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 II of III
Arguments VII - XIII (Pages 291 - 532)

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

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VII.

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, COUNSEL, AND A FAIR TRIAL WHEN JUDGE BOYLE HELD *FARETTA* PROCEEDINGS WHILE APPELLANT WAS UNREPRESENTED BY COUNSEL AND BY GRANTING APPELLANT SELF-REPRESENTATION STATUS WITH THE ASSISTANCE OF SECOND-CHAIR COUNSEL

Following the competency proceeding in September of 1987, the trial court relieved Russell without substituting an attorney as lead counsel in her place, and then, while appellant was without counsel, Judge Boyle granted appellant leave to represent himself and appointed two attorneys to represent appellant as "second chair" counsel. This was error in violation of appellant's rights to due process, a fair trial, and counsel under the Sixth and Fourteenth Amendments to the United States Constitution and reversal of the conviction and sentence is required.

A. Factual Summary

To grasp the magnitude of the trial court's errors in connection with the November 3, 1989, *Faretta* hearing, it is necessary to review the details of events between the issuance of the competence verdict and Judge Boyle's grant of *Faretta* status.

1. Appellant Continued to Seek *Marsden* Relief With Respect to Russell and Khoury, While Petitioning the Court of Appeal Challenging the Determination That he was Competent to Stand Trial; Levitt Denied Russell's Motion for a new Trial and was Removed as Trial Judge Based on Russell's Peremptory Challenge

The competency verdict was rendered on September 21, 1987 (31ART 1193), and appellant immediately attempted to file a written "Motion to Seal Evidence, Testimony, Etc.," which Judge Levitt refused to

file. (31ART 1199; 8CT 1455.) Judge Levitt refused to recognize appellant, admonishing him that the jury had found him "competent to cooperate with counsel." (31ART 1200.) Appellant stated that he had "cooperated with counsel" and shown the motion to Khoury, but Khoury had refused to present it. (*Ibid.*) Levitt permitted Khoury to read the motion into the record; it included a request for a *Marsden* hearing where appellant could explain why counsel was ineffective and seek appointment of a new attorney. Levitt refused to address appellant's motion and remanded the case to Department 9, Judge Haden, for setting of a trial date. (31ART 1203-1204.)

Before Judge Haden on September 24, 1987, appellant again objected that Khoury did not represent him (32ART 1) and requested an immediate *Marsden* hearing, inter alia. (32ART 4.) The trial court took the written motion under submission and "reserved" all of the pending "matters" until September 30. (32ART 4-5.) On the same date, appellant filed an amended notice of appeal of the competency ruling. (8CT 1453.)

On September 30, 1987, the matter came before Judge Haden, who said he first would take up appellant's request for other counsel, asked counsel to advise whether appellant "previously had a *Marsden* hearing." (34ART 3.) Russell said judge Zumwalt had ruled there would be no *Marsden* hearing until appellant's motion to proceed pro per was resolved, the latter issue was not resolved, and Zumwalt's order remained in effect. (*Id.* at 3-5.) The prosecutor urged the court to hear the *Marsden* motion before resolving the *Faretta* question and before assigning the case for all purposes. (*Id.* at 3-4, 7.) Appellant agreed with the prosecutor and objected to the case being sent to Judge Levitt. (*Id.* at 8.) Russell said she had challenged Judge Levitt for cause and if that challenge were denied she would file a peremptory challenge against Levitt. (*Id.* at 6.) Judge Haden

noted that Judge Zumwalt was not available, overruled appellant's objection, and sent the case to Judge Levitt's department on the threshold question, viz., the for cause challenge, stating his belief that thereafter all of the other matters could be heard and "resolved in one department." (34ART 6-8.)

When the case was called moments later by Judge Levitt, Russell was absent and Khoury asked the court to "trail" the matter to Friday. (33ART 1.) Khoury argued that the court had given appellant a chance to air his *Marsden* complaints back in September 1987, denying the motion because there was no showing of ineffective assistance of counsel. (*Id.* at 5.) The prosecutor countered that the September 1987 hearing was inadequate to resolve the substitution question. (*Id.* at 6.)

