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No. S025520 - CAPITAL CASE

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

BILLY RAY WALDON A.K.A. N. I. SEQUOYAH,
Defendant and Appellant.

San Diego County Superior Court, Case No. CR82986
The Honorable David M. Gill, Judge

THIRD SUPPLEMENTAL RESPONDENT'S BRIEF

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ARGUMENT

JUDGE EDWARDS HAD NO BASIS TO DECLARE A DOUBT UNDER SECTION 1368 BASED SOLELY ON HIS REVIEW OF, AND DISAGREEMENT WITH THE EARLIER COMPETENCY DETERMINATIONS

In his third supplemental opening brief, Waldon contends that Judge Edwards, who was assigned to hear a related discovery matter at the request of the trial judge, violated Waldon's due process rights by failing to declare a doubt as to Waldon's competence to stand trial. (3 Supp. AOB 4-15.) A second competency hearing was not required because Judge Edwards's review of previous mental health reports and testimony was not new evidence or substantially changed circumstances warranting a new competency hearing.

The decision whether to order a competency hearing rests within the trial court's discretion, and that decision may be disturbed on appeal only where a doubt as to mental competence appears as a matter of law, or where there is an abuse of discretion. (*People v. Woodruff* (2018) 5 Cal.5th 697, 609.) When the trial court is presented with "substantial evidence of present mental incompetence," the court must order a competency hearing under section 1368. (*Ibid.*) Substantial evidence for the purpose of section 1368 is evidence that raises a reasonable or bona fide doubt as to competence. (*People v. Rodas* (2018) 6 Cal.5th 219, 231 (*Rodas*).) "[T]he evidence must bear on the defendant's competency to stand trial, rather than simply establish the existence of a mental illness that could conceivably affect his ability to understand the proceedings or assist counsel." (*People v. Ghobrial* (2018) 5 Cal.5th 250, 270.)

"Because the decision whether to order a competency hearing "is for the discretion of the trial judge," we will not reverse it on appeal unless "a doubt as to [mental competence] may be said to appear as a matter of law or where there is an abuse of discretion." ([*People v.*] *Pennington* [(1967) 66 Cal.2d 508, 518].) Only where the court is presented with substantial evidence of mental incompetence is a defendant "entitled to a section 1368 hearing as a matter of right." (*Ibid.*)" (*People v. Mickel* (2016) 2 Cal.5th 181, 201-202, emphasis added.)

" 'Once a defendant has been found competent to stand trial, a second competency hearing is required only if the evidence discloses a substantial change of circumstances or new evidence is presented casting serious doubt on the validity of the prior finding of the defendant's competence.' [Citations.]" (*People v. Buenrostro* (2018) 6 Cal.5th 367, 409 (*Buenrostro*); see also *People v. Mendoza* (2016) 62 Cal.4th 856, 884 (*Mendoza*).)

A. The prior competency determinations and Judge Edward's conclusion that further inquiry into Waldon's competence was required

1. Waldon was found competent to stand trial and competent to represent himself

In 1986, Waldon was arrested and charged with the 1985 murders of Dawn Ellerman, Erin Ellerman, and Charles Wells, as well as multiple other related and unrelated crimes. (1 CT 73-77.) In September 1987, after a three-week competency trial, a jury found Waldon competent to stand trial. (5 CT 822.)

Before the proceedings were suspended under section 1368 to determine Waldon's competence to stand trial, Waldon had

filed both *Marsden*[1] and *Faretta*[2] motions. After he was found competent to stand trial, Judge Zumwalt heard those motions in February and March 1988. (39A RT 1-38; 40A RT 39-47, 55-114; 41A RT 115-188.) Judge Zumwalt denied both the *Marsden* motion and the motion for self- representation, finding Waldon incapable of voluntarily exercising an informed choice to waive counsel. (8 CT 1572-1575.)

Following the denial of Waldon's *Marsden* and *Faretta* motions, the trial court denied defense counsel Geraldine Russell's motion to be relieved as counsel. (8 CT 183-1587; 48A RT 530-534.)

Both the prosecution and Waldon filed petitions for writ of mandate challenging the trial court's denial of the *Marsden* and *Faretta* motions. Russell filed a petition for writ of mandate challenging the denial of her motion to be relieved. In September 1988, after consolidating the various proceedings, the Court of Appeal declined to address the denial of the *Faretta/Marsden* motions, but ordered the trial court to relieve Russell and to appoint new lead counsel. (See 10 CT 1920-1933.)

