendant's complaints and reiterated its view that "counsel was in control of the lawsuit." (*Ibid.*) The defendant thereafter was convicted of the capital charge and special circumstance, and after a penalty phase at which trial counsel presented evidence that would have supported a diminished capacity defense the defendant was sentenced to death. (*Id.* at pp. 805, 815, fn. 3.) This Court reversed the guilt and penalty judgments and held that a defendant in a capital trial "must retain the right to have his only viable defense to the guilt or special circumstance charges presented at the initial stage of the trial," notwithstanding that, in the view of defense counsel, it would be better strategy to forego the defense and use the evidence to strengthen the case for a life verdict. (*Id.* at pp. 815, 816.)

Cal.App.3d 375, for its premise that where a defendant has been found "prima facie incompetent," the "control goes to the attorney" because "[y]ou can't entrust decisions to a prima facie incompetent defendant that normally would be in their province in a normal criminal case."[46] (30ART 1026.) The prosecutor said he needed to counter testimony from Kalish that appellant had a "fixation" for "control of the case," and intended to show that "there is a legal basis for him having that right in a case such as this." (*Id.* at 1026.)

Khoury disagreed, arguing that:

> [T]his testimony is irrelevant and it really confuses the jury because of the fact that we, the attorneys in this case, have a defendant who they believe, including myself, is mentally ill. [¶] [The evidence the prosecutor seeks to introduce is] for another case and it doesn't apply here. We are talking about mental illness and a struggle between attorneys and a mentally ill defendant and what – it's going to give the impression to the jury that a mentally ill defendant can run his own case, and that's not the law.

(*Id.* at 1026-1027.) Levitt said he would allow it, that the prosecutor was not "really telling [the jury] a mentally ill defendant can run his case," but rather was "just telling [them] what the law is." (*Id.* at 1027.) The judge continued: "And if this witness tells the jury something that's not the law, that's something again. But he has a right to call an expert to ask what the

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[46]In *Bolden, supra*, 99 Cal.App.3d 375, the defendant contended that he had been provided with the ineffective assistance of counsel because the attorney was acting in what the attorney felt was the best interests of his client, "rather than as an Advocate of his client's position." (*Id.* at p. 379.) The Court of Appeal held that where the attorney doubts the competence of his client, he may "assume that his client cannot act in his own best interests and may act even contrary to the express desires of his client." (*Id.* at pp. 379-380, citing *People v. Hill, supra*, 67 Cal.2d 105, 115, fn. 4.) "To do otherwise may cause prejudicial error." (*Ibid.*, citing *People v. Merkouris* (1956) 46 Cal.2d 540.)

law is." (*Ibid.*) Khoury argued that the evidence would confuse the jury "greatly." (*Id.* at 1027.) Levitt replied, "I don't think they will be confused. I'll make sure they are not confused." (*Id.* at 1028.)

Back in the presence of the jury, DDA Ebert testified that he had been a deputy district attorney for 17 years, and that in assisting in the prosecution of the case against appellant he had researched "the issue of whether or not a defendant is allowed to represent himself in a criminal case, specifically a capital case[.]" (30ART 1030.) Ebert asserted that under *Faretta*, a defendant has a constitutional right to represent himself, even in a capital case (*Id.* at 1031), and that the standard for addressing a defendant's request to represent himself did not vary with the seriousness of the charges. (*Ibid.*)

Ebert testified that he was acquainted with "a case known as the *Frierson* case," and that it "[b]asically . . . stands for the proposition that a defendant himself or herself has the right to control fundamental decisions made in the presentation of that individual's [criminal] case," and that the "defendant retains that control even in situations where the defendant is represented by counsel[.]" (30ART 1031-1032.) Ebert testified that a "*Marsden* hearing is a hearing before a judge in which a defendant seeks to claim . . . that his counsel is ineffective and therefore he is seeking . . . new or different counsel to represent [him] during the course of the proceedings." (*Id.* at 1032.) He said that appellant had, during the course of the case, made requests for a *Marsden* hearing. (*Id.* at 1032.)

On cross-examination, Ebert stated that the "fundamental decisions" left in the control of the defendant under *Frierson* included whether to testify, and "whether or not the defendant . . . would prefer to present a defense of some kind of mental deficiencies." (30ART 1033.) He continued: "Those kinds of major decisions, as I understand the law, are

left to the defendant." (*Ibid.*) Ebert stated that *Frierson* was a criminal case "dealing with the mental competence of the defendant," although he did not "recall" that the case involved issues in a 1368 proceeding. (*Id.* at 1034.)

Khoury asked: "In a situation where a defendant is prima facie incompetent, should he be – under the law, is he allowed to make the fundamental decision, for example, of whether to testify?" (30ART 1034.) The prosecutor objected on the ground that the question was irrelevant and called for conclusion and speculation; Levitt sustained the objection. (*Ibid.*)

Khoury sought Ebert's admission that *Frierson* was inapposite, asking him to "elaborate" on his statement that the case involved "competence issues." (30ART 1034.) Ebert said, "As I recall, I thought it had to do with an insanity defense and whether the defendant wanted that particular defense presented during the course of trial." (*Ibid.*) Ebert admitted that it wasn't "necessarily" an issue of "competence." (*Id.* at 1035.) Khoury asked, "In what manner does the case of *People v. Frierson* deal with the dilemma of a mentally ill defendant then making choices in a criminal trial?" (*Ibid.*) The prosecutor objected that the question was "speculative," and Levitt sustained the objection. (*Ibid.*) Ebert gave Khoury the citation to the *Frierson* decision, 39 Cal.3d 803, and Khoury went to the court library and pulled a copy of the case. (*Id.* at 1036.) Back before the jury, Ebert admitted that in *Frierson*, it was the "defense attorney who was withholding a mental defense" and it was the defendant who wanted to put his "psychiatric history" into evidence. (*Ibid.*)

By stipulation, the prosecutor introduced evidence that appellant had sought *Marsden* relief. (30ART 1041-1042.)

Levitt gave preliminary instructions including the flawed instruction re competency as explained in above. (5CT 925.)

Judge Levitt told the jury that it previously had been instructed as to all the rules of law that were necessary to reach a verdict, and then gave the jury its final instructions (which included nothing on the subject of the roles of defendant and counsel and on which aspects of a case were in a defendant's control, in or out of a competency proceeding). (31ART 1187-1190.)

3. By Admitting Ebert's Testimony on *Frierson, Marsden*, and *Faretta*, and Blocking Efforts to Correctly Explicate the law, the Trial Court Rendered Meaningless Defense Evidence of Appellant's Inability to Assist in his Defense

Ebert's statement of the law under *Marsden* misinformed the jury, because it said that appellant had a right to request substitution of counsel, but failed to explain the sanctity of a defendant's right to counsel and the court's duty to protect that right, or that *Marsden* relief would be granted only if the court determined that counsel was providing ineffective representation, or that a conflict between appellant and counsel was so severe that ineffective assistance was likely to result. Ebert's testimony gave the impression that every defendant has the right not only to *request* substitution of counsel, but also to have that request granted cart blanche.

Regarding *Faretta*, the law as stated by Ebert was misleading because it failed to inform the jury that *Faretta* relief would not be granted unless the court found that the defendant knowingly and voluntarily waived his right to counsel. It also failed to inform the jury that appellant could not represent himself if he was not competent to stand trial.

Regarding *Frierson,* Ebert's testimony was inaccurate because it failed to explain the difference between the legal definition of "fundamental rights," and the lay definition; it failed to iterate the limited list of rights that a defendant controls, contrary to the advice of counsel, in his personal

capacity. (See *Shephard, supra*, 180 Cal.App.3d 23, 31, fn. 3.)[47] It was inaccurate because it stated that under *Frierson*, the defendant has the right to control the defense, when in fact the case held only that an attorney must follow the client's directive to present a defense, *when it is the sole defense* and *when there is credible evidence to support it*. The case said nothing about any prerogative by a defendant to *prevent* his attorney from presenting a defense.

Further, Ebert's testimony misled the jury to believe *Frierson* was even relevant. Because nothing was said to the contrary, the jury likely believed that, assuming a capital defendant does control the decision with respect to a specified right (i.e., to have his attorney present a capital defendant's sole defense if there is competent evidence to support it), the same rule applies when a doubt has been declared as to the defendant's competency to stand trial. In ruling that Ebert could testify, Levitt insisted that the testimony would not confuse the jury into believing that a mentally ill defendant has the right to control his case over his attorney's better

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[47]As stated in *Shephard, supra*, 180 Cal.App.3d 23, 31:

> The specific situations and "fundamental rights" over which case law has conferred ultimate decision making authority to competent defendants are limited to: decisions to testify in own defense at trial (*People v. Robles* (1970) 2 Cal.3d 205, 214-215 . . . ; entry of a guilty plea and concurrent waiver of rights to jury trial and right to present and confront witnesses (*In re Tahl* (1960) 1 Cal.3d 122, 131-133 . . . ; *In re Mosley* (1970) 1 Cal.3d 913, 924 . . . and *People v. Holmes* (1960) 54 Cal.2d 442-444; and right of a competent defendant to refuse to enter an insanity plea (*People v. Gauze* (1975) 15 Cal.3d 709, 717.)

The court in *Shephard* explained that *Frierson's* holding is merely that defense counsel cannot withhold the presentation of the sole defense in the guilt phase of a capital case over the expressed objection of his mentally competent client, despite the existence of some credible evidence to support the defense. (*Ibid.*)

judgment. (30ART 1028; see *Shephard, supra*, 180 Cal.App.3d 23, 31 [*Frierson* does not apply when a doubt has been declared as to the defendant's competency to stand trial]; see also *Hill, supra,* 67 Cal.2d 105, 115, fn. 4; *Masterson, supra*, 8 Cal.4th 965, 974; *Mickle, supra*, 54 Cal.3d 140, 183; *Samuel, supra*, 29 Cal.3d 489, 495; *Robles, supra*, 2 Cal.3d 205, 214-215; *Frierson, supra,* (1985) 39 Cal.3d 803.) However, the judge did nothing to dispel that impression, and, when Khoury tried to clarify the point in argument, the court barred him from doing so.

Ebert's testimony was also misleading because it omitted the facts, which were within Ebert's knowledge, that the court had refused to hear the *Marsden* motion both before and after adjudging appellant *prima facie* incompetent, and in so doing had foreclosed any chance to learn the substance of the attorney-client conflict, and so advise the jury whether the disputed question was within counsel or client's control.

It is a fundamental tenet of a jury trial that the jury determines facts, based on evidence, and the court instructs the jury regarding the law to be applied. Opinion testimony is inadmissible and irrelevant to adjudging questions of law. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884; Evid.Code, § 801, subd. (b); *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 266.) Under the evidence code, expert testimony is allowed on issues of fact but it is improper for an expert to testify what the law is. Here Levitt, over defense objection, allowed the prosecutor to introduce expert testimony on the ultimate issues in the competency trial. In effect, Levitt permitted Ebert to instruct the jury on the substance and meaning of the law. Thus, Ebert's testimony was inadmissible instruction on the law by a witness. When such error removes from the jury "the existence or nonexistence of a necessary fact," harmless error review is

inapplicable because "the error in such a case is that the wrong entity" decided the case. (*Rose v. Clark* (1986) 478 U.S. 570, 578, 580.)

Additionally, the error denied appellant the constructive assistance of counsel by making it impossible for any competent counsel to defend the case. The sole disputed issue in the competency trial was whether appellant had the ability rationally to assist his attorneys, Russell and Khoury, in defending him at trial. Khoury's position was that appellant's mental illness made it impossible for him rationally to assist any attorney who intended to present a defense predicated on psychiatric evidence. The prosecutor's position was that appellant was capable of assisting his present or potential attorneys in such defense, but that he did not want any such defense presented, and the law afforded him the right to control the decision of whether it would be. The "law" with which the jury was instructed through Ebert's testimony was *inaccurate* with respect to the relative roles of the defendant and his counsel. The effect of the misinstruction on *Marsden* and *Frierson* erroneously informing the jury that appellant had unlimited rights to demand new counsel if unsatisfied with their work took the key issue of the reasonableness of his desire for new counsel away from the jury by telling it that appellant's desire for new counsel *was reasonable.* This erroneous information from Ebert, together with the trial court's refusal to allow Khoury to clarify Ebert's misinformation, rendered Khoury's attempts to defend appellant a nullity. No counsel could have provided effective assistance of counsel where the trial court permitted the sole issue in genuine dispute to be taken away from the jury. Thus, reversal is required.

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E. This Court's Opinion in *Lightsey* Supports the Conclusion That the Denial of Counsel at a Competency Trial is Structural Error

As appellant explained above, in *Lightsey*, *supra*, 54 Cal.4th 668, this Court held that the trial court violated Penal Code section 1368, subdivision (a) in allowing a defendant to represent himself during mental competency proceedings after the trial court declared a doubt regarding the defendant's competency to stand trial. (*Id.* at pp. 692-693.) It then held that the error constituted a reversible miscarriage of justice under Article VI, section 13, of the California Constitution. (*Id.* at p. 702.) This Court observed that attempting to:

> assess the effect of the absence of counsel on the trial court's finding of competence is, in truth, no different than attempting to assess the effect on a jury's final verdict of the absence of counsel during a trial on substantive charges: there is no reasoned manner in which to do so because the lack of true adversarial testing denied defendant the basic procedure by which his competence should have been determined.

(*Ibid.*, citing *Rose*, *supra*, 478 U.S. 570, 579, fn. 7, *Gonzalez-Lopez*, *supra*, 548 U.S. 140, 150, and *Neder*, *supra*, 527 U.S. 1, 8-9.) This Court cited *Holloway v. Arkansas* (1978) 435 U.S. 475, 489, for the proposition that "when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense reversal is automatic," and it held that a competency proceeding is a "critical stage of the proceedings." (*Id.* at p. 700.) This Court then concluded that the deprivation of counsel under 1368 was akin to a pervasive violation of the Sixth Amendment right to counsel, citing *Fulminante*, *supra* 499 U.S. 279, 309, for the characterization of the error as structural. (*Id.* at p. 701.)

It follows from this reasoning that the errors in appellant's case are structural. As shown above, the errors in failing to hear appellant's *Marsden* motion and in misinstructing on *Marden*, *Faretta*, and *Frierson* were a denial of the right to counsel at appellant's 1368 trial, and there is no reasoned manner in which to assess the effect of the absence of counsel. As such, reversal is required under both the state and federal Constitutions.

* * * * *

III.

FACTUAL SUMMARY IN SUPPORT OF ARGUMENTS IV, V, AND VI

In Arguments IV, V, and VI below appellant presents errors at the competency trial which require a discussion of prejudice. This discussion requires an additional factual explanation. Appellant incorporates by reference facts delineated in Arguments I and II, and herein adds facts that establish he was prejudiced under both the *Chapman* and *Watson* tests on review, as follows. He duplicates the presentation of facts as little as possible.

After appellant filed his motion for both substitution of counsel and "in propria persona" (aka pro per) status in early March of 1987, both the prosecutor and defense counsel questioned appellant's mental status as related to entry of a knowing, voluntary, and intelligent waiver of his right to counsel. (9A-1ART 7-8; 1CT 126, 1CT 152.) The trial court appointed Alex Landon to assist appellant as advisory counsel in his decision whether to represent himself. (10ART 17-18.)

The case was assigned to Judge Zumwalt to hear and decide appellant's motion for self-representation, and the parties appeared before Zumwalt on April 10, 1987.[48] (11A-1ART 27; 12ART 1.) Zumwalt appointed Dr. Kalish to conduct an examination to assist the court in determining how appellant's mental condition affected his entry of a

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[48]The trial court's treatment of appellant's motion for substitute counsel are recounted above. Similarly, detailed facts related to erroneous instruction on the role of counsel through DDA Ebert's testimony at the competency trial appear above as the basis for appellant's argument of constructive denial of counsel. Thus, while trial court proceedings from March through September of 1987 comprise a continuous course of events, appellant has grouped specific facts from that period to highlight their importance in related legal arguments and claims for relief.

knowing, intelligent, and voluntary waiver of the right to counsel. (*Id.* at 20-21, 32-33.) Hearing on the motion commenced on April 30, 1987. (14ART 1.) Russell requested permission to provide Kalish with certain written materials to consider in making his assessment, but Zumwalt denied the request because it was conditioned on an order that the prosecutor not see the documents. (*Id.* at 51-61,103.) Kalish testified upon examination by Zumwalt and Russell and his report was received as an exhibit. (*Id.* at 12; 67CT 15087-15106.) Kalish testified he had interviewed appellant twice, on April 16 and 17 of 1987. (14ART 29; 67CT 15088.)

Judge Zumwalt led Kalish through testifying in confirmation of his written report, and his conclusion therein that appellant was "not making a knowing and intelligent decision" in choosing to represent himself. (14ART 14-27.) Kalish believed, based on his review of writings to the prosecutor, that appellant was distrustful of his attorney, and the distrust was beyond the "level of paranoia or mistrust" of "the typical defendant who may be distrustful." (*Id.* at 17.) The level of distrust was "generalized" and "not specific to Ms. Russell," and Kalish anticipated appellant would have the same difficulties with "any attorney who represents him." (*Id.* at 18.) Zumwalt asked about appellant's "ability to present his own defense" if granted pro se status. (*Id.* at 18-20.) Kalish referred to a list of appellant's "self-defeating" behavior itemized in Kalish's report, stating as one item on the list that "requesting to appear pro per is self-defeating." (*Id.* at 26.) When asked by Zumwalt, Kalish admitted to having a "prejudice in that regard." (*Ibid.*)

Responding to questions from defense counsel Russell, Kalish said his ability to determine whether appellant had a delusional disorder was limited, where he lacked access to history information (such as old psychiatric records) or results from a battery of psychological tests.

(14ART 31-32.) Kalish said that, with respect to thought disorders and a defendant representing himself in a capital trial, he believed "that the level of competency rises with the seriousness of the charges and the potential penalty." (*Id.* at 32.)

Russell asked Kalish about whether bias had influenced his opinion on appellant's competency to waive counsel:

> Q. As far as the appeal issue goes, do you have any personal belief that would prevent you from evaluating someone for a pro per status just because of your own belief about right to counsel?
>
> A. No.
>
> Q. Do you feel that you have any bias that has influenced your thinking or evaluating this case because of your attitude toward a pro per issue?
>
> A. No.

(14ART 72.)

Kalish said that he would need further testing to determine where appellant fell along the spectrum between paranoid schizophrenia and paranoia. (14ART 75.) Kalish opined that appellant's pro se/*Marsden* motion (February/March 1987 motion) was copied from a pleading in a book in the jail library. (*Id.* at 78.) Kalish said he did not believe appellant understood the increased likelihood of receiving a death judgment if he represented himself, as compared to being represented by adequate counsel. (*Id.* at 80.) Kalish went over with appellant the charges (including three murder charges) and special circumstances in the case (*Id.* at 81-82) and the facts underlying the prosecutor's allegations. (*Id.* at 88.) Kalish did not discuss with appellant any substantive legal issues related to any of the charges in the information. (*Id.* at 83.) Kalish said he believed appellant over-identified with persecuted individuals (*id.* at 87), and that appellant's distrust was not limited toward himself and Russell as individuals, but

would extend to anyone appointed to stand in his or Russell's shoes. (*Id.* at 88.) At Russell's request, Zumwalt ordered a follow-up examination of appellant by Kalish.[49] (*Id.* at 103.)

On May 13, 1987, pursuant to a stipulation of the parties, Zumwalt ordered that documents including material from appellant's Navy psychiatric record be made available for Kalish's consideration after all. (17ART 1-4.) The prosecutor would be barred from using the documents in his case in chief in the criminal trial, and would be required to establish how he obtained lawful access to the documents before making use of them at any later stage of the case. (*Id.* at 1-4.)[50]

Kalish resumed testifying on May 22, 1987. (20ART 24.) Russell questioned the witness, and turned immediately from appellant's mental state as bearing on waiver of counsel to the question of whether appellant was competent to stand trial, asking "are you familiar with the criteria for what is referred to as Penal Code section 1368 proceedings?" (*Id.* at 27.) Kalish said that he was, and Russell asked whether section 1368 proceedings should be initiated. (*Id.* at 28.) Kalish stated that there were "some very significant areas where [appellant's] deficient, to raise, at least in my mind, the issue of whether or not he's competent to stand trial." (*Ibid.*) He mentioned that his April 27, 1987, report outlined factors bearing on the question. (*Ibid.*) Kalish said that he had "grave and

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[49]As Kalish later testified during the competency trial, the further examination Zumwalt ordered on April 30, 1987, was truncated because appellant refused to cooperate verbally in the examination. (27ART 362.)