Judge Levitt said that rather than turning to the *Marsden* question, it would consider setting the case for trial. (33ART 7-8.) After some discussion, Levitt said appellant "refuse[d] to waive time" unless given different counsel, set the trial date for October 7 over defense counsel's objection, and granted defense counsel leave to file a written motion to continue the trial date. (33ART 12, 15-17.) Levitt denied the defense motion to disqualify him for cause, then put the action over to October 2, for hearing on the defense motion for a continuance. (33ART 19-21.)

In court on October 2, after appellant objected to counsel's claimed appearance on his behalf, Russell filed a peremptory challenge against Judge Levitt and the court denied it as untimely and on the ground that a peremptory challenge already had been expended in the case. (35ART 4.) Russell promised to take a writ and argue that the competency trial was a separate proceeding in which a separate peremptory could be used. (*Id.* at 4-7, 10.) The prosecutor urged the court to address the question of

appellant's dissatisfaction with counsel, positing that it provided good cause to continue the trial until it was resolved. (*Id.* at 8-9.)

A *Marsden* hearing was set for October 5; Russell objected on the ground that the motion had been heard and ruled on in September. (35ART 10-11.) Russell asked whether Levitt knew that a hearing on appellant's right to represent himself was pending before Judge Zumwalt; Levitt replied that the case had been assigned to his department for all purposes, including trial. (*Id.* at 13-15.) He set the motion for self-representation and for *Marsden* relief for the next day, and the defense motion for a continuance for October 6. (*Ibid.*) Appellant requested leave to be heard on several matters, including the purported September *Marsden* hearing; Levitt insisted that he be heard through his attorneys. (35ART 16.) Appellant said, "[y]our Honor, I object. I will never be communicating with these attorneys," to which Russell retorted, "[w]e certainly agree with Mr. Waldon's contention. He does not, and in all likelihood will not, communicate, and that does concern us greatly." (*Ibid.*)

On October 5 and 6, 1987, Russell filed an emergency stay application and a petition for writ of mandate, D006915, seeking review of the denial of her peremptory challenge against Levitt. (8CT 1467; 64CT 14313.) The Court of Appeal granted the stay and on October 20 granted the writ. (8CT 1481, 1482; 64CT 14401.)

On October 20, 1987, appellant in his own capacity filed an "Urgent and Emergency Petition for Writ of Mandamus" in the Court of Appeal, D006996, challenging the verdict in the competency proceeding. (63CT 14279.) On October 22, 1987, appellant filed an "Urgent and Emergency Appeal of Competency Trial," D007017, complaining of denial of hearings on *Marsden* and *Faretta* motions. (63CT 14265.) The Court of Appeal

treated D007017 as a petition for writ of mandate and said it would hear it together with D006996. (63CT 14269.)

On October 23, 1987, counsel and appellant appeared before Judge Haden, and he took the case off calendar at the urging of both parties pending the remittitur of the appellate order that appellant could use a peremptory challenge against Judge Levitt. (35A-1RT 1-5.) Appellant objected, stated that Russell did not represent him and he was trying to fire her and Khoury for incompetency, reminded the court of his repeated request for a *Marsden* hearing, and requested the appointment of advisory counsel. (*Id.* at 4.) On October 29, 1987, the Court of Appeal denied petitions D006996 and D007017, stating:

> In previous filings with this court petitioner suggested that he wished to be found competent to stand trial. This was the finding of the jury and it is unclear now why petitioner wishes review of that determination. Should petitioner wish to represent himself at trial, that motion should be made first in the trial court.

(63CT 14292.)

On October 30, 1987, Russell filed a motion for a new competency trial and judgment notwithstanding the verdict (6CT 1230), and on November 9, 1987, she filed supplemental briefing in support of the motions. (7CT 1275.) On December 22, 1987, the parties appeared before Judge Levitt for hearing on the motion. (MH-5RT 1.) Appellant, speaking for himself, objected to the court's failure to decide his *Faretta* and *Marsden* motions, and his request for advisory counsel and law library privileges; he requested "an emergency *Marsden* hearing of life-threatening urgency immediately." (MH-5RT 1-2.) On December 23, 1987, Judge Levitt issued an order denying the motions for a new trial and judgment notwithstanding the verdict. (7CT 1423.) Russell filed a petition for writ of

mandate and request for stay in the Court of Appeal, D007429 (hereinafter "competency writ"), on January 19, 1988.[66] (56CT 11918.)