In February 1989, the court appointed counsel for the limited purpose of presenting Waldon's new motion for self-representation. (66A RT 9-15.)

In June 1989, the case was assigned for all purposes to Judge Boyle. (79A-2 RT 1-2.) After a November 1989 hearing, Judge Boyle granted Waldon's motion for self-representation,

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[1] *People v. Marsden* (1970) 2 Cal.3d 118.

[2] *Faretta v. California* (1975) 422 U.S. 806.

finding his waiver of counsel was intelligent and knowing and that Waldon was competent to waive counsel. (84A RT 64; see also RB at 175-188.)

2. Judge Edwards, assigned to hear a discovery dispute between Waldon and his former attorney, attempts to reopen the inquiry into Waldon's competence

In January 1990, after Judge Boyle resigned from the bench, the matter was reassigned to Judge Gill for all purposes. (90A RT 1; 15 CT 3185.)

In June 1990, Judge Greer (who appears to have been one of the section 987.9 judges considering defense funding requests) signed an order directing Russell to turn over defense files still in her possession, but Russell refused. (1 RT 202-204; see 14 CT 2968 [order], 2969-2975 [Russell memorandum of law].) Judge Gill concluded he should not be involved in a dispute between a former attorney and a self-represented defendant regarding defense work product, and suggested Waldon return to Judge Greer and ask him to issue an order to show cause. (1 RT 204-206.) After Waldon pointed out that it was not a 987.9 matter, Judge Gill agreed to ask the presiding judge to assign another judge to hear the discovery dispute. (1 RT 219-221.)

In July 1990, per Judge Gill's request, Judge Edwards was assigned to hear Waldon's motion seeking to compel his former defense counsel to turn over materials still in her possession. (See 15 CT 3185.) Waldon appeared before Judge Edwards for the first time the afternoon of July 31, 1990. (2 RT 242.) At the outset, Edwards and Waldon engaged in a protracted exchange over Waldon's refusal to acknowledge or make his appearance using

the name Waldon, instead insisting the judge refer to him by the name Sequoyah. (2 RT 242-243.) Waldon told the court he was seeking all materials remaining in Russell's possession, including investigative reports and work product, and that without these materials, he was unable to prepare his defense. (2 RT 243-244.) He argued that since Russell was acting as his attorney over his objection, she was never actually his attorney. He also contended that because he was not an adversary of a former client, but was instead now acting as his own attorney, the work product protection should not prevent Russell from turning over the remaining files. (2 RT 244-246, 248.)

Waldon explained that Judge Greer had signed an order directing Russell to turn over materials in her possession, but that the judge had crossed out "work product" indicating that Russell need not produce those materials. (2 RT 249-250.) Judge Edwards indicated that he would not interfere with Judge Greer's prior order and that Waldon should have challenged that order in the court of appeal. (2 RT 250.) Waldon told the court that notwithstanding the omission of work product from that order, Russell had not yet turned over the required material. (1 RT 250.) Russell told the court she had filed a motion that morning setting forth her position. She indicated that everything that was not considered work product had been made available, and asked to address her concerns outside the prosecutor's presence. (2 RT 251.)

Outside the presence of the prosecutor, Russell indicated her belief that Waldon wanted the material to further his

investigation into Russell's perceived misdeeds. (2-1 RT 252.) Judge Edwards said he would follow Judge Greer's order that everything except work product should be turned over and that he would review the materials in camera to determine if any of the retained material should be turned over. (2-1 RT 252-255.) Waldon continued to insist that Russell had not handed over all of the investigative reports as directed by Judge Greer. (2-1 RT 254.)

On August 30, 1990, when Waldon appeared before Judge Edwards for the second time, Judge Edwards and Waldon again engaged in a lengthy discussion about Waldon's name and whether he should be required to proceed using the name he was arraigned under (Waldon). Waldon refused to announce his appearance as Billy Ray Waldon and declined to discuss his contention that his religion requires the use of another name. Waldon argued that he is a Cherokee and thus has two legal names, Waldon and N.I. Sequoyah. (2 RT 256-261.)