[50]The prosecution also provided some material to Kalish, reports dated July 18, 1983, and December 28, 1983. The parties stipulated the reports would not be used in the prosecutor's case in chief. (17ART 4.) The July 18, 1983, report is in the record (3CT 552-554), but the December 28, 1983, report is not in the record.

significant doubts" about appellant's competency to stand trial, but would need to re-examine appellant before reaching a conclusive opinion on whether the relevant criteria were met. (*Id.* at 30.) Russell asked Zumwalt to recess the proceedings immediately for another examination by Kalish. (*Ibid.*)

Judge Zumwalt noted that she had "read Kalish's report carefully a number of times," and had done so "in the light of" what she had "learned in this case and what [she] had heard and read of Mr. Waldon's statements." (20ART 31.) Judge Zumwalt then entered this ruling:

> The standards are pretty well set by the statute . . . .
>
> It's the question of whether [Mr. Waldon] can assist his counsel, any counsel, in the conduct of his defense in a rational manner. I have a fully-qualified psychiatrist appointed by the court, neither side having raised an objection to his qualifications or his ability to do this. It raises a doubt as to whether this man can, indeed – whether he has a factual understanding, what his rational reasoning is, such that he can assist counsel.
>
> And on the basis of that record, although I believe that I understand the frustration in not going forward with this, I'm going to declare the proceedings suspended and order that he be examined under Penal Code Section 1368. I'll find that sufficient doubt has been raised in my mind whether he can rationally assist his counsel in the conduct of his defense in this case. I fully realize that this may, indeed, be a manipulative maneuver. This may be something that is, indeed, a rational procedure, but I have doubts as to whether he is rational; and on that basis I'm going to proceed under 1368.

(*Id.* at 35-36.) Judge Zumwalt suspended the criminal proceedings, referred the case to the psychiatric department, and ordered that further forensic examination be made. (*Id.* at 36-40.)

On July 15, 1987, there was a proceeding before Judge Levitt. (7CT 1409; 24ART 1.) Matters related to appellant's desire for substitution of

counsel and defense counsel's motion for a continuance were discussed, inter alia. (24ART 1-5.)

The case came before Levitt on August 17, 1987; Khoury appeared for appellant because the court refused to continue the proceeding until Russell could be available. (25ART 1-3.) Khoury moved the court to bar the prosecution from calling appellant as a witness, and to instruct jurors on the effect of a determination of competency or incompetency. (*Id.* at 11-13; 4CT 835; 5CT 849.) The court heard argument on the motions and took them under consideration. (25ART 46-65.)

The next day, August 18, 1987, Levitt denied the defense motion to inform the jury of the effect of its verdict and stated that he saw no barrier to the prosecutor calling appellant as a witness. (26ART 75-76.) The prosecutor then moved the court for leave to inform the jury of the criminal charges against appellant and the potential penalty he was facing. (*Id.* at 76.) He argued that the jury needed that information in order to assess whether appellant comprehended the nature and purpose of the proceedings against him, and also to impeach Dr. Kalish for bias based on his prejudice against having capital defendants represent themselves. (*Id.* at 77-79.) Levitt left the question open pending receipt of testimony. (*Id.* at 85.)

The 1368 trial was interrupted for writ proceedings in the court of appeal, D006718, on the defense challenge to Levitt's ruling that appellant could be called as a witness in the competency trial. The Court of Appeal denied the writ on September 16, 1987 (5CT 877-881) and the competency trial resumed that day. (7CT 1417.)

The defense called Dr. Mohammed Javaid, a psychiatrist, who testified that in late 1983, while assigned to serve at the Eglin Air Force Base, he met appellant, who had served in the Navy for 11 years, when appellant was referred to the hospital as a psychiatric patient for evaluation

and treatment. (26ART 261.) Javaid saw appellant almost daily while he was at the site from September 1983 to early January 1984. (*Id.* at 260-261, 264-265.) While hospitalized, appellant was very withdrawn. (*Id.* at 271.) Javaid explained that he had diagnosed appellant as having major depression that was "chronic and severe with mood congruent psychotic features, and melancholy unresolved as manifest by dysphoric mood, insomnia, loss of interest or pleasure in usual activities, loss of energy, feeling of worthlessness, diminished ability to concentrate, visual and auditory hallucinations, feelings of inadequacy, guilt, disease and preoccupation with somatic complaints." (*Id.* at 270.)

Javaid also diagnosed appellant with pseudoephedrine abuse, "episodic, currently resolved." (26ART 270.) Appellant exhibited psychosis. (*Id.* at 271.) He was very withdrawn; he did not eat well, and would not speak. (*Ibid.*) He was so ill that his life was at risk, and hospital staff provided very close and extensive care daily. (*Id.* at 272.) Previously appellant had been a very competent and capable member of the Naval service, and had received commendations. (*Ibid.*) Appellant told the doctor he was having auditory hallucinations, hearing voices in different languages that were telling him to hurt himself or someone else. (*Ibid.*) Javaid held the firm opinion that appellant was not malingering during his hospital stay. (*Id.* at 276.) Psychological testing of appellant was done. (*Id.* at 283.) Javaid concluded that appellant suffered mental illness, "major depression, chronic-severe, with mood congruent psychotic features and melancholia," that he was under significant stress, and that he would continue to deteriorate over time. (*Id.* at 290, 292.) Javaid's written evaluation and notes and report, nursing notes, and consultations and test results relating to Javaid's treatment of appellant were marked as Court's Exhibit No. 1. (*Id.* at 302.) Javaid opined that appellant exhibited paranoia as part of his

personality; it was a long-standing condition of the type which could limit an individual's capabilities significantly. (*Id.* at 319.)[51] Appellant started taking anti-depressant medication, Norpramin, in February 1983, a type of medication that can cause psychotic features. (*Id.* at 321-322.)

The next witness was Kalish, testifying as the court's witness. (27ART 337, 340.) Kalish said he had examined appellant on April 16 and 17, 1987. (*Id.* at 342.) Appellant had told Kalish that he wanted to represent himself in the case because his attorney was not representing him adequately, although he believed his attorney was "the best there was," and no different attorney could do any better. (*Id.* at 343-344.) Dr. Kalish's report was marked as Court's Exhibit No. 3. (*Id.* at 346.) From his interview of appellant, Kalish formed the conclusion that appellant had a mental infirmity consisting of an affective disorder and that he was paranoid and had a thought disorder. (*Id.* at 346-347.) The depression, paranoia, and thought disorder all combined to "severely impair appellant's ability to relate to his attorney. . . and his ability to think clearly and assess the proceedings against him." (*Id.* at 347.)

Appellant had cooperated poorly with Kalish; he had to be "brought down with the aid of sheriff's deputies," and was "quite resistant to speaking with" Kalish. (27ART 348.) Kalish believed that appellant was withholding information. (*Ibid.*) Kalish attempted to examine appellant again on two subsequent dates, but appellant refused to see him. (*Ibid.*) By refusing to cooperate with Kalish, appellant had thwarted his own desire to be granted leave to represent himself (viz., by convincing Kalish that his

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[51]Defense counsel asked Dr. Javaid if appellant would have been competent to stand trial at the time Javaid was treating him. (27ART 276.) The prosecution's relevance objection to this question was sustained. (27ART 277.)

choice to do so was a reasoned and logical decision.) (*Ibid.*) Appellant had questioned whether the court, or anyone else, had the right to subject him to a psychiatric examination; appellant made his argument using "circumstantial" rather than direct logic. (*Id.* at 350-351.) Kalish asked appellant about current or past psychiatric treatment, but appellant refused to respond. (*Id.* at 352.)

Kalish explained that he had extensive experience in assessing whether inmates were incompetent or were "faking" incompetence, that is, malingering. (27ART 354.) Kalish did not believe appellant was malingering because (1) he had a long, well-documented psychiatric history that was consistent with what Kalish observed of appellant during his examinations; (2) Kalish's own findings over two days of examination were very consistent; (3) although there was a volitional aspect to appellant's behavior (i.e., trying to give people a hard time), that was a part of his illness; and (4) appellant said that he wanted to be found competent but his behavior made it likely that the opposite would occur. (*Id.* at 354-355.) Kalish suspected that appellant suffered mental illness, and the suspicion was confirmed by Kalish's review of appellant's military psychiatric records. (*Id.* at 356.) Kalish explained that paranoia is a symptom of a mental illness, through which the paranoid individual weaves a "tremendous delusional system" around a "very small kernel of truth." (*Id.* at 358-359.) Kalish had partially, but not completely, examined appellant with respect to his competency to stand trial. (*Id.* at 361.) Kalish had begun to doubt appellant's competency to stand trial, and he expressed that doubt to the court. (*Id.* at 361.)

Kalish returned to the jail to further examine appellant on June 2; he met with appellant for approximately 15 minutes, but appellant failed to answer his questions and then got up and left the room. (27ART 362.)

Kalish stated that in his opinion, appellant lacked the capacity to assist counsel in his defense and cooperate with counsel in the preparation of his defense. (*Id.* at 362.) Although there was a volitional aspect to appellant's failure to cooperate, the inability to assist would remain even absent volitional factors because appellant would still suffer disordered thinking and impaired cognition, which were independent "psychiatric symptoms" that rendered him "incompetent to assist with counsel." (*Id.* at 363-364.) His "inability to see the big picture" plus his "paranoia" would be a "definite hinderance [*sic*] to an attorney-client relationship." (*Id.* at 364.) Appellant could be logical, but he was not rational "in the area of attorney/client" relations. (*Id.* at 364-365.) Kalish could not make a full psychological diagnosis of appellant – that is, for the purpose of treatment and prognosis of likely future development of the illness – without a longer period of evaluation including daily observation in a controlled hospital setting. (*Id.* at 368.) Dr. Kalish had reviewed reports of psychological testing of appellant conducted in the fall of 1983, and the result of the testing was consistent with Kalish's opinion based on his interviews. (*Id.* at 378-380.)

Kalish testified that appellant's mental disability interfered with many of the capacities needed to stand trial. He explained that appellant's "distrust and paranoia, coupled with his own agenda, which includes picayune detail and tangential issues unrelated or only marginally related to the major issues in his trial, impair[ed] his capacity to disclose to his attorney available pertinent facts surrounding the events" related to the case. (27ART 382.) Appellant's incapacity was related to a thought disorder stemming from a psychiatric illness, although Kalish could not render a diagnosis because of appellant's unwillingness to cooperate with further examination. (*Ibid.*)

The court granted the prosecutor leave, over defense objection, to cross-examine Kalish on the point that appellant was charged with murder and facing the death penalty. (27ART 388-400.)

The prosecutor cross-examined Kalish about the circumstances under which he had examined appellant (viz., to determine his mental state as related to waiver of counsel) and Kalish's knowledge about *Faretta* and the guarantee that a defendant can represent himself, even in a death penalty case. (27ART 405-407.)[52] Kalish explained his views that the level of competency to represent oneself differed depending on the charges one was facing – for example, being charged with a "traffic ticket" as compared with being charged with a crime carrying the death penalty. (*Id.* at 413.) Defense counsel objected to the relevance of questions concerning competency to represent oneself, when the issue before the jury was competency to stand trial; the objection was overruled. (*Ibid.*) Kalish admitted that with respect to competency to stand trial, his assessment would be different depending on the type of criminal case and the charges the defendant was facing. (*Id.* at 414.)

The prosecutor asked Kalish whether he was aware that appellant was a "security risk because of an attempt to escape from the jail." (27ART 449.) Khoury objected on the grounds of relevance and undue prejudice, moving for a mistrial. (*Id.* at 450.) Levitt sustained the objection, denied the mistrial, and required the prosecutor to rephrase the question to omit reference to any escape attempt, but permitting the words "security risk" to

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[52]The defense objected to this line of questioning. Khoury reminded Levitt of his prior ruling, to which the prosecutor argued that the risk had been dealt to Khoury as to whether the court ultimately would allow questions of the challenged nature. (27ART 408.) Khoury moved for a mistrial. (*Ibid.*) Levitt denied the motion, and ruled that the examination was permissible. (*Id.* at 409.)

be repeated. (*Id.* at 463-464.) Levitt admonished the jury to disregard the question; the prosecutor then rephrased the question to omit the reference to "escape," but asked whether Kalish was aware that appellant was considered a "security risk," and thus required to be accompanied by two deputies when being moved within the jail. (*Id.* at 465.) Later in cross-examination, Kalish opined that appellant would be so demanding and abrasive that he would not be able to effectively utilize any resources given him. (28ART 581.) He would also find it impossible to relate to anyone assigned to work with him. (*Id.* at 582.) Having administered the McGarry[53] test to appellant, Kalish testified that appellant failed the parts of the test dealing with the ability to cooperate with counsel in a rational manner. (*Id.* at 590-591.) Therefore, Kalish held the opinion that appellant was not competent to stand trial. (*Ibid.*)

The next defense witness was Dr. Bruce Ebert, a psychologist who administered diagnostic testing of appellant during appellant's 1983 mental hospitalization while in the Navy. (28ART 518.) Dr. Ebert testified that on the basis of his testing and contact with appellant, he believed appellant, though bright, had a problem interacting with and reacting to other people. (*Id.* at 530-531.) Dr. Ebert opined that at the time of the examination,

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[53]Although Kalish does not specifically identify which McGarry test he used, it appears that he is referring to the Competency to Stand Trial Assessment Instrument ("CAI") developed by A. L. McGarry and Associates, at the Laboratory of Community Psychiatry affiliated with Harvard Medical School. (See Laboratory of Community Psychiatry, Harvard Medical School (1973) *Competence to Stand Trial and Mental Illness* (DHEW Pub. No. ADM-77-103.) Rockville, MD: Department of Health Education and Welfare; see also Thomas Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* ("Grisso") (2d ed. 2003) pp. 121-129 [discussing the CAI].)

appellant's defenses were so deteriorated that he believed other people could see into him, causing him to withdraw dramatically. (*Id.* at 529.)

Dr. Ebert conducted a battery of psychological tests on appellant and wrote a report of his evaluation. (28ART 525.) Answers to questions on the MMPI test, relating symptoms such as "I obsess about death," "I hear voices," and "I have contemplated suicide," were very unusual and indicative of psychopathology.[54] (*Id.* at 526.) Although there were three possible explanations for those responses, including that appellant was exaggerating symptoms as a "cry for help" or to cheat the test, Dr. Ebert favored the third explanation, that appellant was so ill that he was experiencing unusual symptoms and the test accurately reflected his then-current mental state. (*Id.* at 527.)

On a second test, the Shipley Institute of Living Scale test, appellant's performance on the conceptual reasoning portion was very poor; he had extreme difficulty in solving even the simplest logic problem following a sequential reasoning train of thought. (28ART 528.) Ebert interpreted appellant's performance as showing that "his mental disease was so substantial . . . that it was dramatically interfering with his ability to think rationally and logically." (*Id.* at 529.) Appellant's answers on another test, the sentence completion test, corroborated the findings from the MMPI that he was shying away from interpersonal contact because he lacked adequately functioning defense mechanisms. (*Id.* at 530.) Ebert's personal observations of appellant over the months that appellant was hospitalized at Eglin, specifically of appellant's dramatic withdrawal into his own world and reluctance to interact with others, corroborated impressions from the

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[54]Khoury was prohibited from eliciting Ebert's testimony about specific statements in the report. (28ART 526; see also *id.* at 533-540.)

test results that appellant's defense mechanisms were so deteriorated that appellant believed others could see into him. (*Id.* at 531.)

A major factor in Dr. Ebert's conclusion that the MMPI test results did not stem from purposeful exaggeration was that appellant's performance on the Shipley showed such deteriorated ability in conceptual reasoning that he could not have perceived the logical purpose of given questions and chosen intentionally deceptive responses. (28ART 531-532.) Thus, Ebert rejected the "questionable validity" of any single test result by considering the entire battery of test results in total and corroborating it with observations over a long period of time. (*Id.* at 532.) Based on all of this, Ebert concluded that appellant "honestly was experiencing . . . symptoms" and was mentally ill. (*Id.* at 532-533.)

At the time of the testing, Ebert thought that appellant was "relegated to a state of utter hopelessness," and that it would be difficult to treat him with psychotherapy in his condition because appellant was so withdrawn and distrusting that he would be unable to form a relationship with a psychotherapist. (28ART 540.) The type of mental illness appellant exhibited generally did not get better untreated, and his condition would worsen if he were exposed to stress. (*Id.* at 540-541.)

The prosecution called appellant as its first witness, and he refused to answer any questions, stating that he could not answer without the effective assistance of counsel. At a key point, Levitt, exasperated at appellant's refusal to answer, admonished appellant that he was a "competent witness" who must answer questions and then, following appellant's continued refusal to answer, advised the jury that appellant "apparently chooses not to testify." (29ART 831.)

The prosecution then called Dr. William Vargas, who was appointed by the court and attempted to examine appellant on June 2, 1987. (29ART

839.) Khoury was present during that meeting. (*Id.* at 842.) Appellant did not respond to any questions asked of him, saying nothing. (*Id.* at 843-844.) After five or six minutes Vargas dismissed appellant from the interview, and appellant got up and left. (*Id.* at 844.) Vargas testified that paranoia is a mental disorder where the suffering individual holds a very strong, delusional, unshakable belief focused on a particular subject, but which would not interfere with the ability to think clearly in other areas. (*Id.* at 848-849.) Paranoia was not a symptom of mental illness, but rather a mental disorder in itself. (*Id.* at 850.) Nor was circumstantial or tangential thinking, in itself, a sign of mental illness. (*Id.* at 851-852.) Vargas could see nothing in Kalish's testimony or his report that would justify the conclusion appellant had paranoia. (*Id.* at 850-851.)

Vargas defined the term malingering as the giving of misleading information by a defendant, to confuse the examiner, and stated that those with antisocial personality disorder were common among malingerers. (29ART 854-856.) Vargas stated that a "long psychiatric history" would mean that the individual has been in psychiatric treatment for ten years or longer. (*Id.* at 856.) Vargas stated that where a defendant is facing very serious charges, it is "much more convenient" for the defendant to be found incompetent. (*Id.* at 857.) Vargas did not agree with the conclusions in Javaid's report; in his experience the hallucinations described by the appellant did not seem to be genuine. (*Id.* at 859.) He cited possible reasons for appellant's depression in 1987 as his desire to leave the service, the recent death of his grandmother, and his ceasing of taking pseudophedrine. (*Id.* at 860-861.) Vargas described the term "rational" as "the ability to reason." (*Id.* at 862.) Vargas did not see anything irrational in appellant's writings that he had reviewed. (*Id.* at 858-862.)

Vargas gave his opinion, as an "educated guess," that appellant was "able to assist his attorneys" and "competent to stand trial." (29ART 864, 870, 875.) Vargas said he suspected that appellant might be malingering as a way of delaying the trial because a finding of incompetency would send him to a mental hospital. (*Id.* at 875-876.) Vargas' opinion was supported by his review of appellant's resume, which showed that he had an IQ of 124, that he had attended college and was taking pre-med courses, and that he had learned Esperanto, Japanese, and Italian. (*Id.* at 876-877.) Vargas agreed with Javaid's conclusion that appellant in 1983 suffered a mental illness, viz., major depression, but opined that an individual could recover from such mental illness within two to three months, even without treatment. (*Id.* at 884.)

The prosecutor then called as a witness jail deputy Holly Evans, who testified to having had several conversations with appellant in which he seemed coherent, including one in which he complained that his lawyers thought he was crazy, but he wasn't, he just didn't speak to them because he didn't want them. (29ART 891-896.) Over defense objection (*id.* at 899), the prosecutor was allowed to put on the testimony of jail deputy, Kevin Williams, regarding an incident in the jail on July 14, 1986, wherein appellant was attacked by another inmate, and found lying unconscious in a pool of blood, with facial injuries. (*Id.* at 900-907.) There were no signs that the other inmate was injured. (*Id.* at 907.) This evidence was ruled relevant to show an alternative explanation for "the supposed paranoia that Kalish detected in appellant when he examined him." (*Id.* at 899.)

The court refused to give the prosecutor's proposed instructions stating "legal" rules, including that under *Faretta* the same standard as to the defendant's competency to stand trial applies in different types of cases,

saying that instead the prosecutor should offer a witness to testify on the legal standards. (29ART 915-918.)