2. The Case Headed Back to Judge Zumwalt for Resolution of Appellant's Motions under *Marsden* and for Self-Representation; Meanwhile the Court of Appeal Denied Russell's Competency Writ and Russell Challenged that Denial in This Court

On February 11, 1988, before Judge Peterson, Russell appeared for appellant and appellant objected, requesting an immediate "emergency *Marsden* hearing." (36ART 1.) Russell requested Peterson to send the case back to Judge Zumwalt to resolve a pending matter. (*Ibid.*) The prosecutor stated no objection to the case going back to Judge Zumwalt for the "limited purpose . . . [of] determin[ing] whether the defense attorney presently on the case will continue to be on the case." (*Ibid.*) The court told appellant that he could "assert [his] Marsden request to Judge Zumwalt," and appellant responded that he had "asserted it to her a year ago, and during the last year she [had] refused to hear him on the matter." (*Id.* at 1-2.) Over appellant's objection, Peterson assigned the case back to Zumwalt for the limited purpose of addressing the motions pending before her since the previous spring. (*Id.* at 2-6.) The court set a hearing before it the next day to name advisory counsel, and said it would confirm the February 25 date before Judge Zumwalt. (*Id.* at 14.)

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[66]Russell claimed error in allowing the competency jury to be informed of the capital charges, allowing appellant to be examined before the jury, refusing to admit appellant's 1983 psychiatric records, failing to instruct the jury of the consequences of an incompetency verdict, allowing a jury instruction styled on BAJI No. 2.02 calling attention to appellant's response to questioning on the stand, allowing district attorney Ebert to testify, omitting "rationality" from the CALJIC No. 4.10 instruction, giving CALJIC No. 2.21, and denying the motion to continue the proceeding until Russell was available. (56CT 11918; 62CT 13977-13978.)

Judge Peterson heard the appointment of advisory counsel issue on February 16, 1988; Mr. Sevilla was there for possible appointment. (37ART 1.) The court explained to Sevilla the procedural posture of the case, proposing a limited appointment related to the *Marsden* and "pro per" issues that remained pending before Judge Zumwalt. (37ART 2.) Discussion ensued as to whether or not advisory counsel would be "an advocate" for appellant at the hearings before Judge Zumwalt; appellant said he objected because he wanted and had a right to have Ben Sanchez as his advisory counsel. (*Id.* at 3-4.) Peterson continued the hearing to the next day to permit Sevilla to confer with appellant. (*Id.* at 4-5.) The next day, Sevilla stated that he could not serve as appellant's advisory counsel, and advised the court to appoint Ben Sanchez in that capacity; appellant concurred. (38ART 1-3.) Peterson found that appellant was "unwilling to cooperate with the court's efforts to provide you with advisory counsel" and declined to appoint Sanchez. (*Id.* at 3.)

On February 24, 1988, the Court of Appeal denied Russell's competency writ, D007429. (55CT 11702.)

On February 25, 1988, the case came before Judge Zumwalt. Appellant objected to the appearance Russell and Khoury entered on his behalf, stating "these attorneys do not represent me." (39ART 1.) Russell requested an ex parte chambers conference to discuss what she viewed as appellant's "significant mental aberration,"so she could disclose confidential matters and respond to appellant's allegations on the record. (39ART 1-2.) The prosecutor objected to the court holding an ex parte proceeding. (*Ibid.*) Appellant personally asserted a peremptory challenge to Judge Zumwalt, further challenging her for cause. (39ART 3.) The prosecutor said there was a conflict between appellant and his counsel, that Dr. Kalish's testimony which had triggered appellant's competency

proceedings was detrimental to appellant, and that appellant had "good reason" to be upset at having his mental competency questioned. (*Id.* at 9-18.) The prosecutor urged Zumwalt to appoint Ben Sanchez as advisory counsel as appellant desired, but defense counsel challenged Sanchez's qualifications to handle the case. (*Id.* at 18-25.) Judge Zumwalt said she planned to appoint Sanchez as appellant's advisory counsel, and put the matter over so that appellant could confer with Sanchez. (*Id.* at pp. 30-31.)