Edwards told Waldon he had "some doubt as to whether or not you are mentally competent" (2 RT 261), citing the following factors:

- Waldon's false claim of Cherokee heritage;
- Dr. DiFrancesca's March 9, 1988 report of her examination of Waldon and her opinion that he was not competent to represent himself;
- Dr. Norum's August and September 1987 reports as to Waldon's competence to stand trial;
- Dr. Kalish's June 1987 report regarding Waldon's mental competence;

- Judge Zumwalt-Kutzner's March 16, 1988 order finding Waldon was not competent to represent himself; and
- Waldon's mental health records from his earlier military service.

(2 RT 261.)

Judge Edwards also reviewed the records related to Waldon's *Faretta* hearing before Judge Boyle that had taken place some ten months earlier. (2 RT 261-264.) Judge Edwards noted he wanted "to see what had happened between the time of Judge Kutzner's[3] finding that you were not competent to represent yourself and what psychological evidence was presented at the hearing by psychiatrists' testimony–presented at the hearing to cause Judge Boyle to conclude that you were competent." (2 RT 264.) Judge Edwards "found no evidence of any hearing at which Judge Boyle took any evidence or testimony from psychiatrists or psychologists who had been appointed to make a determination and present information to the court as to whether Mr. Waldon was competent to represent himself." (2 RT 266.) Judge Edwards said he had unsealed and read the affidavits presented to Judge Boyle. (2 RT 268.) Judge Edwards went on to read a quote from Dr. DiFrancesca's earlier report that concluded Waldon was not competent to represent himself. (2 RT 269-270.)

[3] Judge Zumwalt is also referred to in this record as Judge Zumwalt-Kutzner and Judge Kutzner.

The prosecution noted that Waldon had appeared before Judge Gill several times in the months since Judge Boyle's decision and the prosecutor gave his own opinion, having observed Waldon during these proceedings, that "he has conducted his defense in a rather exemplary fashion." (2 RT 271, 283.) Judge Edwards responded, "reasonable minds may differ as to whether or not he's conducted an adequate defense." (2 RT 271.) Judge Edwards went on to point to Waldon's motion to disqualify Judge Kennedy as well as his claims related to his prior counsel in a petition for writ of habeas corpus as additional bases for concern and suggest these things undermined any suggestion that Waldon was conducting an adequate defense. (2 RT 271-272.) Judge Edwards went on to quote from Judge Zumwalt's earlier decision finding Waldon incapable of exercising an informed waiver of his right to counsel. (2 RT 273.)

Waldon argued that neither Dr. Norum nor Dr. DiFrancesca had examined him personally and that any mental health examiner who prepares a report on a person without an examination violates the ethical code for mental health professionals. (2 RT 274-275.) Waldon further noted that Dr. Kalish had testified at the competency hearing, but the jury had rejected that testimony in finding Waldon competent to stand trial. (2 RT 275.) Waldon pointed out that in support of his *Faretta* motion before Judge Boyle, in addition to lay opinion affidavits, Waldon had presented affidavits from a psychiatrist and a psychologist who had examined him and concluded he was competent to waive his right to counsel. (2 RT 275, 278.) Waldon

also objected to Judge Edwards's statement that Waldon was not Cherokee, arguing he had never had an opportunity to prove that point. (2 RT 276.) Waldon further contended Judge Edwards lacked jurisdiction to address his competency because the matter was assigned to Judge Edwards solely for purposes of deciding the discovery dispute. (2 RT 277.)

Judge Edwards noted that the experts who examined Waldon and submitted affidavits to Judge Boyle did not take into account the earlier proceedings, reports, or military records that Judge Edwards had reviewed. (2 RT 278.) He went on to explain,

> In any event, sir, the reason I share all of this with you is that, in going over all of these files that I received from Miss Russell, reading these things that you have filed with the court making outlandish claims of conspirators and relationships between former counsel and judges of the bench in an effort to conspire against you, I had thought, well, perhaps it was some joke. Then when I read the psychological reports that I've referred to here and then the finding of Dr. Di Francesca and the rulings of Judge Zumwalt, I, in my mind, had a question as to whether or not you were mentally competent to represent yourself.

(2 RT 278-279.)