The prosecution introduced the testimony of another psychiatrist, Dr. Paul Strauss. (30ART 922.) Strauss said he had the opportunity to observe appellant in court on September 16 and also before Zumwalt in May of 1987. (*Id.* at 927.) Strauss mentioned appellant's uncooperativeness with psychiatric professionals attempting to interview him. (*Id.* at 931-933.) Strauss said that in court the previous day appellant seemed alert, involved and aware of the situation around him, and goal directed as he went through papers as though studying or preparing something. (*Id.* at 933.) Strauss thought that appellant appeared alert, verbal, direct, and to the point when called to the stand to testify. (*Id.* at 934.) His demeanor and behavior gave no evidence of organic brain disease or a major mental disorder. (*Ibid.*) Strauss felt appellant was using a technique of "passive resistance" as a means of "expressing a profound contempt for the . . . judiciary and this proceeding." (*Ibid.*)

Strauss said that appellant's statements upon entering the hospital in September of 1983, that he had seen a television show about depression and believed he was depressed because of auditory and visual hallucinations, unaccompanied by any reports of prior episodes of depression or related family history, seemed contrived and "malingering." (30ART 939-940.) Strauss said the report of the occupational therapist at the hospital, that appellant showed excellent problem solving and ability to plan and organize, was inconsistent with a major depression. (*Id.* at 942-943.) Strauss believed appellant wanted out of the military and "presented himself in whatever way he could to get out of that situation . . ." (*Id.* at 944.)

Strauss believed appellant had experienced depression and had been somewhat paranoid, but not to the degree that would render him

incompetent. (30ART 944.) Strauss' diagnosis would be anti-social personality disorder with some sadistic or violent features. (*Id.* at 946.) Strauss said "the reliability of [Kalish's] report would have to be discounted" because of his "inability or unwillingness" to come up with a diagnosis of appellant. (*Id.* at 951.) He said an individual easily could fool professionals by claiming to hear "voices." (*Id.* at 952-953.) Strauss thought appellant could understand the nature and purpose of the proceedings against him, comprehended his own status and his own condition in reference to the proceedings, and had the capacity to assist his attorney if he chose to. (*Id.* at 953.)

Defense counsel then called Dr. Vance Norum. (30ART 978.) Norum said that he had attempted to interview appellant on August 14 and 17, 1987, without success. (*Id.* at 983-984.) On the second occasion, appellant put his fingers in his ears and repeatedly stated, as if to block out Norum's questions, "I cannot hear a thing you say" and "I don't want to hear anything you say." (*Id.* at 984.) Appellant's mood on August 17 was very depressed and unhappy; his affect was very flat and blunt. (*Ibid.*) Norum had observed appellant in the courtroom, and had seen appellant mumbling to himself in a fashion that was consistent with patients who are schizophrenic and are experiencing a thought disorder. (*Id.* at 985.) Regarding appellant's competence to stand trial, Norum said:

> My opinion is that he is incompetent to proceed with trial by virtue of his inability to cooperate with his counsel and his inability to make the rational decisions on his own behalf should he be allowed to represent himself in pro per.
>
> This opinion is behavior anchored, meaning it's based on his observed behavior rather than . . . being [anchored] on a psychiatric diagnosis as there does remain a question as to the appropriate psychiatric diagnosis of Mr. Waldon at this time due to the availability of only a minimal amount of psychiatric evaluative data.

(*Id.* at 989.)

During a break in testimony and with the jury absent, the prosecutor proposed that the jury be read an instruction based on the then-current version of BAJI No. 2.02, a restatement of Evidence Code section 412:

> If weaker and less satisfactory evidence is offered by a party, when it was within his power to produce stronger and more satisfactory evidence, the evidence should be viewed with mistrust.

(30ART 997.) The prosecutor claimed the instruction was justified because appellant refused to testify, that is, failed to produce evidence. (*Id.* at 997, 998.) Levitt agreed to give the instruction over defense objection, noting that in a section 1368 trial the defendant is presumed competent (*Id.* at 997.)

Norum's testimony resumed. He explained that it was inappropriate to make a diagnosis of antisocial personality disorder because insufficient information was available about appellant's behavior before age 15. (30ART 1019.) There was a "distinct but remote" possibility that appellant was malingering. (*Id.* at 1020.) In Norum's opinion, appellant was capable of understanding the nature and purpose of the proceedings against him and comprehended his own status and condition in reference to the proceedings, but he was unable to assist an attorney in conducting his defense in a rational manner. (*Id.* at 1020-1021.) Appellant also was "unwilling" to assist an attorney, but it was his mental illness which caused him to be unwilling. (*Id.* at 1021.)

The prosecutor called, over defense objection, DDA Michael Ebert to testify as an expert witness on "what the law is" under the case of *People v. Frierson*, to wit "that even where a defendant is represented by an attorney, nevertheless he retains the ultimate control of fundamental

decisions in his case." (30ART 1025-1036.) The details of Ebert's testimony are set out above.

The prosecutor called as a witness Sheriff's Department Captain Roache, who testified that appellant was classified as a maximum security high risk inmate, who was kept separate from other inmates and escorted by staff when moving within the jail facility. (30ART 1037-1040.)

By stipulation, transcripts of earlier proceedings were read into the record. In court on July 15, 1987, Levitt asked appellant whether he was seeking a finding of mental incompetence. Appellant stated he could not decide this issue until he had an attorney. (30ART 1041.) Later on the same date during a scheduling discussion, it was said:

> The Court: Any objection to that date, Mr. Waldon?
>
> Defendant Waldon: Yes, your Honor. I object. Also, could I please have a copy of the declarations that [Russell and Khoury] are filing with the court? It seems if anyone should know, I should be able.
>
> The Court: I certainly think your own attorneys can provide you with a copy. What is your objection to August 17th?
>
> Defendant Waldon: I object to the entire procedure at any date it might occur.
>
> The Court: In other words, it doesn't matter to you whether it's early or later or on that date versus –
>
> Defendant: I would rather have it after that date. That might give me a chance to find another attorney somehow. I don't know.

(*Id.* at 1041-1042.)

Read into the record was a stipulation that nothing was said in any court proceeding regarding appellant's competency to stand trial prior to May 22, 1987. (30ART 1042-1044.) It also was stipulated that Navy Commander Eric Barnett would have testified there was a Navy regulation

requiring anyone applying to be a conscientious objector to have a psychiatric examination. (*Id.* at 1044-1045.)

The court barred the defense from introducing Exhibit No. 2, appellant's writings, as a sanction for appellant's refusal to testify when put on the stand:

> [I]t seems manifestly unfair that the defendant can refuse to be sworn and testify and then receive the benefit of his own testimony and all that he would like to bring before the jury that's of benefit to him by admitting Exhibit 2.(

31ART 1085.)

The court read the bulk of the jury instructions, including the version of CALJIC No. 4.10 that omitted the term "rational" to modify the defendant's ability to assist his attorney in his defense. (31ART 1095-96.) Over defense objection (29ART 913), the court read the jury a version of CALJIC No. 2.21:

> A witness willfully false in one material part of the witness' testimony is to be distrusted in others. You may reject the whole testimony of a witness who has willfully testified falsely to a material point, unless, from all of the evidence, you shall believe that the probability of truth favors the witness' testimony in other particulars.

(31ART 1092.) It also read the version of BAJI No. 2.02 as to which the defense had objected. (*Id.* at 1094.)

In his closing argument, the prosecutor compared the case to the fable of the "blind men and the elephant," where each of four unsighted men touched different parts of an elephant and drew different conclusions about the animal and its physical characteristics. (31ART 1100.) In the prosecutor's analogy, appellant kept each of the four experts (Javaid, Norum, Vargas, and Strauss) "in the dark" about his mental capacity as related to competency, by refusing to talk to them and answer their questions. (*Id.* at 1101-1102.) The prosecutor reminded the jurors that,

when called to the stand, appellant had "refused to answer questions and refused to talk to" the jurors. (*Id.* at 1101.) The prosecutor drew attention to the court's instruction based on BAJI No. 2.02, that "if weaker and less satisfactory evidence is offered by a party when it was within his power to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (*Id.* at 1102.)

The prosecutor drilled the points through repetition:

> [The defendant] has offered the evidence of doctors Kalish and Norum operating in the dark because of his refusal and failure to cooperate with them rendering the opinions they were able to render, each admitting that they would have liked to have had that greater opportunity. And of course, ultimately, the defendant himself refused to talk to you or to tell you anything about his mental state and what he was thinking, what he was feeling, what he knew about what was going on here, anything else. So that instruction, I submit, is extremely applicable to that situation that the party, Mr. Waldon. [*sic*] That's why I distinguish we are not talking about a case between Mr. Khoury and Mr. Patrick. We are talking about a case between Bill Ray Waldon and the People of this State, the party, Mr. Waldon, had it within his power to talk to the psychiatrists, had it within his power to talk to you, refused to do so. So he's the one that bears the onus, that bears the burden of proving his incompetence and to enable the psychiatrists to present stronger evidence concerning that issue.

(31ART 1102-1103.)

The prosecutor argued that the evidence of appellant's psychiatric hospitalization while in the Navy showed he was malingering and manipulating the doctors so he could get a discharge. (*Id.* at 1110.) He stated that appellant had "got[ten] away with it" when he obtained a psychiatric release from the military in 1983, and that he was "trying to get away with it again" in the competency proceeding. (*Id.* at 1110.)

The prosecutor attacked Kalish's opinion as biased, arguing that Kalish was prejudiced against any defendant representing himself in a capital case. (31ART 1111-1112.) The prosecutor cited 15 sources of error in Kalish's opinion. (*Ibid.*) He faulted Kalish's finding that paranoia prevented appellant from assisting counsel, arguing that appellant's rejection of Russell was justified because Russell had lied to appellant and broken promises. (*Id.* at 1120-1121.) Referring to the cross-examination of Kalish, the prosecutor ridiculed Kalish's conclusion appellant could not work with any attorney, arguing that Kalish had failed to consider that appellant had long begged for the court to substitute new counsel in Russell's place, the court had refused to hear appellant's *Marsden* claims, and the law gave appellant, rather than Russell decision-making control over all aspects of the case. (*Id.* at 1122-1124.) He argued that Kalish had made a "quantum leap" in saying appellant would "distrust all lawyers," emphasizing that no other lawyers had "been tried," on behalf of representing appellant. (*Id.* at 1122.)

The prosecutor argued that appellant's distrust of the court was reasonable as well, given that Zumwalt had "ignored his objections to the appointment of the psychiatrist," had "refused to let him speak in court," and had "refused to give him a specific hearing to be able to present his reasons why he wanted to go pro per." (31ART 1123.)

The prosecutor stressed the importance of DDA Ebert's testimony, arguing that Kalish erred in considering appellant's desire to control the case a sign of paranoia:

> Dr. Kalish assumed that Mr. Waldon's desire to control the case was a symptom of paranoia despite the fact that it was brought out by Deputy District Attorney Ebert's testimony a defendant retains the constitutional right to make the fundamental decisions in this case even where he is represented by an attorney.

(31ART 1124.)

The prosecutor emphasized appellant's desire for a *Marsden* hearing, drawing the jury to documentary exhibits wherein appellant sought a hearing to "give reasons to the court why he should get a different lawyer." (31ART 1129.) The prosecutor argued that no doubt arose as to appellant's mental competency during 20 days of court proceedings prior to May 22, 1987, and the issue was first raised on the eve of trial.[55] (*Id.* at 1133.) He discounted Kalish's finding concerning defendant's "paranoid distrust and need for control," exhorting the jury that appellant had the "right to control the fundamental decisions in his case." (*Id.* at 1138.)

The prosecutor stated several times that the third prong of the *Drope/Dusky* test was the defendant's "ability to assist" his attorney – each time omitting any requirement of assistance "in a rational manner." He argued that the definition of competency was the key instruction in the case and required only the defendant's "ability to assist" his attorney:

> Now, an instruction that the court gave to you concerning what it is that is the issue in this case and how you are to determine the outcome of that issue is, in my judgment, although all instructions are presumed to be equal, nevertheless this is a little bit more equal than the rest because it contains the essence of what it is you need to find out in this case. . . .
>
> Basically the way the instruction is worded says that if someone is competent that they are capable of understanding the nature and purpose, et cetera, that they do comprehend their own status, et cetera, and that they are unable to assist their attorney – excuse me, that they are able to assist their attorney.

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[55]Khoury objected to the prosecutor's characterization of the trial date as being "imminent" when the question of appellant's competency to stand trial arose. (31ART 1151.) Judge Levitt overruled the objection on the ground that the record spoke for itself. (*Id.* at 1154.)

(31ART 1142-1143.) The prosecutor continued:

> Those are the three things that you look at to see if you are competent. Are you capable of understanding the nature and purpose of the proceedings? Do you comprehend your own status with reference to those proceedings? Are you able to assist an attorney?

(*Id.* at 1143.)

Yet again, the prosecutor misstated the third prong of the test:

> All three. So I've turned this around and put up at the top, the fact that you have already been told that the defendant is presumed to be competent, presumed to be mentally competent to stand trial. . . .
>
> So in order to be found incompetent he has to prove one of the following things: that he is incapable of understanding the nature and purpose of the proceedings, that he does not comprehend his own status and condition in reference to such proceedings, or, use any one of the three, that he is unable to assist an attorney.

(31ART 1143.)

The prosecutor later returned to this theme, contending that any "ability" to assist counsel, however impaired, would suffice to meet the test:

> The third [element] is that he is unable to assist. It doesn't mean, again, that his ability to assist is impaired in some way, that it isn't as good as the next fellow's might be, nothing like that. He has got to be unable to assist. What it particularly does not say is, it does not say unwilling to assist. You don't see that in there anywhere. It's got to be unable to assist.

(31ART 1144.)

The prosecutor stressed that to find appellant incompetent, the jury would have to find he could not assist any lawyer, again omitting the term "in a rational manner":

> One other thing of significance: he has presently got a lawyer, Ms. Russell, assisted by Mr. Khoury. It's not a question of whether he is able to assist that lawyer or these lawyers, it's

> any lawyer basically. You would have to find that he could not assist his lawyer regardless of who that lawyer was before you could find that No. 3 to be true.

(31ART 1144-1145.)

The prosecutor explicitly argued that "ability to assist" did not suggest a requirement of "ability to cooperate":

> Now, in this case I expect that Mr. Khoury probably in his argument will concede to you that there's no issue on points one and two, that those are established. Certainly Dr. Norum, the final defense witness stated in so many words that he found that Mr. Waldon was capable of understanding the nature and purpose of the proceedings, found that he does comprehend his own status and condition in reference to such proceedings.
>
> Now Dr. Kalish, although he might not have said it in so many words, certainly impliedly conceded the same thing. But the only thing I remember in his testimony that I recall hearing about the reason for incompetency was the number 3, the inability, supposed, to assist an attorney. Note also that we talk about it sometimes, about cooperating with an attorney may be a fine distinction, may be a fine line, but again you won't see the word "cooperate" in that No. 3. The question is: Is he able to assist an attorney. Cooperation is not part of that instruction.

(*Id.* at 1145.)[56] The prosecutor argued that appellant's statements on the stand demonstrated that he was fully *able* to assist an attorney but was "not willing to assist the attorneys that he has now." (*Id.* at 1150.)

Outside the presence of the jury, Khoury objected to the prosecutor's argument that the trial date was imminent when the question of appellant's

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[56]Although the CALJIC does not include the word "cooperate," courts do recognize that competency contemplates the defendant's "cooperation" with counsel; indeed, one might equate assisting "in a rational manner" with "cooperation." (*People v. Clark* (2011) 52 Cal.4th 856, 893, citing *People v. Superior Court (Campbell)* (1975) 51Cal.App.3d 459, 464.)

competency came up, given that as of early June 1987 the defense pretrial motions had been filed but the prosecutor had not yet replied and no immediate hearing was contemplated. (31ART 1151.) The court overruled Khoury's objection. (*Id.* at 1154.) Khoury asked to delay beginning his argument until after lunch, since the time was 11:37 a.m., the prosecutor had argued for an hour and a half and the jury likely would be inattentive to him absent a break. (31ART 1154.) The judge denied the request. (*Ibid.*)

Khoury argued that appellant wanted to be found competent and did not want his psychiatric records to be made public, then broached the topic of what a conscientious attorney would do when faced with the situation at hand. (31ART 1155.) The prosecutor objected to the latter topic as "improper argument," and Levitt sustained the objection, stating there was "no issue here" regarding attorney conduct and that Khoury should address solely the issue of appellant's "competence" and the "evidence . . . introduced on that subject." (*Ibid.*) Khoury argued that appellant's objections and frustrations would extend to any attorney appointed to represent him, because any "self-respecting" attorney would want to make appellant's "psychiatric history" known. (*Id.* at 1157.)

Khoury addressed Ebert's testimony that *People v. Frierson* "stands for the proposition that the defendant gets to run his case," seeking to enlighten the jury that *Frierson* involved an attorney who blocked the defendant from putting his psychiatric history in evidence. (31ART 1157.) Khoury explained that the situation in this case was "the opposite," that the attorneys wanted to put in psychiatric history, but the defendant wanted it out. (*Ibid.*) Khoury argued that appellant's conduct in refusing to talk to Kalish was, indeed, self-defeating because answering Kalish's questions was a prerequisite to being given permission to represent himself, as appellant desired. (*Id.* at 1159.) The testimony of Javaid and Ebert

regarding appellant's psychiatric state in 1983 showed that the problem did not spring up suddenly; appellant's conduct when Norum attempted to interview him was consistent with Ebert's account that appellant believed people could see "right through him" and see that his "life was hopeless." (*Id.* at 1160.)

Khoury referred to appellant's assessment by Dr. Ebert with the Shipley test, alluding to the concept of "rationality" but without explaining how it fit into the definition of competency. Khoury said Ebert concluded that appellant "could not think logically, and logic is different from rationality." (31ART 1161.) He continued:

> Remember that difference. Logic is sequential items, one thing after another in a sequence. You can even be – remember this? You can even be logical but be irrational because things can follow in a sequence logically but not make any sense from an overall rational view. Just like, you know, it's logical that if an attorney is incompetent that you can get a case reversed on appeal for incompetence of attorney. That's logical. Boom. Boom. Boom. But the courts won't do that when you are your own attorney, because that's not rational.

(*Id.* at 1161-1162.)

Khoury addressed the subject of volition: "Of course it's a volitional putting down of that iron curtain [by refusing to further communicate with Kalish]. Of course it is. Of course it's volitionally. You know, he willed it. But the key is – and don't lose sight of this – is that the volition is a result of mental illness." (31ART 1162.)

Khoury argued that the disagreement between appellant and his attorneys became acute because it became clear the attorneys were going to bring out the "psychiatric history," and that a similar "explosion" would occur with any attorney because any counsel would have to get to that evidence. (31ART 1170.) Khoury sought to make the jury aware that a

defendant's control over decisions, where authorized under precedent such as *Frierson*, was entirely different in competency proceedings, attempting to read from *People v. Samuel* (1981) 29 Cal.3d 489. (*Id.* at 1171.) The prosecutor objected this was "improper argument," and Levitt sustained the objection. (*Ibid.*) Khoury then sought to read to the jury from *People v. Deere* (1991) 41 Cal.3d 353 and again Levitt sustained the prosecutor's objection, stating: "I will inform the jurors that I instruct the jury as to the law, not the attorney. And this isn't proper, not part of the case and is not based on evidence." (*Id.* at 1172.)

Khoury reminded the jury of Javaid's testimony that appellant had been unable, in 1983, to benefit from psychotherapy because his illness would have prevented the formation of a trusting relationship with the psychotherapist, arguing that appellant's inability to form an attorney/client relationship or a doctor/patent relationship in 1987 mirrored the earlier situation. (31ART 1173-1174.) He urged that the evidence did not support prosecution witnesses' diagnosis of antisocial personality disorder. (*Id.* at 1176.)

Khoury explained that the law prohibits a defendant who lacks "the capacity because of a mental illness to represent himself" to do so. (31ART 1180.) He further urged: "If the person doesn't have the capacity, the ability, because of mental illness and thought disorder to cooperate with his attorney, he must be found incompetent." (*Ibid.*) Khoury said that with respect to a defendant's competency for self-representation, the question would be "does the man make the decision with reason and rationality and with eyes wide open." (*Id.* at 1181.) In referring immediately thereafter to the separate test for competency to stand trial, however, Khoury said nothing about any requirement of rationality. (*Id.* at 1182 [Kalish had grave

doubts about "whether the man can even go to trial because he's not competent, or he has doubts as to his competency"].)