The case came back before Judge Zumwalt on February 29, 1988, with Mr. Sanchez present as advisory counsel for appellant. (40ART 39.) Appellant forbade Sanchez from speaking for him. (*Id.* at 52.) Appellant requested that his *Marsden* hearing be held before anything else. (*Id.* at 46.) Zumwalt dismissed the prosecutor from the courtroom but then, over appellant's objection, held an in camera hearing to address only appellant's "for cause" challenge of her, with appellant, Russell and Khoury present. (*Id.* at 48.) Russell said appellant was behaving irrationally and would continue to do so, and that the challenge for cause showed his misogynism and impaired mental status. (*Id.* at 49.) Russell complained of appellant's personal attacks upon her in court and said that she later might withdraw from representing him. (*Id.* at 50-51.) Khoury said he thought the court could, and should, turn to the *Marsden* issue to "clear the air," and create a cleaner record. (*Id.* at 51-52.) Zumwalt responded, "[t]he problem is . . . we are in the middle of the pro per, but I think they are inextricably bound up because one does depend upon the other. And I – I can see an intertwining of the two of them." (*Id.* at. 52-53.)

Back in open court, Zumwalt ruled that she would not read the challenge because it was not submitted through appointed counsel, who held the power to submit it. (40ART 54.) Appellant submitted other motions to the court, with the leave of Russell and Khoury. (*Id.* at 55-60.)

The prosecutor and appellant argued in favor of a motion to strike or expunge Kalish's testimony, on the ground that Kalish's opinion, as the court's appointed witness on competence to waive counsel, should have been received only through his written report. (*Id.* at 61-63.) The court denied the motion. (*Id.* at 66.) Dr. Kalish took the stand and resumed testifying as to his views on appellant's mental status. (*Id.* at 68-114.)

Kalish's testimony continued the next day, March 1, 1988, and he was cross-examined. (41ART 115-171.) The court then held an in camera conference with defense counsel, advisory counsel, and appellant, to discuss appellant's desire to call acquaintances as witnesses to establish his competency to waive counsel. (*Id.* at 171-188.) The court directed Russell to issue subpoenas for five such witnesses. (*Id.* at 181.) Russell asked the court to consider structuring some method that would permit appellant and his advisory counsel to present the witnesses' testimony without tipping off the prosecutor, to avoid imperiling a possible mental defense. (*Id.* at 182-184.) Russell further explained that jail security would not permit appellant to communicate confidentially with the intended witnesses. (*Id.* at 185-186.) Russell suggested the court consider asking appellant to "waive the pro per hearing altogether" to avoid harming his defense at trial, and turning directly to the *Marsden* issue. (*Id.* at 186.) Zumwalt finally agreed to take up the *Marsden* issue first, stating: "I'm going into the *Marsden* hearing right now." (*Ibid.*)

Returning to the question of how appellant would interview the five intended witnesses, appellant requested an order permitting confidential legal phone calls in jail; Zumwalt denied the request. (41ART 187.) Appellant said, "I'm not going to be saying anything over the phone that I don't want revealed. The only thing I'm – on the phone that I'll be saying is what will be said here in public a day or two later. I'm not stupid, your

honor. Her objection is ridiculous." (*Ibid.*) Judge Zumwalt said Russell had a lot of experience and appellant should heed her caution as appropriate. (*Id.* aT 188.)