Judge Edwards went on to cite *People v. Teron* (1979) 23 Cal.3d 103, for the proposition that he had an affirmative duty to order a psychiatric examination if he had "a doubt" and said he in fact had "such a doubt." (2 RT 279.) The prosecutor argued that Judge Boyle had decided the issue and that the determination should not be continuously revisited based on "the last judge that sees the case." (2 RT 279-280.) The prosecutor pointed out that all parties had raised challenges to Judge Zumwalt's order and that

the Court of Appeal had indicated that nothing in the case to date should preclude Waldon from proceeding with his motion to represent himself. (2 RT 283.) The prosecutor reiterated that Waldon had appeared before Judge Gill numerous times and that Judge Gill was aware of and had seen all of the items cited by Judge Edwards. (2 RT 283-284.) Despite this, Judge Edwards concluded that further mental health examination was warranted to determine Waldon's competency to represent himself:

> I am at this time convinced that there's a grave question as to the defendant's competency to represent himself. This is based upon all of the documents that I've heretofore discussed, and it is my intention to appoint two psychiatrists to examine Mr. Waldon and provide a report to the court. I will then conduct a hearing after I have those reports, and all of you, ladies and gentlemen, if you care to, can conduct an examination of the doctors. Depending upon—the results of that hearing will depend upon whether he continues in a pro per status or whether or not that status will be revoked.

(2 RT 286; see also 25 CT 5566-5567.)

The next day, the parties returned to Judge Gill's courtroom and discussed the proceedings in front of Judge Edwards and the probable impact on the ongoing criminal proceedings. The prosecutor noted the matter had been referred to Judge Edwards for a very limited purpose, and suggested Judge Edwards had exceeded his authority and acted improperly in ordering the appointment of mental health experts. The prosecutor urged Judge Gill, as the trial judge, to withdraw the matter from Judge Edwards's consideration. (3 RT 308-311.) Waldon joined in the

request. (3 RT 312-313.) Judge Gill declined to make any orders in response to the proceedings before Judge Edwards, but noted that the parties could avail themselves of whatever appellate remedies they considered appropriate. (3 RT 313.) In subsequent proceedings that same day, outside the presence of the prosecutor, Judge Gill offered his assessment of Waldon's behavior to date and expressly indicated that he did not have a doubt as to Waldon's present competence. (3-1 RT 349-350.)

On September 7, the prosecution asked for reconsideration of the order appointing experts. (4 RT 353; 14 CT 3034-3163.) The prosecutor argued that Judge Boyle's finding that Waldon was competent to represent himself should stand, and that Judge Edwards should not be allowed to declare a doubt because he was not the trial judge. (4 RT 374-377.) Judge Edwards indicated that he would be satisfied if Judge Gill agreed to hold a hearing under section 1368. (4 RT 379.) The court denied the motion for reconsideration and appointed counsel to represent Waldon. (4 RT 353; 14 CT 3034-3046; 25 CT 5569.)

3. The Court of Appeal grants writ relief and directs the trial court to vacate the order for further mental health examination

Both the prosecution and Waldon filed writ petitions in the Court of Appeal, case numbers D012975 and D013055, arguing that Judge Boyle had properly granted Waldon's motion for self-representation and that Judge Edwards had improperly reconsidered Waldon's mental competency to represent himself. (25 CT 3186; 72 CT 15685-15709; 74 CT 16050-16075.) The Court of Appeal granted the petitions and directed the lower court to

vacate its order requiring mental examinations, finding Judge Edwards had abused his discretion in reopening the issue of Waldon's self-representation based on reports and hearings conducted more than two years earlier and that there was no basis to order the examinations. (15 CT 3182-3190.)[4]

The Court of Appeal explained,

> Although Judge Edwards considered Judge Boyle to have made his ruling on "limited documentation" and without awareness of the earlier proceedings before Judge Zumwalt, we reach a different conclusion. While it is unclear what knowledge, if any, Judge Boyle may have had of the earlier proceedings, a review of the reporters transcript from the hearing conducted by Judge Boyle and a review of the documentation submitted in support of Waldon's motion shows Judge Boyle's ruling was not made lightly. The documents reviewed by Judge Boyle included reports from two mental health professionals and numerous affidavits from people familiar with Waldon, attesting to his mental competency.
>
> More importantly, at the time Judge Edwards ordered Waldon to be examined, he had been representing himself for almost ten months. During that time no one had questioned his mental or legal capacity to represent himself based upon his conduct of his defense. Based on this history, we find it an abuse of discretion to reopen the in propria persona question based upon a review of reports and a hearing that took place more than two years before.

(15 CT 3187-3188.)

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[4] Waldon's related claim that the Court of Appeal erred in vacating Judge Edwards's order to appoint mental health experts is addressed in respondent's brief at pages 202 through 204.