Khoury later sought to counter the importance of evidence that appellant did well in occupational therapy tests, arguing that individuals with mental illness often did fine until "their area of mental illness is pushed, touched, impinged upon," for example when "an attorney say[s] we've got to get into this mental history." (31ART 1185.) Levitt sustained the prosecutor's objection, admonishing the jury that "what the attorneys say in summation" is not evidence. (*Ibid.*)

Khoury could have styled his argument to address the flawed version of CALJIC No. 4.10, which was echoed time and again in the prosecutor's argument. However, it is clear from the record that Khoury had not noticed the defect. Khoury advised the jury in his argument that the judge was "going to read [it] the jury instruction" of what must be shown "in order to be found incompetent." (31ART 1186.) Khoury finally did say that the test was whether the defendant was "unable to assist an attorney in conducting his defense in a rational manner" (*id.* at 1186), but still he neglected to point out the omission in the court's read and written instruction and in the test as stated by the prosecutor.

Khoury argued that the case was a "mirror image" of the situation in *Frierson*, because in that case the defendant wanted psychiatric history introduced and the attorney refused to do so, but in this case the attorney wanted to introduce psychiatric history and the defendant did not want the issue raised. (31ART 1186-1187.)

Levitt told the jury that it previously had been instructed as to all the rules of law that were necessary to reach a verdict, and then gave the jury its final instructions. (31ART 1187-1190.) The jury recessed for deliberations. (*Id.* at 1192.) During deliberations, the jurors asked to have

a copy of defense exhibits 1 and 7, the social history report of Dr. Shirley Levin and the hospital notes relating to appellant's treatment while hospitalized in the Navy, respectively (all of which had been excluded from evidence). Counsel was not informed of the jury's request. The trial judge did not give the jurors the exhibits. Shortly thereafter, the jury returned a verdict that appellant was competent to stand trial. (*Id.* at 1193.)

Subsequently, Levitt admonished appellant that the jury had found appellant "competent to cooperate with counsel." (31ART 1200, 1203.) Levitt remanded the case to Judge Haden for setting of a trial date. (*Id.* at 1203-1204.) On October 30, 1987, counsel filed a motion for Judgement NOV and for New Trial, including exhibits in support of the motion. (7CT 1232-1267.) On November 9, 1987, counsel filed a second declaration in support of its motion. (7CT 1275-1288.) The motions were denied in a minute order dated December 23, 1987. (7CT 1423.)

* * * * *

IV.

THE TRIAL COURT ERRED IN STATING IN FRONT OF THE JURY THAT APPELLANT WAS A COMPETENT WITNESS, AND THEN INSTRUCTING THE JURY THAT THE DEFENSE POSITION SHOULD BE DISTRUSTED BASED ON APPELLANT'S SILENCE ON THE STAND

A. Introduction

As will be explained below, Judge Levitt addressed appellant in exasperation when appellant stayed silent on the witness stand in response to the prosecutor's questions, admonishing appellant that he was a "competent witness" required to respond to examination. (29ART 831.) Levitt went even further, turning directly to the jury and commenting that appellant "apparently chooses not to testify." (*Ibid.*) The judge then incorrectly instructed the jury on how to assess appellant's silence on the stand. Both the remarks and the instruction violated appellant's rights to due process and a fair trial; separately and together they demand reversal under any standard of prejudice.

B. Legal Background

The United States Supreme Court has repeatedly warned that "[i]t is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." (*Starr v. U.S.* (1894) 153 U.S. 614, 626; accord, *Bollenbach v. U.S.* (1946) 326 U.S. 607, 612.) In *Quercia v. U.S.* (1933) 289 U.S. 466, the High Court reversed the defendant's conviction because the trial judge's observation that a witness wiping his hands while testifying was almost always an indication of lying was "a sweeping denunciation repudiat[ing] as a lie all that the accused had said in his own behalf . . . . This was error and

we cannot doubt that it was highly prejudicial." (*Id.* at p. 472.) The Court added:

> Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it they should find the defendant not guilty. His definite and concrete assertion of fact which he had made with all the persuasiveness of judicial utterance, as to the basis of his opinion was not withdrawn. His characterization of the manner and testimony of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence. [Citations.]

(*Ibid.*; see also *U.S. v. Buchanan* (5th Cir. 1978) 585 F.2d 100, 102 [comments may not be "so highly prejudicial" that instruction cannot cure any error].)

Likewise, this Court has often emphasized that a trial judge's remarks carry great weight with a jury because this interfere's with the juror's ability to freely perform their fact-finding responsibilities. (*People v. Cook* (1983) 33 Cal.3d 400, 413, overruled on another ground, *People v. Rodriguez* (1986) 42 Cal.3d 730, 770.) As the Court of Appeal emphasized many years ago:

> It is a matter of common knowledge that jurors . . . are very susceptible to the influence of the judge. . . . [J]urors watch closely his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict. He cannot be too careful and guarded in language and conduct in the presence of the jury to avoid prejudice to either party.

(*People v. Frank* (1925) 71 Cal.App. 575, 581.) Thus, although a trial judge may properly comment on the evidence, such judicial remarks must be "accurate, temperate, and 'scrupulously fair.'" (*People v. Melton* (1988) 44 Cal.3d 713, 735, citing *Cook, supra*, 33 Cal.3d 400, 408.) The court

may not express its views on the ultimate issue of guilt or innocence or otherwise usurp the jury's exclusive function as the arbiter of questions of fact and the credibility of witnesses. (*Ibid.*; *People v. Proctor* (1992) 4 Cal.4th 499, 542.) "No matter how overwhelming the evidence of guilt, '[t]he judge may not in the guise of comment control the verdicts by a direction either directly or impliedly made.' [Citations.] The ultimate responsibility for determining the guilt or innocence of the accused must remain with those in the jury box. 'This principle is so well established that its basis is not normally a matter of discussion.' [Citation omitted]." (*Cook*, *supra*, 33 Cal.3d 400, 408.) "The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made. [Citation.]" (*Melton*, *supra*, 44 Cal.3d. 713, 735.)

C. Factual Background

On July 15, 1987, during a discussion in court of whether a second psychiatrist should be appointed to examine appellant to determine his competence to stand trial, the prosecution stated that he thought appellant never had been asked whether he believed that he was competent to stand trial.[57] (24ART 3, 4.) Russell said she believed such appointment was unnecessary since appellant had not cooperated with Dr. Vargas, the first psychiatrist assigned specifically to assess competency to stand trial. (24ART 3.) Over the objection of trial counsel (24ART 5), Judge Levitt then addressed appellant:

> The Court: Mr. Waldon, are you seeking to inform the Court that you're not seeking a finding of mental incompetence?

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[57]Penal Code section 1369, subdivision (a) requires that a second psychiatrist be appointed unless either the defendant or his counsel asserts that the defendant is competent.

Defendant Waldon: Your Honor, I would be happy to make a decision on that as soon as the Court would be kind enough to appoint an attorney for me. With an attorney I can get counseling and come up with a decision on that. I haven't had an attorney for months now.

The Court: You don't --

Defendant Waldon: Until I get an attorney, I can't make a decision on that.

The Court: In other words, you are not now seeking to inform the Court that you are not seeking a finding?

Defendant Waldon: I'm not making any dicision [*sic*] on it at all since I don't have an attorney.

(24ART 5.)

Later, in spite of the fact that the prosecution knew from July 15 that appellant was unlikely to testify about his opinion of his own competence, the prosecution asked to call appellant as a witness to elicit such information. The trial court granted the request and ordered defendant to testify. (7CT 1410.)[58] When called to the stand appellant did not answer the prosecutor's questions. After refusing to be sworn, appellant told the court's clerk that he could answer questions only if he first received "the effective assistance of counsel." When Judge Levitt told appellant he had to either affirm or swear, appellant said: "My answer stands." (29ART 830.) The prosecutor then questioned appellant:

Q. Would you state your name, please?

A. (No response.)

Q. Is your name Billy Ray Waldon?

A. (No response.)

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[58]On August 18, counsel filed a petition, D006718, seeking relief from the ruling permitting the prosecution to call appellant to the stand. (54ACT 11482.) This was denied on September 16, 1987. (5CT 877.)

Q. Are you able to hear me, Mr. Waldon?

A. (No response.)

The Court: Could you hear Mr. Patrick's question Mr. Waldon?

(29ART 830.)

The prosecutor continued questioning:

Q. Do you have any difficulty in understanding my questions, Mr. Waldon?

A. (No response.)

Q. Mr. Waldon, can you explain to us . . . can you explain to us why it is you need the effective assistance of counsel to answer those questions?

A. (No response.)

(29ART 830-831.)

The trial court then intervened with the following comment:

The Court: Mr. Waldon, *you are a competent witness here* and we want to receive answers to the questions. How would effective assistance of counsel assist you in answering what your name is?

A. (No response.)

The Court: *Mr. Waldon apparently chooses not to testify.*

(29ART 831, emphasis added.) The prosecutor continued questioning, asking appellant directly whether he desired to be found competent:

Q. Mr. Waldon, do you wish to be found competent in these proceedings?

A. (No response.)

Q. Do you wish to be found incompetent in these proceedings?

A. (No response.)

(*Id.* at 831.)

Over continued defense objection, the prosecutor then asked appellant about some of the exhibits, including appellant's pro se motion to dismiss his attorneys and be allowed to represent himself (Exhibit No. 9), and a petition wherein appellant argued that he had been denied the effective assistance of counsel (Exhibit No. 10). (29ART 832.) Again the trial court overruled Khoury's objection to further questioning; the prosecutor continued:

> Q. Is that a question you're interested in answering, Mr. Waldon, my last one about that document, No. 10?
>
> A. (No response.)
>
> Q. Is there anything that you can tell us about, Mr. Waldon, that you seek to hope or gain by not answering?

(*Id.* at 833.) The trial judge disallowed this question as too broad. Defense counsel had no questions and appellant was permitted to step down. (*Id.* at 833.)

Instructions to the jury included, over defense objection, a version of BAJI No. 2.02: "If weaker and less satisfactory evidence is offered by a party when it was within that party's power to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (31ART 1094; 5CT 922.) The prosecutor argued to the jury that BAJI No. 2.02 favored a finding against appellant, because he had kept his own experts in the dark by refusing to talk to them and had "refused to talk to" the jury when called to the stand. (31ART 1101-1102.) He argued:

> Mr. Waldon [ ] had it within his power to talk to the psychiatrists, had it within his power to talk to you, refused to do so. So he's the one that bears the onus, that bears the burden of proving his in competence [*sic*] and to enable the psychiatrists to present stronger evidence concerning that issue.

(*Id.* at 1103.)

D. Judge Levitt's Admonition to Appellant That he was a Competent Witness who Must Answer Questions, and his Comment to the Jury That Mr. Waldon "Apparently Chooses tot to Testify," Undermined the Factfinding Role of the Jury

The judge's remarks in this case were highly prejudicial and demand reversal of the verdict. It can hardly be said that the comment was "accurate, temperate, and scrupulously fair" (*Melton*, *supra*, 44 Cal.3d 713, 735), where clearly it was made out of the judge's exasperation toward appellant, which it appears from the record had built over several months.[59] The comment that appellant was "competent" obviously invaded on the jury's function as the "arbiter of questions of fact and the credibility of witnesses." (*Ibid.*) It sent the message that the judge believed and perhaps had even found the ultimate issue, that appellant was competent to stand trial, thus "either directly or indirectly" controlling the verdict. (*Cook*, *supra*, 33 Cal.3d 400, 408.) The trial court's remark that appellant *chose* not to testify was in effect an instruction that appellant's silence was evidence that he was rational – the very issue before the jury.

As to "credibility" (*Melton*, *supra*, 44 Cal.3d 713, 735), the comments highlighted the prosecutor's theme that appellant was

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[59] Judge Levitt's exasperation with appellant is evident. For example, early in the proceedings in front of Levitt, appellant was asked whether he believed that he was competent. Appellant declined to answer on the grounds that he did not have counsel. Judge Levitt concluded that this meant that he had not informed the court that he was competent. (24ART 5.) Later, appellant objected when Levitt stated he would show one of appellant's motions to Russell. Levitt simply concluded that the motion was a matter of public record. (25ART 10.) A day later, Levitt observed that appellant had refused to put on civilian clothing. Appellant explained that he would not accept clothing from Russell since he had fired her. Levitt concluded that this was a "tactic" on appellant's part. (*Id.* at 17-18.) He was clearly exasperated about the amount of time wasted on the issue. (*Id.* at 20.)

malingering, that he feigned mental illness as a means of manipulating others to get his way. The content of the judge's comment was highly damaging; he could have said "you are presumed to be a competent witness," but instead he said "you are a competent witness," suggesting that the "presumption" of competency was irrebutable. The circumstances of the comment could not have been more unfavorable for the defense, given that appellant was the prosecutor's first witness. There was no curative instruction or admonition for the jury to disregard the intemperate judicial comment. The judge's second comment, that "apparently appellant chooses not to testify," showed sarcasm toward appellant and told the jury that appellant had full choice in (viz., control over) his conduct, belying that mental incapacity or disturbance factored in to appellant's actions, demeanor, statements, or silence.

Because the error removed from the jury "the existence or nonexistence of a necessary fact," harmless error review is inapplicable because "the error in such a case is that the wrong entity" decided the case. (*Rose v. Clark* (2002) 478 U.S. 570, 578.) As such, the error must be reversed without a prejudice showing. Moreover, the remarks were so highly prejudicial that, as in *Quercia*, *supra*, 289 U.S. 466, 470, they were likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence – another reason why reversal is required without a showing of prejudice. However, the remarks were also prejudicial, as appellant will show below.

E. Giving BAJI No. 2.02 was Error

After the court instructed with BAJI No. 2.02, the prosecutor's argument bonded appellant's recalcitrance on the stand and during psychiatric examinations with that instruction, urging the jury to apply it as

a basis to conclude that all evidence from the defense was untrustworthy. It is more than reasonably likely that the jury misunderstood how appellant's non-cooperation related to its assessment of his competency to stand trial.

There was no foundation for the court to give BAJI No. 2.02. A trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 177), and has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." (*People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10, overruled on another ground in *People v. Flood* (1998) 18 Cal.4th 470, 485-487.) "It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference. [Citation]." (*People v. Hannon* (1977) 19 Cal.3d 588, 597.)

BAJI No. 2.02 should not be given in the absence of a showing that the "party" that offered weaker evidence in fact was in possession of, or had access to, the claimed "higher" evidence that it was withholding. (*People v. Marshall* (1996) 13 Cal.4th 799, 836, fn. 5, citing *People v. Taylor* (1977) 67 Cal.App.3d 403, 412; *People v. Von Villas* (1992) 10 Cal.App. 4th 201, 245, citing *People v. Saddler* (1979) 24 Cal.3d 671, 681 [instruction should not be given when it is impossible for the party to produce the evidence].)

Appellant's silence on the stand did not amount to a party who was offering evidence, as defined in the instruction. Appellant refused to be sworn and refused to answer questions – it can hardly be said that such silence was "offering evidence." More importantly, it was the prosecutor and not the defense who was the "party" who called appellant as a witness.

Compare this to a scenario where the defense called the defendant as a witness and the defendant testified that a doctor had found him or her a schizophrenic, while failing to introduce a medical record to which the defense had access stating contradictory findings by a doctor. BAJI No. 2.02 would then come into play. Nothing of this nature happened. The prosecutor's forcing appellant to the stand where he said nothing cannot be deemed the defense, as a "party," offering his silence as evidence.

The prosecutor also argued that the instruction pertained to appellant's non-responsiveness to questions during psychiatric examinations. (31ART 1103.) Here too, the foundation was not laid with respect to a "party offering weaker evidence" when that party had the power to provide stronger evidence. While the prosecutor in argument alluded to the psychiatric opinions of Doctors Strauss, Kalish, Vargas, Norum, and Javaid (*id.* at 1101), of these only Kalish, Norum and Vargas terminated psychiatric evaluations for appellant's non-response to questions. The testimony of Vargas, a prosecution witness, was not offered by the defense as a "party" and, therefore, BAJI No. 2.02 does not apply. As for Kalish and Norum, there was no foundation to conclude that appellant's response to questions during evaluation would have yielded higher evidence of his incompetence than that actually offered.

BAJI No. 2.02 requires that the evidence the party was supposed to have produced was "stronger or more satisfactory." (Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."]; *People v. Dole* (1898) 122 Cal.486, 493-494 [It must be shown that the party offered evidence of an inferior or lower class when that party could have produced evidence of

a higher class.].) In this case, there is no showing that appellant's testimony would have been stronger than the expert testimony the defense presented.

To warrant the instruction, the prosecutor should have been required to show it was within the power of the defense to produce more probative evidence of appellant's trial incompetence. The prosecution fell far short of this. In fact, the prosecution did not even show exactly what evidence the defense was supposed to have produced. Given the discussion of the instruction, it appears that the prosecution believed that it was within the power of defense counsel to have appellant testify as part of its case in chief – and to have him testify in a way that was helpful to the defense. (30ART 997-1000.) However, the prosecution did not say what it was the appellant could have said on the stand that would have been helpful.

At any rate, appellant did not desire to help defense counsel show that he was not competent to stand trial. Quite the contrary: appellant did all that he could to undermine trial counsel's efforts in this regard. In fact, appellant's intransigence, i.e., his refusal to talk to the psychiatrists or the court about his competence, actually was part of the defense – that appellant did not cooperate with counsel because his mental illness prevented him from doing so. Merely by taking the stand to testify helpfully for the defense as part of its case that appellant *could not* rationally assist counsel, appellant would have been offering evidence to the contrary, viz., that he *was* able to rationally assist counsel. While the prosecutor might have enjoyed seeing appellant in this Catch-22, it was not a scenario that could have yielded "more satisfactory evidence" (Evid. Code, § 412) of appellant's incompetency.

Perhaps the prosecution believed that if appellant testified he would have shown the jury that he could not understand the proceedings by acting overtly "crazy" or unable to understand the proceedings. In fact, the

prosecutor argued in closing that the jury should find that appellant was competent because appellant did not act incompetent on the stand and his repeated request for "effective assistance" showed acumen with respect to legal proceedings and his right to counsel. (31ART 1150.) However, appellant's ability to *understand* legal concepts, though a part of the *Dusky* test, was not at issue and appellant's case turned solely upon appellant's ability to rationally assist counsel. (*Dusky v. U.S.* (1960) 362 U.S. 402.)

The present situation is one where BAJI No. 2.02 simply does not apply. Ordinarily, it makes sense to presume that a witness has access to his or her mental state, so that when called to the stand it could be expected that the person would testify accurately about that mental state. Failure to do so could reasonably be taken to cast doubt on the remainder of the party's case. So, there are cases holding that where a defendant testifies on his own behalf about what happened during the crimes for which he is on trial, but is silent about other facts within his knowledge, the court can instruct the jury that it may draw a negative inference from that silence. (*People v. Richardson* (1978) 83 Cal.App.3d 853, 864, overruled on another ground in *Saddler, supra*, 24 Cal.3d 671, 682; see CALJIC No. 2.62 [Defendant Testifying – When Adverse Inference May Be Drawn]; see also *Williamson v. Superior Court of Los Angeles* (1978) 21 Cal.3d 829, 835-836, fn. 2; *Breland v. Traylor Engineering & Mfg. Co.* (1942) 52 Cal.App.2d 415, 426.) However, here it makes no sense to presume that the jury could learn anything about appellant's ability rationally to assist his attorneys from his own testimony. Rather, appellant's behavior had to be understood in light of the expert testimony in the case, putting it in the context of the rest of appellant's behavior with his lawyers and in the context of his psychological history.

BAJI No. 2.02 is not appropriately given where the defendant as to whom a doubt has been declared is not cooperating with his counsel during a competency trial. In this case, the defense was claiming that appellant's odd and indirect answers to the court's and the prosecutor's questions about his wishes to be found competent, were a symptom of his problems. By instructing the jury that they should distrust the defense's case because appellant did not himself testify in support of it, the court was in effect instructing the jury to conclude that appellant had not proved his case because appellant was simply voluntarily not cooperating.

F. Instructing the Jury with BAJI No. 2.02 Demands Reversal, Particularly in the Context of the Court's Remarks

Appellant shows that the error in reading BAJI was structural. Taken together with the trial court's intemperate remarks, it was also prejudicial error under any standard.