The court went back on the record and notified the prosecutor that *Marsden* proceedings would commence in camera. (41ART 189-194.) Once again ex parte, Zumwalt asked Russell whether her investigator, Mr. Haines, would be testifying on the *Marsden* matter. (*Id.* at 195.) Appellant objected that he had not "submitted [his] complaint yet," so Mr. Haines would have nothing to offer. (*Ibid.*) The court said the proceeding related back to appellant's February 1987 motion, wherein he moved to "dismiss" Russell and Khoury. (*Id.* at 196-197.) Appellant asked for leave to "give the court his complaints" in court on March 8. (*Id.* at 197.)

Judge Zumwalt said she would like to give him an idea of "the sort of questions" to which she would expect answers. (41ART 197) She continued: "Anything that you say in regards to this – this is now a *Marsden* hearing and is in confidence – will be held in confidence. And you can speak freely. [¶] You're requesting that Ms. Russell and Mr. Khoury be relieved as attorneys?" (*Ibid.*) Appellant refused to answer questions that day. (*Ibid.*) Zumwalt explained: "I'm going to want to know – expect you to present to me the specific respects in which you believe these counsel have not represented you. I want to know . . . from [Russell] . . . what she has done, and I will want her comments on what you have alleged are her or Mr. Khoury's deficiencies in representing you." (*Ibid.*)

Russell identified which of appellant's filings, submitted from February through May of 1987, expressed appellant's complaints about her representation. (41ART 198-199.) Zumwalt asked appellant whether he wished for her to take those documents as the basis for his motion. (*Id.* at 199.) He responded that he was not prepared for a *Marsden* hearing that

day, and he wanted to confer with advisory counsel before proceeding. (*Id.* at 199-200.) Zumwalt said she wanted to proceed on the *Marsden* matter the next day, March 2, and then hopefully wrap up the *Faretta* proceeding on March 8 and rule on it. (*Id.* at 200.) Appellant reluctantly agreed. (*Id.* at 201.)

Russell informed the court that based on what she knew of appellant's complaints, she would need the testimony of her investigator, Mr. Haines, at the *Marsden* hearing, and Haines was present that day but was leaving on a planned vacation. (41ART 200-201.) Appellant said, "I have no complaints related to Mr. Haines. I object to him even being here." (*Ibid.*) He continued, "[Russell] just wishes to manipulate the situation and reveal defense strategy in a clever way," to which he objected. (*Id.* at 202.) Russell objected to Zumwalt dismissing Haines, saying: "My concern is he knows what the fallout was with Mr. Waldon, because Mr. Waldon refuses to articulate a rational defense, and Mr. Haines is the one who talked with Mr. Waldon about what I consider to be an irrational defense. And as to the *Marsden* complaints, it's very material to this court . . ." (*Ibid.*) The court said that if Haines were unavailable Russell could make an offer of proof as to what he would say if present. Appellant's objections grew more heated: "None of my complaints even relate to Mr. Haines. Geraldine Russell wishes to use him to reveal defense strategy, which is confidential." (*Id.* at 203.) The court assured Russell that she would be permitted to make an offer of proof what Haines would say, if it should become necessary, and dismissed Mr. Haines for his trip. (*Ibid.*) Appellant reiterated that anything from Russell on the subject would be a "revelation of confidential material" regarding "confidential defense strategy." (*Id.* at 203-204.)

Zumwalt advised appellant,

> Sir, if you're going to go into a *Marsden* hearing, what you tell me is in confidence. But there may, indeed, be some revelations of defense strategy because you're questioning counsel as to their ability to formulate and to execute strategy, amongst other things; and when you do that, you are waiving the [attorney-client] privilege in regards to it.

(*Id.* at 204.) Appellant replied, "I object because none of my complaints have anything to do with defense strategy." (*Id.* at 204.) Judge Zumwalt explained that she had not looked at appellant's filings of the previous year, and that appellant should come to court the next day prepared to tell her his complaints under *Marsden* and why he felt that he had not been adequately represented. (*Id.* at 205.)