The Court of Appeal went on to note, “This case has a long and tortured history. It has been pending for more than four years. Waldon has been representing himself for more than 11 months. Even the prosecution acknowledges he has done so in an ‘exemplary fashion.’ Waldon’s ability to represent himself should not now be called into question based on outdated proceedings and reports.” (15 CT 3190.)

B. Judge Edwards’s inquiry into Waldon’s competence to represent himself was not the equivalent of declaring a doubt as to his competence to stand trial

At the outset, Judge Edwards never explicitly declared a doubt under section 1368 as to Waldon’s competency to stand trial. Judge Edwards appointed mental health examiners to examine Waldon and prepare a report as to his competence to waive counsel.

“A trial court’s expression of preliminary concerns about competency does not require the commencement of competency proceedings.” (*People v. Price* (1991) 1 Cal.4th 324, 396–397, citing *People v. Gallego* (1990) 52 Cal.3d 115, 159, 162-163.) Here, the court appointed two mental health experts to examine appellant and prepare a report to assist the court in deciding whether appellant was competent to represent himself. This was not the equivalent of declaring a doubt as to Waldon’s competency. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 35 [court’s appointment of mental health expert as part of preliminary inquiry into competence is not tantamount to declaration of doubt about competence that triggers § 1368 hearing]; see also *People v. Hines* (2020) 58 Cal.App.5th 583, 602-603 [declining to find the

trial court had implicitly declared a doubt by ordering mental health examination because section 1368 requires the court to declare a doubt on the record].)

In any event, based on the law at the time, declaring a doubt as to Waldon's competence to represent himself did not equate to declaring a doubt as to his competency to stand trial. Waldon claims that a doubt as to his competence to waive counsel was necessarily a doubt as to his competence to stand trial because the due process standards are the same. According to Waldon, because Judge Edwards had a doubt as to Waldon's competence to waive counsel, "[t]hat means, also as a matter of law, that the court had substantial evidence of appellant's incompetence to stand trial." (3 Supp. AOB at 8-9, citing *People v. Wycoff* (2021)12 Cal.5th 58, 81, 89 (*Wycoff).*) Although *Wycoff* notes that the two due process standards are the same (*id.* at p. 81), at the time of the proceedings before Judge Edwards, the standard required in California for competency to waive counsel was unclear.

In *People v. Welch* (1999) 20 Cal.4th 701, this court rejected a similar claim that "the evidence presented to the trial court in the context of the *Faretta* hearing led it to determine that defendant was not competent to waive his right to counsel, and that, having made that determination, the court should have declared a doubt as to defendant's competence to stand trial and should have ordered a hearing to determine his competence pursuant to section 1368." (*Id.* at p. 736.)

The *Welch* court noted that at the time of the proceedings, as was also the case here, some California courts had held that the

standard to waive counsel was higher than the standard for competence to stand trial. (*Welch, supra,* 20 Cal.4th at p. 740.) Later, in *Godinez v. Moran* (1993) 509 U.S. 389, 400-401, the United States Supreme Court held that the due process standards for competency to stand trial and competency to waive counsel are the same. (*Id.*) The court rejected the argument that because the trial court concluded Welch was incompetent to waive counsel, "it necessarily also had a doubt, or should have had a doubt, as to his competence to stand trial and should have conducted a competence hearing pursuant to section 1368." (*Id.* at p. 741.) The court declined to apply the *Godinez* standard retroactively to find error in failing to declare a doubt under section 1368 under these circumstances. "Accordingly, we may not conclude as a matter of law that the trial court's determination that defendant was incompetent to waive his right to the assistance of counsel must be equated with a determination that a doubt existed as to defendant's competence to stand trial." (*Id.* at p. 742.)

As was the case in *Welch,* Waldon's trial took place before the Supreme Court's decision in *Godinez.* Here too, the record makes clear the court was applying a higher standard for competency to waive counsel and competency to stand trial. (See 74 CT 15987-15988.) Judge Edwards's concern about Waldon's competence to waive counsel was thus not the equivalent of a bona fide doubt as to his competence to stand trial.

C. Judge Edwards's disagreement with the earlier competency finding and the decision to allow Waldon to represent himself was not a proper basis for reinitiating competency proceedings

Here, as the Court of Appeal explained, "[q]uestions were raised in Judge Edwards mind only upon his examining reports considered by Judge Zumwalt two and one-half years earlier." (15 CT 3187.) The record reflects Judge Edwards's concerns about Waldon's mental competence were based on the earlier proceedings and evidence presented at Waldon's first *Faretta* hearing and on Judge Edwards's conclusion that Judge Boyle had not adequately considered evidence of Waldon's mental competence in granting the second *Faretta* motion. (2 RT 261-270, 278-279.)