1. The Error was Structural

The error in reading BAJI No. 2.02 was structural. It stated that a party's presentation of weaker evidence when he had the ability to present stronger evidence cast doubt on the weaker evidence offered – which yet further raised appellant's burden of proof to establish incompetency to stand trial. The effect of that instruction provides yet another weight on the scale of why this Court should find structural error requiring reversal of the competency verdict without consideration of prejudice.

2. Any Prejudice Must be Assessed Using *Chapman*

This Court has not yet resolved whether the prejudice from instructional error at a competency trial is to be measured under *People v. Watson* (1956) 46 Cal.2d 818 or *Chapman v. California* (1967) 386 U.S. 18. (See *People v. Huggins* (2006) 38 Cal.4th 175, 193 [finding no error

assuming *Chapman* was standard without deciding issue].) Appellant urges that the correct standard is the standard articulated in *Chapman*, i.e., an error requires reversal unless the prosecution can show that it was harmless beyond a reasonable doubt.

Section 1368 proceedings are considered civil proceedings, generally governed by the rules of civil proceedings. (*People v. Lawley* (2002) 27 Cal.4th 102, 131, citing *People v. Skeirik* (1991) 229 Cal.App.3d 444, 455 ["Although it arises in the context of a criminal trial, a competency hearing is a special proceeding, governed generally by the rules applicable to civil proceedings."].) The standard of prejudice for the giving of an erroneous instruction in an ordinary civil case is essentially that of *Watson*: "Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' [Citations.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

This does not mean, however, that the *Watson* standard applies simply because a trial on the issue of competency is not a criminal proceeding. (See, e.g., *People v. Hurtado* (2002) 28 Cal.4th 1179, 1190-1194 [*Chapman* standard applicable to failure to instruct on element essential to commitment under Sexually Violent Predators Act, a civil proceeding].) The right to a jury trial in a competency proceeding, and the concomitant right to a properly instructed jury, may be only statutory (Pen. Code § 1369; *Samuel, supra,* 29 Cal.3d 489, 505), but a defendant's right not to be put to trial when he is more likely than not incompetent, is constitutional. (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 369.) "Indeed, the right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination. [Citation.]" (*Id.* at p. 354, fn. 4.) As such, even if a defendant does not have the full panoply of rights in a

competency trial, such a defendant is protected by principles of due process and right to a fair trial as articulated in the Fifth and Fourteenth Amendments to the United States Constitution. (See *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274-1275 [holding that *Chapman* applied when an erroneous instruction in a competency proceeding affected the burden of proof].) These Amendments protect a defendant's right to a properly instructed jury, and in particular protect a defendant from instructions which improperly shift the burden of proof to the defendant. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 526.)

One California decision explicitly has held that instructional errors in a competency trial should be assessed under the *Chapman* standard. (*Johnwell, supra,* 121 Cal.App.4th 1267, 1273-1274 [reviewing error in instructing jury at competency trial with CALJIC No. 2.01 regarding circumstantial evidence], citing *Cooper, supra*, 517 U.S. 348, 350, 369.) In other cases, courts in this state have assessed instructional errors during a competency proceeding under the *Watson* standard. (*People v. Marks* (2003) 31 Cal.4th 197 [instructional error in competency proceeding assessed under *Watson* standard, because the omitted instruction was not constitutionally based]; *People v. Mickle* (1991) 54 Cal.3d 140 [*Watson* error applied in case where the trial court never declared a doubt and no competency trial was required under either statutory or constitutional standards].) In *Huggins, supra*, this Court's majority opinion declined to state whether *Chapman* or *Watson* would apply to the claimed instructional error, while the dissent said that *Chapman* would apply. (*Huggins, supra,* 38 Cal.4th 175, 193, 258.)

Under prevailing United States Supreme Court precedent, where a claimant challenges an ambiguity in the instructions, the reviewing court must apply these principles: The question is "'whether the ailing instruction

by itself so infected the entire trial that the resulting conviction violates due process.'" (*Estelle v. McGuire*, 502 U.S. 62, 72, quoting *Cupp v. Naughten* (1973) 414 U.S. 141, 147.) Moreover, "'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. [Citation.]'" (*Boyde v. California* (1990) 494 U.S. 370, 378, quoting *Cupp, supra*, 414 U.S. 141, 146-147.) Finally, if the charge as a whole is ambiguous, the question is whether there is a "'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle, supra*, 502 U.S. 62, 72, quoting *Boyde, supra*, 494 U.S. 370, 380.)

Both this Court and the Court of Appeal have applied the principles of *Estelle* and *Boyde* to instructional errors at a competency trial. (See *Huggins, supra*, 38 Cal.4th 175, 192 [citing *Middleton v. McNeil* (2004) 541 U.S. 433, 437 for propositions in *Estelle* and *Boyde*]; *People v. Dunkle* (2005) 36 Cal.4th 861, 899; *People v. Jablonski* (2006) 37 Cal.4th 774, 809; *Johnwell, supra*, 121 Cal.App.4th 1267, 1274, fn. 5.)

3. The Error was Prejudicial

Taken together, the erroneous BAJI instruction and the trial judge's comments about appellant's behavior had the effect of confusing and misleading the jury, and suggesting that appellant's refusal to cooperate with his counsel meant that the rest of the case was weak. Without any evidence in the record, the instruction in effect told the jury that they should distrust appellant's case, which was based entirely on the testimony of experts, because appellant was non-cooperative on the stand. More seriously, it effectively resolved a key factual matter in the case, that is, it told the jury, especially when the instruction is taken together with the trial court's comments that appellant was competent and had chosen not to testify, that appellant had the ability to cooperate with the court and,

therefore with counsel, should he choose to do so. This was exactly the issue that was contested by the defense. This made it likely that the jury applied "the challenged instruction in a way that violates the constitution" (*Estelle*, *supra*, 502 U.S. 62, 72), thus "infecting the entire trial." (*Ibid.*)

Boyde, *supra*, instructs that the effect of the error must be viewed in the context of the whole charge. (494 U.S. 370, 378.) As such, the BAJI error must be seen in the context of the erroneous *Dusky* instruction which failed to inform the jury that appellant was not competent if he could not rationally assist counsel. In combination with that error, it is even more likely the jury applied BAJI No. 2.02 in an unconstitutional manner. First, jurors were misinformed that appellant had to show that he could not assist counsel, then they implicitly were told that he could assist counsel, and that his silence on the stand was simple recalcitrance.

The fact that BAJI No. 2.02 is phrased as conditional (i.e., "[i]f weaker and less satisfactory evidence. . . when stronger more satisfactory evidence is available. . .") does not assure that the jury at appellant's competency trial applied the instruction only if it concluded that the first part of the conditional was true. The prosecutor's argument, which made much of the instruction and the inference to be drawn, while inflaming the jurors' frustration toward appellant for his failure to answer questions on the stand, undoubtedly convinced the jurors that the instruction was key to its determination of whether appellant had met his burden of showing he was incompetent to stand trial. The situation was greatly aggravated by the remarks of Judge Levitt, especially the remark that appellant "chose" not to testify which signaled to the jury the court's view that appellant refused to testify because of some unexplained nefarious motive, not as a consequence

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of mental illness. The harm from the instruction was prejudicial under any standard.

* * * * *

V.

MULTIPLE INSTRUCTIONAL ERRORS DURING APPELLANT'S COMPETENCY TRIAL VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL AND REQUIRE A NEW COMPETENCY PROCEEDING

A. Introduction

Appellant showed above that erroneous instruction on the definition of competency and the constructive denial of counsel during appellant's competency proceeding violated appellant's constitutional rights and require reversal without consideration of prejudice. If this Court disagrees that the errors are structural, it must consider the effect of those errors, combined with additional instructional errors, in swaying the verdict actually rendered by the competency jury. In addition to the error in instruction with BAJI No. 2.02, explicated in Argument IV, the instructions at appellant's competency trial: (1) misstated the definition of competency to stand trial by omitting any reference to rationality; (2) painted a surreal picture of the relationship between a defendant and his counsel, especially once a doubt of competency has been declared; (3) allowed the prosecutor to portray Dr. Kalish as a "willfully false" witness to be distrusted; and (4) failed to check the jury's likely conjecture that appellant, if found incompetent, might go free.

These errors violated appellant's state and federal constitutional rights to due process and a fair trial, to a fair competency trial, to a properly instructed jury, to not be tried when incompetent, to present a defense, and to instructions that are properly balanced between the prosecution and defense; they also compromised his related rights to effective assistance of counsel, to present evidence, to confront and cross-examine witnesses, and to a reliable, non-arbitrary determination of guilt and penalty. (U.S. Const.,

5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15; *Pate v. Robinson* (1966) 383 U.S. 375, 386-387; *Dusky, supra,* 362 U.S. 402.)

B. The Jury Received an Erroneous Definition of Competence to Stand Trial, and it is More Than Reasonably Likely That the Jury Misunderstood the law and Misapplied it to the Evidence

Above, appellant focuses on a glaring omission by the trial court – it struck the term "rational" from the instruction it gave the jury on the test for trial competency – and shows that the error, when combined with other defects in CALJIC No. 4.10, violated due process so that reversal is required irrespective of any consideration of prejudice. Here, appellant explains how the erroneous instruction played out in *his* competency trial: it disguised from the jury the significance of the most hotly contested issue in the trial, and made it far easier for the prosecution to win its case on competency.

The focus of the competency trial was whether appellant's refusal to assist or communicate with counsel was a result of mental illness rendering him incapable of assisting counsel, or was simply a choice. The court's instructional error deprived the jurors of any meaningful basis to consider defense expert testimony drawing a distinction between a rational choice to reject counsel and an irrational one driven by mental illness. The flawed instruction gave the jury nothing from which to understand the significance of, and take into account, defense evidence that appellant, although capable of volition and a certain internal rigid consistency of logic, was not rationally evaluating reality and the choices before him related to cooperating with counsel and assisting counsel in preparing a defense. The jury thus was denied any means of understanding that the very *essence* of the question presented to them depended upon the existence of not only

factual understanding and raw volition, but also rational understanding and rational decision making.

Defense counsel's case focused on appellant's ability to cooperate rationally with an attorney to present a defense. (26ART 81.) All of appellant's experts addressed the issue. First, Dr. Javaid told the jury of appellant's diagnosis in 1983: chronic and severe major depression with psychotic features and auditory and visual hallucinations, a condition which would continue to deteriorate over time. (*Id.* at 270, 291.) Dr. Ebert then testified that as a result of his examinations and testing of appellant believed that appellant's "mental disease was so substantial at that time that it was dramatically interfering with his ability to think rationally and logically." (28ART 522-529.) Defense witness Dr. Norum opined, based on his observations and the materials he had reviewed, that appellant was incompetent to stand trial because he was unable to cooperate with counsel, make rational decisions on his own behalf, or assist an attorney in conducting his defense in a rational manner, because his mental illness caused him to be unwilling to do so. (30ART 1021.)

Dr. Kalish also testified that appellant's mental illness rendered him incapable of rationally evaluating his choice not to assist counsel. Kalish said that depression, paranoia, and a thought disorder combined to severely impair appellant's ability to relate to his attorney and to think clearly and assess the proceedings against him (27ART 347), which would effect his ability to relate to all attorneys. (*Id.* at 343-345.) In Kalish's opinion appellant lacked the capacity, due to his mental illness, to cooperate with counsel and rationally prepare a defense. (*Id.* at 362.) Appellant was capable of *volition* in choosing not to cooperate with his counsel, but was not capable of rationally evaluating that choice, or rationally relating to the attorney-client relationship, because of his impaired cognition and thought

disorder. (*Id.* at 362-365.) Even had appellant chosen to give counsel his full cooperation, his disordered thinking and impaired cognition alone still would render him incompetent to assist counsel. (*Id.* at 363-364.) That impaired cognition, separating process from consequence, and appellant's distrust and paranoia toward counsel, were the result of psychiatric illness and a thought disorder, and impaired his capacity to communicate with counsel regarding the case. (*Id.* at 382.) Kalish assessed appellant's ability to give counsel a "consistent rational and relevant account of motivational and external facts," and found appellant unable to do so because of his mental illness, expressed through both his distrust and paranoia and his obsession with picayune detail and tangential issues instead of the major issues in his case. (*Id.* at 381-382.) Even if appellant wanted to assist counsel, these impairments would have rendered him incompetent to communicate relevantly and rationally with counsel and assist in his defense. (*Id.* at 363-364.)

Dr. Kalish focused specifically on the *rationality* of appellant's thought process. Dr. Kalish testified that even though appellant's thinking on certain issues was "logical," because it showed the ability to put thoughts in a logical sequence, it was not "reasonable" when considered in context. (27ART 364-367.)[60] For example, the prosecutor tried to suggest appellant's apparent unconcern about a potential death sentence might stem from the absence of executions in California, but Kalish insisted that the possible sentence was something that a "rational person would place into the equation." (*Id.* at 469-470.) Thus, while appellant appeared to have a "logical and factual understanding" that the case could result in his

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[60]Kalish sought to explain how a person with a thought disorder can be logical yet not rational, but the trial court sustained the prosecutor's relevancy objection and barred the testimony. (27ART 365-366.)

execution, it was doubtful that he had "a rational appreciation, a reasoned appreciation" of that possible consequence. (*Id.* at 469-470.)

It is in this context that the prejudice from the erroneous *Dusky* instruction must be assessed. The test, under this standard, "is 'whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."' [Citations.] . . . 'To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.]" (*Flood, supra*, 18 Cal.4th 470, 494.) As the United States Supreme Court explained in *Sullivan v. Louisiana* (1993) 508 U.S. 275: "the question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks . . . to the basis on which 'the jury *actually rested* its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Id.* at p. 279; see *Johnwell, supra,* 121 Cal.App.4th 1267, 1278 [citing *Sullivan*].)

Using this analysis, the omission of the critical factor "rational" from the instruction was clearly prejudicial. As appellant explained in detail above, the prosecution repeatedly alluded to the *Dusky* standard that was to be applied without mention of the "rationality" requirement. The prosecutor repeatedly characterized the defendant as having to show that he was "able to assist" and "able to understand." (31ART 1142-1143.) He also stated that appellant's ability to assist could be impaired, but that to show incompetency, appellant had to show that had to be completely

"unable to assist." (*Id.* at 1144.) The prosecutor argued that appellant's statements on the stand demonstrated that he was fully *able* to assist an attorney, but not willing to assist his present attorney. (*Id.* at 1150.) Neither did Khoury's argument do anything to dispel the misinformation in the court's omission, or in the prosecution's reiteration of the incorrect standard. Khoury obviously did not notice the omission and alluded only to the rationality requirement one time in his argument, and failed to mention it in connection with the *Dusky* standard.

Using *People v. Aranda* (2012) 55 Cal.4th 342, as authority, appellant argued above that reversal without a showing of prejudice was required because the trial court *misinstructed*, rather than failed to instruct on the burden of proof. However, should this court view the error as the failure to instruct on aspects of the *Dusky* standard, i.e. on the "rationality" requirement, other parts of *Aranda* nevertheless provide guidance as *Aranda* also addressed how to evaluate prejudice under *Chapman* when a trial court has failed to instruct on the standard of proof. In *Aranda*, the trial court had failed to give the reasonable doubt instruction in connection with a charged gang offence, in violation of due process. The Court held that in:

> applying the *Chapman* standard to determine the prejudicial effect of the erroneous omission of the standard reasonable doubt instruction [the reviewing court] should evaluate the record as a whole – *but not rely upon its view of the overwhelming weight of the evidence supporting the verdict* -- to assess how the trial court's failure to satisfy its constitutional obligation to instruct on the prosecution's burden of proof beyond a reasonable doubt affected the jury's determination of guilt. If it can be said beyond a reasonable doubt that the jury must have found the defendant's guilt beyond a reasonable doubt, the error is harmless. If the reviewing court cannot draw this conclusion, reversal is required.

(*Id.* at p. 350, emphasis added.)

In this case, it cannot be said beyond a reasonable doubt that the jury's verdict relied upon the correct standard of proof. The only instruction the trial judge gave on the burden of proof was the defective instruction. Jurors are presumed to have followed the instructions given to them by the court. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

Aranda stated that arguments of counsel may factor into a prejudice analysis, noting there had been nothing in the closing arguments to mislead the jurors about the applicable standard. (*Aranda, supra,* 55 Cal.4th 342, 369.) Here, in contrast, the arguments of counsel support reversal because, as noted above, the prosecution's argument reenforced the court's error and the defense's did nothing to clear it up.

Before jury selection Levitt told the jury that a defendant was presumed mentally competent and that he was competent if he could rationally assist counsel.[61] However, no party addressed the rationality issue in jury selection; and, more importantly, immediately before he released the jury for deliberation, Levitt informed the jury that it previously had been instructed as to all the rules of law that were necessary to reach a verdict, and then gave the jury its final instructions. (31ART 1187-1190.) Thus the jury was led to believe that the predeliberation instructions were all the law they needed to decide the case, and they should ignore prior explications of the law. (See *People v. Vann* (1974) 12 Cal3d 220, 227 [reading burden of proof instruction before jury selection did not cure error in failing to instruct on prosecution's burden of proof in predeliberation

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[61]Levitt told the jury that a defendant is competent if ". . . he is capable of understanding the nature and purpose of the proceedings against him and if he comprehends his own status and condition in reference to such proceedings, and if he is able to assist his attorney in conducting his defense in a rational manner." (25ART 23.)

instructions]; *Aranda, supra*, 55 Cal.4th 342, 363-364, fn.11 [citing *Vann* for the same conclusion].)

In *People v. Mil* (2012) 53 Cal.4th 400, this Court explained how *Chapman* prejudice should be assessed where an erroneous instruction has omitted one or more elements of a crime:

> *Neder* instructs us to "conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless." (*Neder, supra,* 527 U.S. at p. 19, 119 S.Ct. 1827.) On the other hand, instructional error is harmless "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence." (*Id.* at p. 17, 119 S.Ct. 1827 [additional citation].) Our task, then, is to determine "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." (*Neder, supra,* at p. 19, 119 S.Ct. 1827; [citations].)

(*Id.* at p. 417.) In *Mil,* this Court warned that the reviewing court should not presume in support of the judgement the existence of any facts "the jury might reasonably infer from the evidence [citation]," stressing that its "task in analyzing prejudice from the instructional error is whether any rational factfinder could have come to the *opposite* conclusion." (*Id.* at p. 418, emphasis in original.)

Appellant easily meets the *Mil* test. Appellant has shown immediately above that the testimony of all of his experts went to appellant's ability rationally to consult with counsel. Dr. Kalish's testimony, in particular, made clear that whatever logical abilities appellant had, he was not able to assist counsel in a rational manner in the preparation of the defense. There was evidence in the record from which a properly

instructed juror could have concluded that appellant had shown by a preponderance that he was not competent to stand trial. It follows that the omission of the rationality factor was prejudicial requiring reversal of the competency verdict.

As to whether the trial court's provision of the insufficient, instruction arose to the level of constitutional error, the test is whether, "considered in the context of the instructions as a whole and the trial record[,] . . . 'there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the constitution." (*Estelle, supra,* 502 U.S. 62, 72, quoting *Boyde, supra,* 494 U.S. 370, 380.) Here, the "reasonable likelihood" standard is easily met because the erroneous instruction directly pertained to material disputed issues (i.e., whether appellant rationally could assist any attorney, whether appellant's non-cooperation with his lawyers was a reasonable exercise of his rights under the constitution or an irrational obsession to control decisions within the purview of appointed counsel), and because argument by counsel failed to compensate for the court's error.

C. The Jury Received Erroneous Instruction on *Marsden*, *Faretta*, *Frierson*, and the Respective Roles of a Defendant and his Counsel, and it is More Than Reasonably Likely That the Jury Misunderstood the law and Misapplied it to the Evidence

As explained in detail above, the trial court erroneously permitted the prosecutor to call DDA Ebert to the stand where Ebert misadvised the jury about the law under *Frierson*, *Marsden*, and *Faretta,* and the roles of a defendant and his lawyer, and then failed to instruct the jury on the correct law. Appellant argued that he need not show this error was prejudicial; but if he must, the burden is easily met.

The impact of Ebert's erroneous instruction scarcely can be exaggerated. The prosecutor's case strove to show that appellant's non-cooperation with counsel was nothing more than a protected assertion of his constitutional rights concerning representation and control of the case, which Russell and the court refused to heed. The unheard *Marsden* request to remove Russell loomed large in the prosecutor's cross-examination of Dr. Kalish, as he referred to Russell four times as the attorney appellant wanted to "get rid of." (28ART 555-564.) Then in argument, the prosecutor ridiculed Kalish's conclusion appellant could not work with any attorney. (31ART 1122-1129 [saying that Kalish made a "quantum leap" in saying appellant would "distrust all lawyers"]; *id.* at 1150 ["this is not a situation of someone who is not able to assist an attorney, it's someone who is simply not willing to assist the attorneys that he has now"].)

The prosecutor stressed that the law gave appellant, rather than Russell, decision-making control over the defense: "Dr. Kalish assumed that Mr. Waldon's desire to control the case was a symptom of paranoia despite the fact that it was brought out by Deputy District Attorney Ebert's testimony a defendant retains the constitutional right to make the fundamental decisions in this case even where he is represented by an attorney." (31ART 1124.) The jury never learned the correct law – that *Frierson* was completely inapposite where Russell wanted to present a defense over appellant's objection, rather than the other way round (where an attorney withholds the defendant's sole defense at guilt in order to enhance the case at the penalty phase of a capital case).

Nor did the jury learn that the law gives defense counsel a duty to investigate all plausible defenses – even over the defendant's objection. (See, e.g., *Strickland v. Washington* (1984) 466 U.S. 668, 691 "[[C]ounsel has a duty to make reasonable investigations or to make a reasonable

decision that makes particular investigations unnecessary."]; *In re Lucas* (2004) 33 Cal.4th 682, 722 [same]; *Silva v. Woodford*, (9th Cir 2002) 279 F.3d 825, 840 [duty to investigate is virtually absolute regardless of client's expressed wishes]; *Williamson v. Ward* (10th Cir. 1997) 110 F.3d 1508, 1517 [counsel had duty to investigate client's mental health problems in guilt phase]; *Fisher v. Gibson* (10th Cir. 2002) 282 F.3d 1283, 1291, citing *Nguyen v. Reynolds* (1997) 131 F.3d 1340, 1347 [in order to make the adversarial process meaningful, counsel has a duty to investigate all reasonable lines of defense].)

The jury never learned that it is the attorney, not the client, who has the power to make strategic and tactical decisions in choosing the defense and deciding what evidence to present, what witnesses to call, etc. (See, e.g, *Wainwright v. Sykes* (1977) 433 U.S. 72, 93-94 (Burger, C.J., concurring) [placing ultimate responsibility for strategic and tactical decisions with the lawyer, without need for consultation, in part, because of nature of trial process]; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1162 ["By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to counsel's complete control of defense strategies and tactics. [Citations.]"].)

Nor did it learn that under the law a defendant's self-representation prerogative is suspended after a doubt has been declared of the defendant's trial competency (making appellant's desire for self-representation after May 22, 1987, completely irrelevant, here); that during a competency proceeding after the declaration of a doubt, defense counsel assumes an expanded role and the defendant *loses* control he otherwise has over a decision to exercise any of the limited "fundamental" rights personal to the defendant; that under *Marsden*, even outside of the trial competency context a defendant cannot "fire" his court-appointed lawyer unless the court finds

ineffective assistance or a severe conflict that makes ineffective assistance likely to occur; or that under then-current law (see *People v. Burnett* (1987) 188 Cal.App.3d 1314, 1325) Kalish was justified, rather than biased, in using a variable yardstick to assess appellant's competency to represent himself, depending on the seriousness and complexity of the case.

The trial court had two choices. It could have limited the evidence so that questions concerning appellant's request for self-representation, the unheard *Marsden* motion, the respective roles of appellant and his counsel, the difference between competency to stand trial and competency for self-representation under then-existing California law, and the limited circumstances where *Frierson* comes into play, never reached the jury. Alternatively, once evidence on these issues was admitted, the trial court could have fulfilled its obligation to instruct accurately on the law pertaining to facts presented. Instead, the trial court did neither, permitting the prosecutor to call Ebert to give incomplete and erroneous instruction on the law.

The trial court erred and there is more than a reasonable likelihood that the jury misunderstood the law, and thus misinterpreted the evidence on whether appellant could rationally assist his counsel, and whether his unwillingness to cooperate with counsel was caused by his mental incapacity. (*Estelle, supra,* 502 U.S. 62, 72, citing *Boyde, supra,* 494 U.S. 370, 380.) The trial court breached its duty to instruct on the general principles of law governing the case, that is, "those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citations.]" (*People v. St. Martin* (1970) 1 Cal.3d 524, 531; *Breverman, supra*, 19 Cal.4th 142, 155.) Nothing in the arguments of counsel mended the error – indeed, the prosecutor's argument made it even more likely that the jury misunderstood

the governing law. (Compare *People v. Kelly* (1992) 1 Cal.4th 495, 526-527; *Huggins, supra*, 38 Cal.4th 175, 193.) There is much more than a "reasonable likelihood" (*Estelle, supra*, 502 U.S. 62, 72) that the jury misunderstood the law.

D. The Trial Court Erred in Refusing to Instruct the Jury on the Consequences of a Verdict of Legal Incompetency

Appellant's counsel filed a motion to inform the jury of the effect of a verdict of incompetence to stand trial. (5CT 849.) The proposed instruction, an adaptation of CALJIC No. 4.01, stated that

> If the jury returns a verdict of "incompetence to stand trial" it does not mean that the defendant will be released from custody as it would were he to be found "not guilty" of the criminal act itself. Instead, criminal proceedings shall remain suspended until the person becomes mentally competent and the court shall order that, in the meantime, the defendant shall be delivered by the Sheriff to a state hospital for the care and treatment of the mentally disordered which will promote the defendant's speedy restoration of mental competence. Upon restoration of competence, criminal proceedings shall resume.

(5CT 852.) The trial court refused to give the instruction. Appellant is aware that this Court has rejected a claim that it is error to fail to give such an instruction in *Dunkle, supra*, 36 Cal.4th 861, 896, *People v. Turner* (2004) 34 Cal.4th 406, 433, and *Marks, supra*, 31 Cal.4th 197, 221, but, as shown below, these decisions are not dispositive. The trial court's error in refusing to give an appropriate, requested instruction violated appellant's state law right to an accurate instruction addressing a pertinent issue in the trial and his state and federal constitutional rights to due process and a fair trial, requiring reversal of the competency verdict. (Cal. Const., art. I, § 7 & 15; U.S. Const., 14th Amend.)

In a criminal trial, the trial court may charge the jury "on any points of law pertinent to the issues, if requested by either party." (Pen. Code, §

1093, subd. (f).) "If the court thinks it correct and pertinent, it must be given; if not, it must be refused." (Pen. Code, § 1127; see *People v. Barajas* (2004) 120 Cal.App.4th 787, 791.) As a general rule, a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. (*People v. Gurule* (2002) 28 Cal.4th 557, 559.) Similar rules apply in civil trials. (See Code Civ. Proc., § 607a; *Soule, supra,* 8 Cal.4th 548, 572.)

Appellant's request met the three fundamental requisites for an instruction: (1) it dealt with the law, not with facts; (2) it set forth a point of law that was relevant to the issues; (3) it stated the law correctly. (See 5 Witkin, Cal. Crim. Law 3d (2000), Crim. Trial, § 606, p. 864.) The requested instruction made two relevant main points. It told the jury that if the verdict was "incompetent to stand trial," appellant would not be released from custody, and the criminal prosecution against him would be postponed until he regained his competence. The instruction also elaborated these principles by informing the jury where appellant would be confined and that upon restoration of competence, "criminal proceedings shall resume."

The instruction also was relevant and important to the reliability of the jury's decision-making about appellant's competence to stand trial. It apparently was patterned after CALJIC No. 4.01 "Effect of Verdict of Not Guilty by Reason of Insanity," which "is intended to aid the defense by telling the jury not to find the defendant sane out of a concern that otherwise he would be improperly released from custody." (*Kelly, supra*, 1 Cal.4th 495, 538 [citing with approval *People v. Moore* (1985) 166 Cal.App.3d 540, 548-557, and *People v. Dennis* (1985) 169 Cal.App.3d 1135, 1140-1141, which reversed convictions because the defendants were denied no-release instructions even though the instructions they proffered were inaccurate].) The instruction ultimately contained in CALJIC No.

4.01 was found necessary in a sanity trial because jurors, who "are unaware of the postverdict disposition of an insane defendant," could "assume the defendant will walk free just as would an accused found not guilty for other reasons." (*Moore*, *supra*, 166 Cal.App.3d 540, 554.)

The same principle should apply here. There was a risk that jurors, unfamiliar with competency proceedings, would mistakenly assume that appellant would or could be released from jail upon a finding that he was incompetent to stand trial and, therefore, might vote for a verdict of competence, even if they believed the evidence proved him incompetent, to guarantee that he remained in custody. It would be understandable if jurors were concerned that appellant, whom they knew was charged with murder, not be released back into their community. The defense instruction would have eliminated the danger that the jury's consideration of mistaken, extraneous factors may have resulted in an erroneous verdict by informing the jury that, in accordance with California law, appellant would remain confined while he was incompetent to stand trial and would be tried upon restoration of his competence. Defense counsel decided that the risk was serious enough to be addressed, and he drafted a clear, correct, and succinct instruction in response. The trial court abused its discretion in denying the special instruction. (See *Moore*, *supra*, 166 Cal.App.3d 540, 555, citing *People v. Ramos* (1984) 37 Cal.3d 136, 159 [applying this Court's ruling that the defendant should be allowed to assess the relative cost and benefit of a cautionary instruction on the consequences of a verdict of not guilty by reason of insanity].)

In a lay person's mind, punishment likely equates with jail or prison, i.e., confinement. Having been told by the prosecutor that it should not let appellant "get away with" faking mental illness as he had done when obtaining discharge from the military (31ART 1110), the jurors reasonably

might have worried that appellant was malingering or attempting to trick them into believing he was incompetent. (30ART 939-940.) Over defense counsel's objection, the jury learned that the case involved charges of murder and a potential death sentence. (27ART 399, 407-409.) The jury knew this was a high-stakes prosecution. The prosecutor's malingering argument encouraged the jurors to speculate about whether a verdict of incompetence would insulate appellant from the death penalty or other severe punishment by ending the prosecution with his release – this made giving the defense instruction styled on CALJIC No. 4.10 even more imperative.

The trial court's refusal to give the requested instruction also abridged appellant's due process right, under the Fourteenth Amendment, to inform the jury that he would not be released upon a finding that he was incompetent to stand trial. The principle requiring the instruction was set forth in *Simmons v. South Carolina* (1994) 512 U.S. 154 (plur. opn. of Blackmun, J.), and reiterated in *Shafer v. South Carolina* (2001) 532 U.S. 36, and *Kelly v. South Carolina* (2002) 534 U.S. 246. In those cases, the United States Supreme Court held that "where a defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." (*Simmons, supra*, 512 U.S. 154, 156; accord, *Shafer, supra*, 532 U.S. 36, 39; *Kelly, supra*, 534 U.S. 246, 248 [all reversing death sentences where trial courts denied requested parole-ineligibility instructions].)

The High Court's rationale was straightforward: When a jury may consider future dangerousness in determining the appropriate sentence, a defendant who is eligible for parole reasonably will be viewed as a greater threat to society than a defendant who will not be released, and without

accurate information about the actual duration of a defendant's prison sentence, the jury is left to speculate about the possibility of his release in assessing his potential for future dangerousness. (*Simmons, supra*, 512 U.S. 154, 163, 165.) To avoid the risk that the jury might impose a death sentence it otherwise did not think appropriate in order to prevent the defendant's release, the defendant is entitled to give the jury legally accurate information about his parole ineligibility. (*Id.* at pp. 168-169.)

In applying the *Simmons* rule in *Kelly, supra*, 534 U.S. 246, the High Court made clear that the defendant's right to inform the jury about his parole ineligibility arose: (1) even when the jury did not inquire or demonstrate confusion about the issue (*Id.* at p. 255); (2) when evidence tended to prove his dangerousness in the future even if it also supported other inferences (*Id.* at p. 254); and (3) when the issue of future dangerousness was raised impliedly rather than directly by the prosecutor's argument. (*Id.* at p. 255.)

Although the *Simmons* rule arose in the context of the question of future dangerousness at a capital-sentencing trial, its central teaching applies to appellant's competency trial. In *Simmons*, the High Court acknowledged the reality that jurors will speculate about whether the defendants they are judging will be released back into society. Certainly, that issue is front and center when a jury is deciding between life and death and future dangerousness is part of the evidentiary equation. As the Court of Appeal recognized in *Moore, supra*, 166 Cal.App.3d 540, 544, similar speculation occurs about the consequences of the verdict in a sanity trial, which precludes punishment after a trial and a finding of guilt.

Logic and common sense dictate that the same speculation likely occurs about the consequences of the verdict in a competency trial, which interrupts the trial and postpones any possible punishment. There is no

reason to think that jurors are any more certain, or any less concerned, about what happens to a defendant after an incompetency verdict than after a sentence of life imprisonment. As explained above, the prosecutor here put the question of appellant's release at issue with his argument that appellant was malingering and the jury should not let him "get away with" feigning mental incapacity. The inference that appellant was seeking to avoid punishment (viz., the "consequences" of his malfeasance) was implied. Just as the defendants in *Simmons, Shafer* and *Kelly* had a due process right to give their juries "truthful information" about their ineligibility for parole, appellant had a due process right to rebut the prosecutor's charge with accurate information explaining that he would be not released from custody upon a finding that he was incompetent and that the criminal charges he was facing would remain undiminished. The trial court's refusal to give the requested instruction violated appellant's right to due process under the Fourteenth Amendment.[62]

The trial court's error in refusing to give appellant's requested instruction about the consequences of finding that he was incompetent to stand trial requires reversal of all the verdicts. In reversing for analogous claims, the United States Supreme Court in *Simmons, Shafer* and *Kelly* and the California Courts of Appeal in *Moore* and *Dennis* did not engage in harmless error review or indicate that such a prejudice analysis would be appropriate. Rather, all these courts reversed the relevant judgment and remanded for further proceedings not inconsistent with their opinions. (*Simmons, supra*, 512 U.S. 154, 171; *Shafer, supra*, 532 U.S. 36, 55; *Kelly,*

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[62]Appellant is aware that in *Turner, supra*, 34 Cal.4th 406, 434, this Court, in dictum, rejected a due process claim based on analogy to *Simmons, Shafer* and *Kelly* to an instruction on the consequences of an incompetency verdict, but urges reconsideration of this holding for the reasons explained herein.

supra, 534 U.S. 246, 258; *Moore, supra*, 166 Cal.App.3d 540, 557; *Dennis, supra*, 169 Cal.App.3d 1135, 1141.) Consistent with these cases, this Court should find that the error in refusing to instruct on the consequences of an incompetency verdict requires reversal per se.

But even if a traditional harmless error analysis were undertaken, reversal still would be warranted whether the error is considered under the state standard (*Watson, supra*, 46 Cal.2d 818, 836) or the federal constitutional standard (*Chapman, supra*, 386 U.S. 18, 24). The evidence at the competency trial did not overwhelmingly point to a competency verdict, but instead was hotly disputed on the issue of whether appellant could rationally assist counsel. Where, as here, the evidence was so disputed, the jury's concern about appellant's possible release likely influenced the deliberations toward a verdict of competency. Accordingly, reversal of the entire judgment is required.

E. The Jury Received Erroneous Instruction CALJIC No. 2.21 Suggesting Appellant's key Expert Witness Should be Distrusted

In a hearing immediately before the start of appellant's 1368 trial, Khoury objected to the decision to read former CALJIC No. 2.21. The objection was overruled, and CALJIC No. 2.21 was read, as follows:

> A witness willfully false in one material part of his testimony is to be distrusted in others. You may reject that whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you shall believe the probability of truth favors his testimony in other particulars.

(5CT 899; 31ART 1092.) The judge denied a motion for new trial that the instruction was improperly given. (7CT 1297-1309; 1423.)

Giving the instruction was error because there was no evidence that any witness lied. The general rule is that in a criminal case the trial court

must instruct on the "principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty 'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' [Citations]." (*People v. Mobley* (1999) 72 Cal.App.4th 761, 781, citing *Saddler, supra*, 24 Cal.3d 671, 681.) Which jury instructions are given is determined by the evidence and must be responsive to the issues presented in the case. (*People v. Carmen* (1951) 36 Cal.2d 768, 773, disapproved on another ground in *People v. Flannel* (1979) 25 Cal.3d 668.) It follows that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.

California courts have held that former CALJIC No. 2.21 is a correct statement of the law when there is an evidentiary basis for it. (*People v. Allison* (1989) 48 Cal.3d 879, 895.) By its explicit terms former CALJIC No. 2.21 provides that if a witness is willfully false then jurors may infer that the witness' entire testimony is false. This instruction should be given only when there is evidence that a witness has been willfully false. In this case, there was no such evidence and it was error to give the instruction.

> The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence [citations omitted] and has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." (*People v. Satchel* (1971) 6 Cal.3d 28, 33, fn. 10, 98 Cal.Rptr. 33, 36, 489 P.2d 1361, 1364.) "It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference. [Citations omitted].

(*Saddler, supra*, 24 Cal.App.3d 671, 681.)

In opposing the defense motion for a new trial for error in giving this instruction, the prosecutor argued that the instruction properly was given because expert witnesses had given conflicting evidence, so that this case was a "battle of the experts." (7CT 1378.) It cited *People v. Lescallett* (1981) 123 Cal.App.3d 487, 492, overruled on another ground in *Allison*, *supra*, 48 Cal.3d 879, 895, as authority for the giving of the instruction. In *Lescallett*, the defense claimed that CALJIC No. 2.21 was improperly given because there was no evidence that witnesses had fabricated testimony. The Court of Appeal disagreed, holding that conflicting evidence about a factual matter left open the inference that one or the other of the witnesses were "willfully false." (*Ibid.*) Thus, *Lescallet* stands not for the proposition that any conflict in the evidence warrants instructing with CALJIC No. 2.21, but for the more limited premise that it is proper to give the instruction when a conflict in the evidence is the basis for a conclusion that someone was "willfully false" on the stand.

There is no such evidence in this case. The experts on appellant's mental condition disagreed and, indeed, disagreed radically about appellant's competence to stand trial. However, there was never so much as a whisper that any of the expert witnesses was "willfully false." Since there was no conflicting evidence from which a juror could reasonably conclude that a witness was lying, the instruction was improperly given. In this case, giving the instruction was prejudicial under any standard.

It is clear that the prosecution could prevail in this matter only by convincing the jury its experts were more reliable than those of the defense. The prosecutor in his argument focused on what he perceived to be errors in the testimony of defense experts. (See, e.g., 31ART 1111 [pointing out numerous sources of error in Dr. Kalish's testimony].) It would be quite easy for the jury, when given CALCIC No. 2.21, to assume wrongly that

there was a factual basis for giving the instruction, conclude that defense expert witnesses were willfully false, and therefore reject their entire testimony. Since there was no evidence in the record to support the giving of CALCIC No. 2.21 and since it is reasonably likely the jury was confused by such an instruction to the detriment of appellant, the error requires reversal. (*Estelle*, *supra*, 502 U.S. 62, 72; *Boyde*, *supra*, 494 U.S. 370, 380.)

* * * * *

VI.

OTHER NON-INSTRUCTIONAL ERRORS MARRED THE COMPETENCY TRIAL

A. Introduction

There were other non-instructional errors at the competency trial that prevented the defense from presenting its case and which, together and separately, denied appellant his rights to confront witnesses, to counsel, to present his case, to confront witnesses, and his due process right to a fair trial, as well as his state statutory rights under Penal Code section 1138. (U.S. Const., 5th, 6th & 14th Amends; Cal. Const., art. I, §§ 7 & 15.) The errors also violated appellant's federal constitutional right and his state constitutional and statutory rights not to be tried while incompetent, and his federal constitutional right to an adequate state procedure protecting the right not to be tried while incompetent. (*Pate v. Robinson* (1966) 383 U.S. 375, 378; Pen. Code, § 1367, subd. (a).)