"As a general rule, a trial judge cannot overturn the order of another trial judge." (*Paul Blanco's Good Car Co. Auto Group v. Superior Court* (2020) 56 Cal.App.5th 86, 99.) "Fundamentally, it 'is founded on the inherent difference between a judge and a court and is designed to ensure the orderly administration of justice.' [Citation.] Because a superior court is a single entity comprised of member judges, ' "one member of that court cannot sit in review on the actions of another member of that same court." ' " (*Ibid.*; see also *In re Marriage of Tamir* (2021) 72 Cal.App.5th 1068, 1081.) "A trial court 'generally has the authority to correct its own prejudgment errors.' [Citation.] 'Different policy considerations, however, are operative if the reconsideration is accomplished by a different judge[, and] ... the general rule is just the opposite: the power of one judge to vacate an order made by another judge is limited.' [Citation.] 'For one

superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge [improperly] places the second judge in the role of a one-judge appellate court,' and thus 'an order " ' " 'made in one department during the progress of a cause can neither be ignored nor overlooked in another department ....' " ' " ' " (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1184-1185.)

In *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, 1128-1129, the appellate court held that a 987.9 judge should not have entertained other ex parte discovery motions presented to him by the defendant, concluding that "[t]he trial judge supervises and handles the substantive case and, without his express delegation, another judge should not hear and decide pretrial discovery motions." As the court explained, "To hold otherwise would undermine the trial judge's control over the case and would encourage the unacceptable practice of "judge shopping."" (*Id.*) Here too, to allow Judge Edwards to unilaterally reopen the inquiry into Waldon's mental competence based solely on evidence already considered in earlier competency proceedings would have undermined Judge Gill's control over the criminal proceedings.

As this court explained in *Williams v. Superior Court* (1939) 14 Cal.2d 656, "where a proceeding has been duly assigned for hearing and determination to one department of the superior court by the presiding judge of said court in conformity with the rules thereof, and the proceeding so assigned has not been finally

disposed of therein or legally removed therefrom, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. [Citation.]" (*Id.* at p. 662.)

In this case, the matter was assigned to Judge Gill for all purposes in January 1990 and the criminal matter continued to be heard by Judge Gill, while the discovery dispute was referred to Judge Edwards only for the limited purpose of deciding whether the former defense counsel was required to turn over materials still in her possession. Waldon appeared before Judge Edwards only a single time before Judge Edwards concluded, based on his review of the earlier proceedings, that Judge Boyle had erred in granting Waldon's motion for self-representation. In contrast, the record reflects Waldon appeared in pro per multiple times before Judge Gill, both before and after the proceedings involving Judge Edwards, and Judge Gill explicitly concluded there was no new evidence requiring a second competency hearing.

In August 1990, the day after Judge Edwards first expressed his concern over Waldon's mental status during the related discovery proceedings, Judge Gill told Waldon that while he thought Waldon's allegations of conspiracies and his continuing attacks on his former counsel were unhelpful to his defense, he did not, at that point have any reason to doubt Waldon's competence:

> Again, let me say, regardless of what happens with the proceedings before Judge Edwards, as the trial

> judge I have an ongoing responsibility with respect to your present competency in terms of 1368 and your competency to represent yourself. I think those are two different standards, two different aspects of competency. It's not too helpful, I think, to your cause to be referring to your enemies and people conspiring against you. More and more of that is going to cause me to begin to have some concerns about your present status. I think you have a blind spot, you obviously have a blind spot about Geraldine Russell, some chronic emotional problems.
>
> Up to this point I haven't had any real question in my mind that you are incompetent within the meaning [of section] 1368; I think you are [competent]. But the attacks we have about these conspiracies and your enemies, the enemy camp, that's not too helpful to your status before the court, Mr. Sequoyah. I think you need to understand that. That may cause me at some point to have—make some further inquiry pursuant to 1368 or otherwise. I am not persuaded to do that at this point, again, as foolish as I think you may be to try to represent yourself and to do some of the things you are doing. I guess the law gives you the right to be foolish, but I do have some investment, I think, in not catering to some of these fantasies, some of these whims and blind spots on your part because I think the interests of justice demand this case be moved along to some resolution, justice to you. On the one hand you are telling me you are not guilty of these charges, we don't have any jurisdiction; but yet on the other hand I get [the] impression that it would be dandy with you if we never had the case tried, if we dragged this thing out over the next five or ten years. I'm not going to let you do that. That's not in your best interest, I think, or anyone's best interest.