B. The Trial Court Erred in Refusing to Continue the Competency Proceeding Until Defense Counsel Russell Could be Available

1. Factual Background

On October 30, 1986, Judge Hoffman inquired of defense counsel Geraldine Russell about appointment of second counsel to assist her. Russell said she was seeking someone with penalty trial experience. Hoffman urged her to seek appointment of a research attorney to help with motions work pending the retention of second trial counsel for the trial itself, and said that he would recommend to Judge Greer that Greer appoint a research attorney as "a temporary second counsel," as an "interim measure," so that motion work could move forward. (7ART 5-7.) It was in this context that on December 16, 1986, Greer appointed Charles Khoury as second counsel. (30CT 6462.)

On June 17, 1987, after Judge Levitt was assigned to appellant's competency trial, defense counsel filed argument and evidence in support of a challenge of Levitt for cause. (4CT 609-787; 23ART 1).) On June 18, 1987, Levitt set the section 1368 trial for July 15, 1987. (22ART 3.) On July 10, 1987, Judge Hammer denied the disqualification motion. (4CT 811-812.) On July 13, defense counsel petitioned the Court of Appeal for a writ of mandate, which was denied on July 14, 1987. (47CT 10432-10452.) The same date, the defense filed a motion to continue the section 1368 trial for six weeks, citing both the pendency of the motion to disqualify Levitt and Russell's unavailability due to her participation in another death penalty trial. (4CT 807-810.) On July 15, Russell filed a supplemental declaration supporting her motion to continue, further detailing her conflict, and Khoury's unpreparedness to try this case on his own. (*Id.* at 813-817.)

The parties appeared before Levitt on July 15. (24ART 1.) The prosecutor did not oppose the continuance. He stated that he would prefer to continue the case so that he could complete the trial of a pending case, if he was unsuccessful in opposing the continuance of that case. (*Id.* at 1-2.) Russell anticipated being done with her trial by August 14. Levitt continued the trial to August 17. (*Id.* at 11-12.) On July 27, the prosecutor filed a memorandum indicating an intention to compel appellant to testify at the 1368 trial. (4CT 818-826.) On August 11, 1987, defense counsel filed an *in limine* motion to resolve the issue of whether appellant could be called at trial by the prosecution. (*Id.* at 835-844.)

On August 6, appellant's counsel filed a motion to continue the August 17 trial date because Russell still was occupied with her death penalty trial and likely would be so through the end of the month. (4CT 829-831.) The motion reiterated that Khoury was brought in as a research assistant, not as a trial litigator. (*Id.* at 829-831.) The prosecutor responded

not in opposition, but simply stated his availability for trial in October, 1987. (*Id.* at 832-833.)

The parties appeared before Judge Levitt on the August 17, 1987 trial date. Russell reported that she still was in trial, having just rested in the guilt phase, and anticipated that the other case would run into early September. The prosecutor stated he had nothing to add to his written response. Levitt then said: "I think it is inordinately improper to continue the case to the latter part of October, and that is what would be the result[,]" observing that "Mr. Khoury is available." (25ART 1-2.) Russell pointed out that Khoury was not on the court's list of counsel qualified for appointment in capital cases, that a continuance would cause no prejudice to any party since there were no witness problems, that she would be available within a month, and it was only the prosecutor's own conflicts which would push the trial date another month into October.

Judge Levitt refused to grant the continuance, stating:

> There is always prejudice to the system of justice when a case is continued. It is not supposed to be continued. Mr. Khoury, on the 17th of June, 1987, certified under penalty of perjury [in the motion to disqualify me] that he would likely have the primary responsibility for any trial under Penal Code section 1368 issues in this case. I am not influenced by the fact that he is not on the panel.

(*Id.* at 2-3.) When Khoury sought to explain that his June 17 statement regarding trying the case "was made with the idea that if push came to shove and we found ourselves with no possibility of continuance, I better be ready to go[,]" Levitt dismissed this assertion, commenting, "That is fine. I don't read it that way. I think the words speak for themselves[,]" and denied the continuance. (*Id.* at 2-3.) The competency trial commenced that day, without Russell.

Khoury's June 17, 1987, declaration referenced by Levitt stated as follows:

> WHEREFORE, as defense counsel who likely will have primary responsibility for any trial of the Penal Code 1368 issues in this case in view of Ms. Russell's position as chief trial counsel in the presently ongoing death penalty trial of *People v. Troiani*, I respectfully request the disqualification and removal of Judge Jack Levitt from this case for cause pursuant to sections 170.1 and 170.3 of the Code of Civil Procedure.

(4CT 626, original emphasis.) Precisely as Khoury characterized it, it was a recognition that, "if push comes to shove" on the question of continuance, Khoury would be compelled to try the case, and *not* an assertion of preparedness or qualification to do so without the assistance of Russell as lead counsel.

2. The Judge's Denial of the Continuance Request was an Abuse of Discretion

Levitt abused his discretion in denying a reasonable continuance to permit appellant's lead counsel, an experienced trial attorney, to conduct the competency trial. Although "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality[,] . . . [t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. [Citations.]" (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589-590.) Instead, "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (*Id.* at p. 590; *People v. Howard* (1992) 1 Cal.4th 1132, 1172 [quoting same].)

In this case, Levitt acted unreasonably in denying appellant's motion for a continuance. There was no good reason to deny the motion other than his desire to proceed forthwith to trial, as Levitt asserted erroneously that

"[t]here is always prejudice to the system of justice when a case is continued." (25ART 2.) That comment reflects the very arbitrariness which this Court and others have taught is inappropriate when weighing a request for continuance.

"Although the expediency of judicial resolution is a valid concern and the scheduling of trials is an important element of the administration of justice, we must bear in mind that the ultimate goal of our system is justice." (*U.S. v. Clinger* (4th Cir. 1982) 681 F.2d 221, 223.) "Simply put, the trial court's duty to conduct judicial business efficiently cannot trump defendant's right to present his defense in a manner he desires, particularly where accommodating him in the two instances here would have had only a slight impact on efficiency." (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) "[A] scheduled trial date should never become such an overarching end that it results in the erosion of the defendant's right to a fair trial." (*U.S. v. Uptain* (5th Cir. 1976) 531 F.2d 1281, 1291.) "The interest in ensuring the defendant a fair, adversarial proceeding assumes great significance in criminal cases, so the normal reluctance of a trial judge to grant continuances should give way when there is a significant potential that counsel's performance will be adversely affected." (*U.S. v. Rodgers* (7th Cir. 1985) 755 F.2d 533, 540, fn.4.) "If forcing a defendant to an early trial date substantially impairs his ability to effectively present evidence to rebut the prosecution's case or to establish defenses, then pursuit of the goal of expeditiousness is far more detrimental to our common purposes in the criminal justice system than the delay of a few days or weeks that may be sought." (*Uptain, supra*, 531 F.2d 1281, 1291; *U.S. v. Moya-Gomez* (7th Cir. 1988) 860 F.2d 706.) The discretion to determine "whether a continuance should be granted . . . may not be exercised so as to deprive the

defendant or his attorney of a reasonable opportunity to prepare." (*People v. Sakarias* (2000) 22 Cal.4th 596, 646.)

The United States Supreme Court has explained:

> It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob. [¶] As the court said in *Commonwealth v. O'Keefe*, (1929) 298 Pa. 169, 173, 148 A. 73, 74: [¶] "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case . . ."

(*Powell v. Alabama* (1932) 287 U.S. 45, 59.)

The party seeking a continuance of course has the burden to show good cause. (*People v. Wilson* (1965) 235 Cal.App.2d 266.) Here the cause offered was unquestionably "good cause," and the prosecution did not oppose the request nor challenge defense assertions that no witness problems or other prejudice would be caused to the prosecution. In reviewing a motion for continuance, a trial judge must consider not only the benefit which the moving party anticipates, but also the likelihood that such benefit will result, the burden on witnesses, jurors and the court and above all whether substantial justice will be accomplished or defeated by the granting of the motion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 972.) In *Samayoa,* this Court held that it was not an abuse of discretion to deny a continuance in

the midst of trial to prepare for a cross examination. (*Ibid.*) Here, the trial had not even begun and no such disruption would have occurred. The delay sought was not extreme. The prior continuance was relatively short, and mandatory in any event due to the pending ruling on the challenge to Levitt for cause. The prosecutor voiced no objection and offered the dates upon which he would be available in October. None of the factors this Court mentioned in *Samayoa, supra*, as weighing in favor of denial of a continuance were present.

More recently, in *People v. Jacobs* (2007) 156 Cal.App.4th 728, the Court of Appeal reversed where the trial court denied a continuance requested so that the defendant could be sentenced by the trial judge, stating "[u]nless there is some authority saying that I shouldn't do it today, I'm going to do it today which is the day it's scheduled." (*Id.* at p. 732.) The trial court in *Jacobs* referred to "a jail overcrowding issue which I always do my best to address whenever possible and this is one of those times." (*Id.* at pp. 732-733.) Noting that the defendant did not have a *right* to be sentenced by the trial judge, the Court of Appeal nevertheless reversed and remanded for resentencing, adopting the reasoning of *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, that "abuse of discretion" includes not only "whimsical, arbitrary, or capricious" judicial actions. The court explained, "[t]he discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where *no reasonable basis for the action is shown.*" (*Jacobs, supra*, 156 Cal.App.4th 728, 737, emphasis added, quoting from *City of Sacramento, supra*, 207 Cal.App.3d 1287, 1297.) Finding that the established and preferred practice was for the trial judge to perform sentencing, the *Jacobs* court reversed.

The court in *Jacobs* stated that although the judge's concern about jail overcrowding precluded his action from being arbitrary or capricious, the judge nonetheless abused his discretion by weighing judicial administration more heavily than the defendant's due process right to the established, preferred procedure of sentencing by his trial judge:

> Here, the undisputed record reveals that Judge Champlin specifically set the matter so that it would be reassigned to his department for sentencing. That is what Judge Champlin expected. So did defendant, who asserted his claim to that expectation to Judge Kroyer at the first opportunity. And the prosecutor agreed. But it was all to no avail, trumped by a single fact - a "jail overcrowding issue." Whether jail overcrowding is an "administrative problem" or the "convenience of the court" within the literal language of *Strunk*, it is at least analogous. And by itself it should not be, and we hold cannot be, enough to overcome the recognized preferred procedure that defendant be sentenced by the trial judge-especially when the trial judge was available on the following Monday, necessitating a continuance of all of two days. [¶] Defendant contends that he "could have received a more lenient sentence" if he had been sentenced to the lower term instead of the middle term on one or both of the auto burglary convictions or to concurrent sentences instead of consecutive ones, or if his prior strike had been stricken. He further submits that if he had been sentenced by Judge Champlin a "more lenient result [was] reasonably probable because of [his] relative youth, the two auto burglaries were committed within what was essentially a single criminal episode, and . . . this was essentially a property crime that did not result in injury to any person." While there is perhaps an element of speculation in this, it is, we conclude, sufficient to support the conclusion that a denial of a two-day continuance prejudiced defendant.

(*Jacobs, supra*, 156 Cal.App.4th 728, 740.)

This case presents circumstances similar to those in *Jacobs*. Certainly, it is the established and preferred practice that a defendant's appointed lead counsel be permitted to conduct his trial. That becomes

particularly acute under these circumstances where second counsel was unqualified for capital trial work and was appointed specifically for the purpose of researching motions with the understanding he would be replaced as second counsel with an experienced trial attorney. Defendant was deprived of the assistance of his experienced trial attorney solely to meet the trial court's misplaced concern that "[t]here is always prejudice to the system of justice when a case is continued" and the judge's gut feeling that cases are not "supposed to be" continued. (25ART 2-3.)

The trial court's unreasonable refusal to continue the trial until Russell was available was prejudicial under either *Chapman v. California* 386 U.S. 18, 24 or *People v. Watson* (1956) 46 Cal.2d 818, 836. By refusing to continue the trial and insisting that it start that very day with Khoury, who was unqualified, representing appellant, Levitt stood in the way of counsel assisting in appellant's defense. Appellant's expert, Kalish, testified at length about appellant's inability to cooperate with Russell. (See, e.g., 27ART 428-438) Because Russell was absent, the jury was invited to assume the worst about her effectiveness – in other words, to assume she justifiably had earned appellant's individual disdain. Such assumption would weigh heavily where, as here, appellant's dissatisfaction with counsel and desire for substitute counsel became the centerpiece of the prosecutor's case for competency, as explained above.

Further, as the competency proceeding played out it became clear that Khoury's lack of trial experience really mattered. He inadvertently permitted the jury to be mis-instructed on the definition of competency, and he struggled with the technical requirements for having key exhibits admitted into evidence. (See, e.g., 5MH 6 [Khoury mistakenly believed he had shown that Court Exhibit 1, appellant's Navy psychiatric file, could be admitted as a medical record].) It is likely that having the inexperienced

Khoury rather than Russell, his lead counsel, as defense counsel in the competency trial made a difference in this case.

C. The Trial Court Erred in Allowing the Jury to Learn of the Charges, Special Circumstance Allegations, and Potential Penalty Defendant was Facing

The trial court erred under Evidence Code section 352 in permitting the prosecutor to impeach Dr. Mark Kalish by asking a question that informed the jury appellant was charged with murder and special circumstances, and was facing the death penalty, because the probative value of the impeachment outweighed the risk that the information would inflame the jury to fear that appellant was a dangerous criminal who would go unpunished unless found competent to stand trial.

The prosecutor's theory on the admissibility of the evidence was that Dr. Kalish's opinion was skewed by a bias against criminal defendants representing themselves at all, but most especially in cases involving serious charges and the possibility of the penalty of death and that Kalish had used a higher standard for competency when he first evaluated him because appellant was facing the death penalty. (26ART 77-79.) As defense counsel pointed out in objecting to the inquiry, Kalish's views on appellant's *mental capacity to represent himself* bore little, if any, relevance to the inquiry during the competency to stand trial proceeding, and evidence on the subject was likely to mislead and confuse the jury. (27ART 389-390.) Khoury argued that even if evidence that appellant was charged with murder and special circumstances and facing the death penalty had some relevance, it should be excluded under Evidence Code section 352 balancing because of the danger it would influence the jury in its determination of competency to stand trial. (27ART 392.) Judge Levitt overruled the objection, and the prosecution was permitted to ask Kalish

whether he was aware that appellant "was charged with a number of crimes, including murder and faced the possibility of the death penalty . . ." (*Id.* at 409.) Kalish stated that he knew appellant was so charged. (*Ibid.*)

Implicit in the prosecutor's theory of relevance was the prosecutor's view that all defendants competent to stand trial were competent to represent themselves, and that a psychiatrist appointed by the court to assess a defendant's competency to waive counsel was forbidden from considering the seriousness of the charges and anticipated complexity of the trial. However, the California law in effect in 1987, when the competency trial took place, simply did not support the prosecutor's premise – several California cases (e.g., *People v. Burnett* (1987) 188 Cal.App.3d 1314, 1325) did weigh in the seriousness of the charges and the complexity of the trial and proceedings in determining whether the defendant was competent to "waive counsel" and to do so with "eyes wide open."[63]

Thus, the prosecutor's purported "impeachment" of Kalish as a scofflaw whose opinion should be disbelieved was a red herring. Rather than steering carefully through the shoals of unsettled law, the trial court took the bait, and gave the prosecutor a field day to flaunt one side of the case law split as the divine truth and impugn Kalish as being "biased" for following the opposing legal view.

Under the evidence code, it is permissible to attack a witness's credibility by showing his "bias, interest, or other motive to lie." (Evid. Code, § 780, subd. (f); *Greene v. McElroy* (1959) 360 U.S. 474, 496.) However, the admission of such evidence still is subject to Evidence Code section 352, which allows the court to exclude evidence if its probative

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[63]As this Court held in *People v. Taylor* (2009) 47 Cal.4th 850, 873-874, it was only upon the High Court's decision in *Godinez* in 1993 that the line of case law put forth in *Burnett* lost the status of "good law."

value is substantially outweighed by its prejudicial effect. (*Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274; *People v. Knox* (1979) 95 Cal.App.3d 420, 435.) Here, the scale tipped decidedly in favor of excluding the evidence. Its relevance to impeaching Kalish was weak because the effect on Kalish's opinion on appellant's competency to *waive counsel* and represent himself was unconnected to the jury's question on competency to stand trial. Given the shifting landscape in 1987 on governing legal principles, the trial court had a duty to parse out the factual issues and focus the jury on the sole question before it. Instead, the court gave the prosecutor carte blanche to muddle up the facts, because it wanted to guarantee that the prosecutor would have a "fair trial" and dispel the "false aura of credibility or truthfulness or persuasiveness" of Dr. Kalish as a witness. (27ART 392.)

Reversal is required whether the error is considered under the state standard (*Watson, supra*, 46 Cal.2d 818, 836) or the federal constitutional standard (*Chapman, supra*, 386 U.S. 18, 24). The error improperly undercut Kalish's opinion, in a case where the defense evidence was highly dependent upon expert testimony. The error allowed the jury to learn that appellant was charged with very serious crimes – something that was irrelevant to its deliberations, but which likely influenced the jury against appellant. Moreover, as discussed above, the court failed to instruct the jury that if it found appellant incompetent he would not be released. The prejudice in allowing the jury to learn that appellant was charged with capital crimes was compounded by this error: the jury knew that appellant had been charged, but had no assurance that if it found him incompetent that he would not go free. Reversal of the entire judgment is required.

D. The Trial Court Erred in Response to the Prosecutor's Reference to an Attempted Escape by Appellant When Cross-examining Dr. Kalish

As explained immediately above, the prosecutor, with the trial court's permission, elicited the fact that appellant was facing murder charges and the death penalty. (27ART 409.) Shortly thereafter, the prosecutor played again upon the jury's fears by telling it, through use of a leading question to Dr. Kalish, that appellant was a security risk in the jail because he had attempted an escape. The trial court denied a timely motion for mistrial, gave an inadequate admonition to the jury, and permitted the prosecutor to resume questioning with another reference to appellant as a "security risk." The injection of this inflammatory information was reversible error.

On direct examination, Dr. Kalish testified that appellant did not cooperate with him, although Kalish advised appellant that his cooperation would further appellant's stated goal of representing himself, and that appellant "had to be brought down" with the aid of sheriff deputies, "which is very unusual." (27ART 348.) In cross-examining Dr. Kalish, the prosecutor asked, "Were you aware that Mr. Waldon was considered a security risk because of an attempt to escape from the jail?" (*Id.* at 449.) Khoury immediately requested a sidebar, and in chambers requested a mistrial, arguing that although the question might have some marginal relevance, its prejudicial impact rendered its introduction highly improper and injurious to appellant. (*Id.* at 450-451.) The prosecutor responded that Kalish had assigned some significance to the fact that appellant had been brought down by two deputies, interpreting that as a sign of appellant's reluctance to be evaluated. (*Id.* at 451.) Khoury responded that the thrust of the doctor's testimony was that it was unusual for a subject to be brought down against his will if he does not wish to be evaluated, and that the

manner of bringing him down was of no significance; in any event, this was a minor and tangential part of the doctor's findings, so that the prejudice of planting the thought of appellant being an escape risk in the jurors' minds far outweighed any probative value. (*Id.* at 451-452.) The trial court denied the mistrial motion and the Evidence Code section 352 motion, had the prosecutor restate the question to include the words "security risk" without mention of an attempted escape, and admonished the jury to disregard the previous question and answer. (*Id.* at 454-455, 465.) The prosecutor then asked: "Dr. Kalish, were you aware at the time Mr. Waldon was brought down to you on that first occasion by the two deputies that because of his having been considered to be a security risk, jail procedures and policies required he be accompanied by two deputies in his movements within the jail?" The answer was "No." (*Id.* at 465.)

Slipping the reference to an escape attempt into this line of questioning served no probative purpose more significant than the impermissible one of suggesting that appellant was a dangerous criminal. The trial court's purported cure of striking the prosecutor's improper question and admonishing the jury to disregard the reference to escape was but an ineffective band-aid which could not cure the harm. The jurors had heard it, were not going to forget it, and were likely to assign it some significance.

Nothing in Kalish's testimony rendered relevant the prejudicial allegation that appellant had attempted to escape from the jail. The comment about appellant having been "brought down" for the interview was but an aside – Kalish had other direct evidence of appellant's uncooperativeness with being examined through appellant's own statements over two days' of evaluation. Clearly there was no basis for informing the

jury of an alleged *escape* attempt, an inflammatory fact unnecessary to the inference the prosecutor sought to draw from the presence of the deputies.