(3-1 RT 349-1-350-1.)

Under the circumstances presented here, Judge Edwards was not in a position to declare a doubt as to Waldon's

competency to stand trial where Waldon had already been found competent to stand trial and to represent himself, the current trial judge had not declared a doubt, and the record reflected no changed circumstances or new evidence of incompetence. (See *People v. Mai* (2013) 57 Cal.4th 986, 1033 ["[A]bsent a showing of 'incompetence' that is 'substantial' as a matter of law, the trial judge's decision not to order a competency hearing is entitled to great deference, because the trial court is in the best position to observe the defendant during trial"]; *People v. Johnson* (2012) 53 Cal.4th 519, 531-533 [deference to trial court's decision regarding competency to self-represent is especially appropriate when judge has had opportunity to observe the defendant on multiple occasions].)

D. A second competency hearing was not required because a competency hearing had already been held and there was no new evidence or changed circumstances such that a doubt as to Waldon's competency appeared as a matter of law

As set forth above, a competency trial had already been held, and a jury found Waldon was competent to stand trial. If a competency hearing has already been held and the defendant has been found competent to stand trial, a second competency hearing is not required unless the court is presented with a substantial change in circumstances or new evidence casting serious doubt on the validity of the prior finding. (*People v. Jones* (1991) 53 Cal.3d 1115, 1153.) The standard set forth in *Jones* is clear and has been consistently followed by this Court. (See *Rodas*, *supra*, 6 Cal.5th at p. 231, 234; *Buenrostro*, *supra*, 6 Cal.5th at p. 409; *Mendoza, supra,* 62 Cal.4th at p. 911.) "The effect of the *Jones* rule is simply to make clear that the duty to

suspend is not triggered by information that substantially duplicates evidence already considered at an earlier, formal inquiry into the defendant's competence; when faced with evidence of relatively minor changes in the defendant's mental state, the court may rely on a prior competency finding rather than convening a new hearing to cover largely the same ground." (*Rodas*, *supra*, 6 Cal.5th at p. 234-235). Whether there has been a change in circumstances sufficient to call for a new competency hearing is a fact-specific inquiry. (*Id.* at p. 235.) Here, there was no new evidence or changed circumstances warranting a second competency hearing.

Aside from Waldon's claim of Cherokee heritage, his insistence on using his "Cherokee" name, and Judge Edwards's disagreement with the adequacy of Waldon's self-representation, Judge Edwards pointed only to evidence already considered at earlier competency and *Faretta* proceedings. (See 2 RT 261.) This was not substantial evidence requiring a second competency hearing. "More is required than just bizarre actions or statements by the defendant to raise a doubt of competency." (*Buenrostro*, *supra,* 6 Cal.5th at p. 409.)

The record here does not contain "substantial evidence of a *change* of condition or *new* evidence casting doubt on the competency verdict that would *require* the court to order a second competency hearing." (*Mendoza, supra,* 62 Cal.4th at p. 889, *emphasis original*.) Judge Edwards's concerns were based primarily on his review of mental health experts' reports and testimony from earlier proceedings in 1987 and 1988. Both Dr.

Kalish and Dr. Norum testified at the 1987 competency trial as to their opinion that Waldon was not competent to stand trial. Multiple witnesses testified as to Waldon's history of mental illness while he was on active duty in the Navy prior to his discharge in 1984. (See RB 58-64.) Nonetheless, the competency jury ultimately found Waldon competent to stand trial. (31A RT 1193; 5 CT 882.) Similarly, Dr. DiFrancesca testified during the 1988 *Faretta* hearing before Judge Zumwalt that Waldon was not competent to represent himself (45A RT 427-439), and that based on her interview with him a year earlier, she also concluded Waldon was unable to rationally assist his attorney in his own defense (45A RT 447-449). Judge Zumwalt relied on that opinion in denying Waldon's initial *Faretta* motion. (See 8 CT 1572-1575.) On appeal, Waldon contends DiFrancesca's report was substantial evidence requiring a hearing under section 1368. (3 Supp. AOB at 9.) But Dr. DiFrancesca's interview with Waldon took place in 1987, well before the competency trial, and her testimony covered largely the same ground as the opinions of the defense mental health experts considered and rejected at the competency trial. Thus, Dr. DiFrancesca's opinion cannot be considered new evidence that required a second competency hearing in 1990. As this Court explained in *Rodas, supra,* 6 Cal.5th at p. 241, competency evaluations must examine the subject's competency at a certain point in time. Because a person's competence may fluctuate or be dependent on medication, where there is not a contemporaneous psychiatric evaluation, a trial court cannot "fairly come to a reliable