The prosecutor revealed to the court, in arguing the propriety of this question, that there were in fact *two* bases for appellant's security status; not only the escape attempt but also a *protective* concern because he had been assaulted by other inmates. The prosecutor argued that he should be able to introduce evidence of that assault, by another client of his trial counsel's, and argue that it was relevant to the depression, mistrust and estrangement from counsel that Kalish took as evidence of mental disease. (27ART 456.) But the prosecutor gratuitously inserted into his question *not* that alternative basis for appellant's security status, but the wholly irrelevant and inflammatory escape allegation. The prosecutor had to know that his introduction of the alleged escape attempt would be objectionable as irrelevant or at best subject to exclusion under Evidence Code section 352. Yet, rather than seek a ruling out of the presence of the jury, he injected the allegation into the proceedings and planted the inflammatory escape reference in the jurors' minds, all the time knowing that the specific reason for appellant's special security status was irrelevant.

The Court of Appeal has held:

> [P]rosecutive zeal and honesty in belief of guilt are not a substitute for the orderly, lawful and constitutional processes and guarantees. The law, in its wisdom, has seen fit to surround those accused of crime with certain rights and privileges. Among them are the privilege against self-incrimination, the presumption of innocence, the right of the accused to remain silent on advice of counsel, and the right not to be found guilty except upon a finding of a jury that the offense has been proved beyond a reasonable doubt. Prosecuting officials have no right to weaken these and other protective constitutional devices. No doubt some prosecuting officials feel restive because of the necessity of proceeding step by step in the manner provided by law in the handling of

> prosecutions, and seek to substitute their fixed belief in the guilt of the accused for the proof required by law. Prosecuting those accused of crime if often a tedious and tiresome process. But this is the process required by law, and short cuts cannot be tolerated. Constitutional guarantees are not arbitrary pronouncements adopted to protect the guilty, and to make it difficult for sincere hardworking prosecutors. They are the result of hundreds of years of struggle in fighting governmental oppression. They are necessary to protect the innocent. If an accused, even a guilty accused, cannot be convicted except by a violation of these principles, then he should not and cannot be lawfully convicted.

(*People v. Talle* (1952) 111 Cal.App.2d 650, 678.) By injecting the inflammatory and irrelevant specter of "escape" into the case the prosecutor committed misconduct, and the court abused its discretion in denying the timely motion for mistrial. It is immaterial whether this was done in bad faith. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Appellant's counsel properly made a timely mistrial motion on the basis of this misconduct. A mistrial should be granted where any misconduct or irregularity prevents any party from receiving a fair trial and is incurable by admonition. (*People v. Hines* (1997) 15 Cal.4th 997, 1038, citing *People v. Woodberry* (1970) 10 Cal.App.3d 695, 708.)

Improper remarks by a prosecutor can so infect a sentencing proceeding with unfairness as to violate the Due Process Clause of the Fourteenth Amendment, because future dangerousness is something jurors tend naturally to think about. (See, e.g., *Darden v. Wainwright* (1986) 477 U.S. 168; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637.) Some penalty phase jurors worry about parole being possible even under a sentence of life without possibility of parole. (See, e.g., *People v. Steele* (2002) 27 Cal.4th 1230, 1259 [two trial jurors stated in post-trial declaration that they believed defendant might be released on parole someday even with a life without parole sentence].) By analogy, it is safe to say that at least some of the

jurors in appellant's competency proceeding would have been concerned that appellant, if found incompetent to stand trial, would not be safely confined from society. The prosecutor's improper reference to an escape attempt invited the jury to speculate about the possibility that appellant could escape from a mental health facility if found legally incompetent.

The court's admonition could not un-ring the proverbial bell in the jurors' mind. (*People v. Brooks* (1979) 88 Cal.App.3d 180, 185-187 [reversal where trial court allowed irrelevant testimony regarding threats to a witness and where prosecutor could not prove defendant had anything to do with threats and error not cured by court's specific cautionary instructions].) While jurors are presumed to follow the court's admonitions and instructions (*People v. Hill* (1992) 3 Cal.4th 959, 1011, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), here "the misconduct is of such a character that it cannot be purged of its harmful effect by an admonition, it will be considered as a possible ground for reversal in cases where the jury has been admonished [citations][.]" (*People v. Ford* (1948) 89 Cal.App.2d 467, 470.) "[F]acts that have been impressed upon the minds of jurors which are calculated to materially influence their consideration of the issues cannot be forgotten or dismissed at the mere direction of a court." (*People v. Roof* (1963) 216 Cal.App.2d 222, 225.) Such was the case here.

Further, the trial court erred under Evidence Code section 352 in permitting the prosecutor, after the court ordered the previous question stricken and admonished the jury to disregard it, to ask Dr. Kalish whether he was aware that defendant was a "security risk" in the jail. It would have sufficed to have referred to appellant's placement on "security status" that required an escort when moving within the jail – it also would have been

more accurate, when the justification for the security designation was both protective and preventive.

The error was prejudicial under either *Chapman* or *Watson*. The defense evidence that appellant was unable to assist his attorney was stronger than the prosecution's evidence to the contrary. However, the jury's concern about the appellant's supposed dangerousness likely influenced the deliberations toward a verdict of competency. The error was compounded by other errors, viz., failing to instruct the jury about the consequences of a verdict of incompetence, and permitting the jury to learn about appellant's capital crimes. Accordingly, reversal of the entire judgment is required.

E. The Trial Court Erred in Limiting Khoury's Examination of DDA Ebert

Appellant has explained above that it was error to permit the testimony of DDA Michael Ebert on the meaning of *People v. Frierson* (1985) 39 Cal.3d 803. He has also explained that the error was structural and, if not structural, constituted improper jury instruction demanding reversal. In addition, it was error for the trial court to prevent defense counsel from correcting Ebert's statements about *Frierson* in cross-examination.

During cross-examination, Khoury asked Ebert what the fundamental decisions were under *Frierson*. Ebert stated that one of the areas was whether a defendant should be permitted to present a mental defense. (30ART 1033.) Khoury attempted to ask Ebert what a defense attorney should do if he believed that his client is mentally ill. The court sustained objections that the question was irrelevant and speculative. Immediately thereafter, Khoury asked whether a prima facie incompetent defendant had the right to make fundamental decisions. The prosecution's

objections were again sustained. Finally, Khouy asked whether *Frierson* dealt with the "dilemma of a mentally ill defendant then making choices in a criminal trial." The prosecution's speculation objection was again sustained. (*Ibid.*)

Khoury also sought to make the jury aware in closing argument that a defendant's control over decisions was entirely different in competency proceedings, so that *Frierson* was inapplicable to this case, attempting to read from *People v. Samuel* (1981) 29 Cal.3d 489. (31ART 1171.) The prosecutor objected this was "improper argument," and Levitt sustained the objection. (*Ibid.*) Khoury attempted to read to the jury from *People v. Deere* (1991) 41 Cal.3d 353. The trial judge again sustained the prosecutor's objection, stating: "I will inform the jurors that I instruct the jury as to the law, not the attorney. And this isn't proper, not part of the case and is not based on evidence." (31ART 1172.)

It was error to restrict defense cross-examination and closing argument on the *Frierson* issue. Appellant has argued above that it was error to admit DDA Ebert's testimony on *Frierson*, which was false and misleading. However, this having been permitted, the defendant had a right to clarify the confusion through cross-examination and argument. Clarification of the *Frierson* issue was central to the defense rebutting the prosecution's assertion that appellant's problems were limited to his current counsel, with whom he had a simple disagreement. Restriction of cross-examination on the issue denied appellant his rights to a fair trial and due process, including the right to present his defense, under the Fifth and Fourteenth Amendments (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678) and the right to present closing argument to the trier of fact. (*Herring v. New York* (1975) 422 U.S. 853, 856-862). In addition, the restrictions violated

appellant's due process right not to be tried while incompetent and to an adequate state procedure which protected appellant's right not to be tried while incompetent. (*Pate, supra*, 383 U.S. 375, 385-386.) The evidence the defense sought to elicit would have dispelled misinformation about the key issue in the case. Without this evidence the jury was likely misled about the issue and found appellant competent when they otherwise would not have. As such, the error was prejudicial.

F. The Trial Court Erred in Limiting Khoury's Examination of Expert Witnesses

The trial court limited the examination of expert witnesses, Dr. Javaid and Dr. Bruce Ebert, in the following ways: Dr. Javaid was not allowed to state his opinion about whether in 1983 (at the time of Javaid's examination) appellant would not have been able to assist his attorney had he been facing criminal charges. (26ART 276-277.) Although Javaid had reviewed Dr. Kalish's report, he was also not permitted to testify whether appellant was suffering from the same mental illness at the time of trial that he had in 1983 and 1984. (*Id.* at 277-278.) Finally, Khoury was not permitted to elicit Javaid's testimony about whether appellant had the same symptoms as Kalish observed. (*Id.* at 278.) In each of these instances, the trial court held that the evidence was not relevant. (*Id.* at 277, 278.) The trial court also held that the question about the similarity between the symptoms Javaid observed and those of Kalish called for hearsay (*id.* at 278) and that Javaid's opinion about whether appellant was still suffering from the same mental illness was improper. (*Id.* at 277.)

Also on relevance grounds, the trial court did not permit appellant to elicit from Dr. Bruce Ebert (the Air Force psychologist who did psychological testing on appellant and wrote a report) his diagnosis of appellant in 1983. The trial court's reason for the ruling was that Ebert had

not put a diagnosis of appellant into the report he prepared in 1983,[64] only what Ebert put in his report at the time of the evaluation was relevant, and what he independently diagnosed was irrelevant. (28ART 535-536.) The trial judge also denied Khoury's request to elicit evidence of what individuals with test results like appellant would have been diagnosed with. (*Id.* at 537-539.) Finally, Dr. Ebert was not permitted to state whether or not appellant would have been mentally competent to stand trial in 1983. (*Id.* at 541.)

Only relevant evidence is admissible. (Evid. Code, § 350.) An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including a ruling concerning the relevance of evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) However, if the exclusion of evidence denies a defendant his right to present a defense, federal due process is implicated. (*Chambers*, *supra*, 410 U.S. 284, 302-303.)

The trial court erred in holding that the information appellant sought was irrelevant and/or improper. The evidence of other professional opinions about appellant's inability to assist counsel were relevant to bolster the testimony that appellant was not able to assist counsel, within the meaning of the definition of trial competency. The opinions of doctors who saw appellant in 1983 and 1984 showed that appellant's problems were not

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[64]Dr. Ebert's report was part of Court Exhibit No. 1, a 149 page document consisting of the record of appellant's psychiatric treatment in the Navy which was marked as an exhibit but not admitted into evidence. (26ART 262.) Page 88 of that exhibit is the report of Dr. Ebert. That report does not contain a diagnosis of appellant. However, it does state that individuals with similar test results as appellant's are often "diagnosed as schizo-affective, manic-depressed or major depressive episode." Appellant will request that the exhibit be transferred to this Court at the appropriate time.

counterfeited for his competency trial, but were long-standing. They were also relevant to show that appellant suffered from a mental illness that had not gotten better. The trial court erred in its assertion that Ebert's opinion was not relevant because he did not offer it in 1983. Ebert's opinion about appellant's diagnosis was also relevant because it showed the duration of appellant's problems.

The restriction on cross-examination denied appellant his rights to a fair trial and due process, including the right to present his defense, under the Fifth and Fourteenth Amendments. In addition, it violated appellant's due process right not to be tried while incompetent and to an adequate state procedure which protected appellant's right not to be tried while incompetent. (*Pate, supra*, 383 U.S. 375, 385-386.) The error was prejudicial under any prejudice standard because it is reasonably probable that the outcome would have been different had Khoury been permitted to examine the experts on the numerous relevant areas that the trial court erroneously prohibited. The prosecution sought to undermine Kalish's testimony by asserting that Kalish had not had extensive contact with appellant. The inability of appellant's counsel to support Kalish's testimony with expert evidence of appellant's long-standing problems influenced the deliberations toward a verdict of competency. Accordingly, reversal is required.

G. The Trial Court Erred in Overruling Counsel's Objections to the Prosecution's Misrepresentations Concerning the Trial Date

In closing argument, the prosecution argued that the jury should distrust the defense evidence of incompetence because Kalish expressed a doubt about appellant's competence only on May 22, 1987, a mere 10 days before the trial date of June 1. This was misconduct since the prosecution

knew full well that the trial never would have proceeded on the June 1 date. The misconduct requires reversal.

During the prosecutor's cross-examination of Dr. Kalish, he prosecution elicited testimony that Kalish had developed concerns about appellant's ability to stand trial after a hearing on April 30, 1987, which Kalish did not express until a hearing on May 22, 1987. (28A RT 575-576.) At the end of the competency trial, the prosecution offered the minute orders of previous proceedings into evidence (30ART 910-911), asserting that they were relevant to show there had been no doubts raised about his competency prior to May 22, 1987. Levitt overruled Khoury's objection to the admission of the minute orders (*Id.* at 1006), and the parties stipulated that there was no mention of competency to stand trial in any of the minute orders until May 22, 1987, when the proceedings were suspended. Included in the stipulation was a statement that on October 22, 1986, the date for appellant's criminal trial was set for June 1, 1987. (*Id.* at 1042-1044.)

Not made part of the stipulation was the following information relevant to whether appellant's trial would actually begin on June 1:

On April 1, 1987, the defense filed numerous pretrial motions. (1CT 223-2CT 369.) The deadline for the prosecution to reply to the motions was May 15. (1CT 123.) On May 1, the prosecution filed a request to continue the deadline for its response, to continue the trial readiness date, and to determine a trial date. In that request, the prosecution asserted that the June 1 trial date was not realistic. It stated that Russell was involved in another capital case, which was to go to trial in mid-May. (*Id.* at 513-514.) It also observed that if appellant were to be granted the right to represent himself, appellant could choose to "request appointment of co-counsel or advisory counsel," and that "any attorney so appointed is likely to require additional time to prepare." (*Id.* at 514.)

It was also not part of the stipulation that Russell had addressed Zumwalt at a hearing on May 8 and told her that although the trial was set for June 1, "[i]t was never contemplated that we would actually go then, it was a convenience to track the case. If I don't have a stay granted next week I will be starting a four to six month capital trial on May 18." (13ART 13.) Russell stated that she would not be available for June 1, and that if she were relieved because of the time, a new lawyer would need at least six months to get ready. (*Ibid.*) At a hearing on that same day, Judge Richard Haden declined to take a time waiver from the defendant because of the matters pending before Zumwalt (i.e., appellant's *Marsden* and *Faretta* motions). (15ART 2.)

Also not made part of the stipulation was the information about the trial readiness conference: A trial readiness conference date had been set for May 22, 1987. (1CT 78.) However, on that date the readiness conference was taken off calender. (3CT 591.)

Finally, it was not part of the stipulation that the prosecution did not file a response to the defense motions and filed no pretrial motions of its own.

In closing argument at the competency trial, the prosecutor argued that the jury should distrust the defense competency case because Kalish did not express a doubt about appellant's competency until days before the trial was to begin:

> I think it's particularly significant, too, in considering that that doubt was ultimately expressed and these proceedings commenced to *determine his competency just ten days before the date which had been established for trial of the criminal case way back on October the 20th of 1986.* We go clear till May the 22nd and then ten days before that trial date this supposed doubt about his competency comes up.

(31ART 1133-1134, emphasis added.) Khoury objected. He explained that the trial date was not imminent:

> Your honor, Mr. Patrick [the prosecutor] in his argument mentioned that the trial date was eminent [*sic*] when Mr. Waldon's when the issue of Mr. Waldon's competence came up. As a matter of fact, the minutes of this case, of course, will show, that there was no such eminence [*sic*] of the trial date because the motions had not been heard and there was no possibility that the trial could proceed on the date that Mr. Patrick was alluding to, if he alluded to a date or that it was eminent [*sic*] at all. There was no possibility of eminence [*sic*] in fact.

(*Id.* at 1151.) Khoury asked: "Mr. Patrick's statement should be either in the alternative stricken about the eminence [*sic*] of the trial date, or we should have – be able to state the truth, which is that there was no possibility of this case going to trial before the motions were filed and, therefore, there was no eminent [*sic*] trial date." (*Ibid.*)

The prosecution argued that appellant had filed a motion to go pro per and "soon after that filed a statement with the court requesting that all motions on file be withdrawn." (31ART 1151-1152.) He stated that there was no certainty that there would be motions, and noted that he had issued subpoenas for June 1. (*Id.* at 1152.) Khoury asserted that the only possible way that it would have gone to trial without motions was if appellant represented himself, on which there had been no hearing. (*Ibid.*) He thought that if appellant represented himself he would have his own agenda, and would have his own motions. (*Id.* at 1153.) The prosecutor observed that the request to continue the trial date was denied, so that it was at least a possibility that they would go to trial. (*Ibid.*) The trial court overruled Khoury's objections. He stated: "All right. I think the record is correct. Mr. Patrick indicated that there was a trial date eminent [*sic*], and that's

what there was so I'm not going to strike it. We will proceed from here." (*Id.* at 1154.)

In fact, DDA Patrick misinformed the trial court on the issue of appellant filing a motion to withdraw all previous motions. At a hearing on April 17, 1987, before Zumwalt, the judge stated that she would *not* file appellant's motion to withdraw the motions. (13ART 18.)

The prosecution's argument was misconduct. The prosecution may argue all reasonable inferences, and while it has a broad range within which to argue the facts and the law, a prosecutor "may not mislead the jury." (*People v. Daggett* (1990) 225 Cal.App.3d 751, 758.) The defense has the obligation to seek an admonition if it believes the prosecution has over-stepped his bounds. (*People v. Visciotti* (1992) 2 Cal.4th 1, 79.) However, once the misconduct has been pointed out, "[t]he trial judge has the primary duty to curb prosecution misconduct, either by admonition or, where the damage is too great for cure, by ordering a mistrial." (Witkin & Epstein, Cal. Crim. Law (3d ed. 2000) Crim.Trial § 571(4), p. 817.) In evaluating claims of misconduct in final argument the court looks at how the statements could have been understood by a reasonable juror viewed in the context of the entire argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522, citing *People v. Lucas* (1995) 12 Cal.4th 415, 475.) The question is also whether there is a reasonable likelihood the jury construed or applied any of the comments in an objectionable fashion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.)

Here, it is clear that the prosecution knew that it was well nigh impossible that appellant's trial would begin on June 1. First, the trial readiness hearing had been taken off calender. According to the rules of court in effect in 1987, a trial readiness conference was a requirement prior

to trial.[65] Since there had been no readiness conference, it was unlikely there would be a trial on June 1. Morever, the prosecutor was present at the hearing where Russell told the court that the trial date was not a real one because she would be in another trial and that the June 1 date was solely on the books as a tracking device.

The prosecutor could not have genuinely believed that the trial would begin on June 1 because appellant might win his motion to represent himself, and then withdraw the motions. As of May 22, the hearing on appellant's motion to represent himself was still going on – and was unlikely to be resolved by June 1. Also, the prosecutor knew that appellant had not been permitted to file a motion to withdraw his motions – something of which he neglected to tell the court. He also knew that appellant, if indeed he was permitted to represent himself, was unlikely to go to trial without asking for time to get ready. Recall that it was the prosecution who stated in its motion to continue its filing deadline that if appellant were permitted to represent himself, he would want advisory counsel who would need additional time to get ready. Finally, the prosecutor knew that *he* was not ready to start trial since he had filed no motions.

Under these circumstances it was simple misrepresentation – and misconduct – to suggest that June 1 was a firm trial date, and to imply that defense was attempting to get around that date with a last minute maneuver. The defense offered the trial judge two easy solutions to correct the

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[65]The rule stated: "A readiness conference *shall* be held within one to fourteen days before the date set for trial. Trial counsel shall appear and be prepared to discuss the case and determine whether the case can be disposed of without trial. The prosecuting attorney shall have the authority to dispose of the case, and the defendant shall be present in court." (Cal. Rules of Court, rule 227.6 (1987 ed.), emphasis added.)

11misconduct: Either inform the jury that the trial date was not imminent, or allow the defendant to put on additional evidence showing that neither party anticipated that the trial would start on June 1. Yet, the trial judge refused to do either, allowing the misinformation to stand.

The misconduct was prejudicial under any standard of prejudice. The prosecution's argument that the defense case could not be trusted because their expert was dishonest or manipulating the court system by declaring a doubt just before trial began fit right in with its argument that the defendant was malingering. The evidence supporting the defense case that appellant was mentally incompetent to be tried was strong and consistent, and the unwarranted focus on malingering influenced the verdict towards competency. As such, reversal is required.

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