conclusion that defendant was competent at that time." (*Ibid*.; see also *People v. Bloom* (2022) 12 Cal.5th 1008, 1033 [distinguishing *Wycoff* and finding new competency hearing not required where there was no contemporaneous expert opinion of incompetence].)

Waldon further suggests, citing *Rodas, supra,* 6 Cal.5th and *People v. Tejeda* (2019) 40 Cal.App.5th 785, that his continued distrust and paranoia were changed circumstances requiring a second competency hearing. (3 Supp. AOB 10-14.) He characterizes the prosecutor's argument during the competency trial as suggesting Waldon's behavior was not "broad paranoia," but "limited to his dispute with Ms. Russell," and suggests that the prosecutor urged the competency jury to find Waldon's "behavior was compartmentalized to his relationship with Ms. Russell." (3 Supp. AOB 11-12.)

Unlike the situations in *Rodas* and *Tejeda,* there was no evidence before Judge Edwards that Waldon's mental competency had deteriorated such that he had become incompetent. The fact that the prosecutor argued—at the competency trial—that Waldon's behavior was focused on his relationship with his former counsel does not demonstrate that the competency jury limited its findings to his ability to work with Russell. The jury was properly instructed as to the standard for competence to stand trial and found that he understood the nature of the proceedings and was able to assist an attorney in conducting his defense. (See RB at 73-74 fn. 9, citing 31A RT 1095-1096 [CALJIC No. 4.10 as given].)

Waldon's continued paranoid behavior and lack of cooperation was not changed circumstances or evidence that he had since become incompetent. The trial court was not required to conduct a second competency hearing. (See RB 207-214.) The fact that Judge Edwards himself gave more credence to the experts who believed Waldon was incompetent than to the multiple experts who opined he was mentally competent was not changed circumstances or new evidence requiring a second competency hearing.

Because there was no new evidence that raised a serious doubt as to whether Waldon understood the nature of the proceedings or was able to assist in his own defense, the court simply had no reason to reinitiate competency proceedings. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1064.)

Waldon's refusal to work with defense counsel or with advisory counsel was not, in itself, evidence of incompetence. In *People v. Lewis* (2008) 43 Cal.4th 415, the defendant claimed the trial court erred by failing to hold a competency hearing where the defendant was, as Waldon was in this case, uncooperative. The California Supreme Court held that no competency hearing was required where there was no substantial evidence the defendant's behavior reflected inability rather than an unwillingness to cooperate with counsel and where the trial court had observed the defendant's behavior and demeanor at trial and concluded there was no substantial evidence of incompetence. (*Id.* at p. 526; see also *People v. Johnson* (2018) 6 Cal.5th 541, 576 ["Defendant's unwillingness to cooperate with counsel does not

demonstrate incompetence"].) In *People v. Johnson*, this Court explained, "And defendant's belief—even if sincere—that counsel was "in league with the prosecution" does not establish that the trial court abused its discretion in failing to order a competency hearing, either." (*People v. Johnson, supra,* 6 Cal.5th at p. 576, citing *People v. Welch, supra,* 20 Cal.4th at p. 742.) Similarly here, Waldon's continued expressions of mistrust in his former counsel and his strained relationships with advisory counsel are not new evidence or changed circumstances requiring a second competency hearing, thus Judge Edward did not err in failing to declare a doubt under section 1368.

CONCLUSION

For the foregoing reasons, as well as those reasons previously submitted to this Court in respondent's brief, respondent's first supplemental brief, and respondent's second supplemental brief, respondent respectfully requests that the judgment be affirmed.

Respectfully submitted,

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July 12, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached third supplemental respondent's brief uses a 13 point Century Schoolbook font and contains 6,394 words.

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July 12, 2022

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On July 12, 2022, I served the attached **third supplemental respondent's brief** by transmitting a true copy via electronic mail.

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on July 12, 2022, at San Diego, California.

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Signature

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