The next day, March 2, 1988, Zumwalt commenced hearing on appellant's *Marsden* motion, with Russell, Khoury, Sanchez and appellant present. (42ART 207.) Appellant then stated that although he did want Russell and Khoury relieved, he thereby withdrew his *Marsden* motion because "of the court's refusal to prevent Geraldine Russell from revealing to the court privileged information regarding defense strategy, et cetera, which in no way relates to the defendant's complaints." (*Id.* at 212.) The court probed whether appellant understood that withdrawing his *Marsden* motion would mean withdrawing his request that Russell be relieved as counsel. (*Id.* at p. 213.) Appellant reiterated that he wanted the court to relieve the lawyers, but he withdrew his *Marsden* request because he did not want to discuss with the court the reasons for dismissal based on what counsel had or had not done. (*Id.* at 213-214.) Appellant insisted that dismissal was warranted because he had no communication with them presently, nor had he communicated with them for months. (*Id.* at 214-217.)

Russell then explained her efforts to prepare a defense. (42ART 220-224.) She noted that a problem to overcome in the case was a factual

"modus operandi" of violence against women. (*Id.* at 220.) Russell had employed numerous investigators and experts; the work of fire experts indicated that the fire in Del Mar that had killed two people might not have been intentional. (*Id.* at 220-221.) Appellant objected that Russell was revealing material protected under the attorney-client privilege, and revealing defense strategy without his permission. (*Id.* at 221.) Judge Zumwalt overruled the objection, stating that there had been "no revelation of any strategy" and she was just trying to find out how much work Russell had done on the case. (*Ibid.*) Russell said that the preliminary hearing judge had been impressed with defense efforts, and Russell believed that the defense had "really come a long way in a very difficult case to work toward defeating the special circumstances." (*Ibid.*) On the last day of the preliminary hearing, Russell had read in the paper that appellant had tried to escape from the jail; she persuaded the prosecutor not to file charges based on the attempt. (*Ibid.*)

Russell said Khoury, who had substantial appellate experience, was appointed as second counsel and worked extensively on preparing and filing pretrial motions. (42ART 222.) Russell also employed a law clerk who spoke Esperanto:

> [The law clerk] worked almost on a daily basis with Mr. Waldon at the jail because Mr. Waldon spoke some [E]speranto, so the two of them had a rather unique relationship and spent hours doing things that were not strictly related to the case. But it was in an effort to, to some extent, hand-hold because of the nature of the case and because of my concern for Mr. Waldon's stability. So [the law clerk] Jim Fife . . . worked with Mr. Waldon from before the prelim, and I believe, until he refused to see him sometime last spring. And that relationship, I think, was very important to Mr. Waldon. It was a way of maintaining contact with reality, actually.

(*Ibid.*)

Russell then told Judge Zumwalt the history relating to the core dispute between herself and appellant, with the judge overruling appellant's objections based on attorney/client privilege on the ground that she was required to "make a record," because appellant had "raise[d] this issue." (42ART 222-223.) Russell said:

> As of last February . . . investigator . . . Richard Haines had discussed a defense position with Mr. Waldon, and because of those discussions, the upshot was . . .[that] Mr. Waldon elected to take a certain position, he refused, then, to work any further with Mr. Haines on going forward on the defense.
>
> I have repeatedly explained to Mr. Waldon that I am in a great moral dilemma to go to trial with someone who refuses to cooperate, and this was before the breakdown in communication. It had to do with his refusal to discuss or articulate any rational defense position. And to my knowledge, he has never discussed a rational defense to any of the charges in this case with anyone, either his family members or any member of the defense team. I think the defense team has ranged in terms of five to fifteen people, including all the experts, so there has been a number of people that have made great efforts to work on this case.

(42ART 222-223.)

Russell continued:

> I consider this case to be triable to some extent and untriable to some other extent because of the issues, and we went over what the obvious defenses are in homicide cases, and unless the client has a rational grasp of that information, decisions have to be made about what to go forward on. It's my position that regardless of what happens in the first phase of the case, the penalty phase has to be prepared from a standpoint of psychiatric evidence in most cases. And if you get to the penalty phase, you've got to be prepared to defend that person against the gas chamber. There has to be that kind of background history provided to the jury. And Mr. Waldon is adamant that that not be pursued. He has indicated that to

the court. He deeply resents any intrusion into his background and his psychiatric history.

That is precisely why it's so important to be very careful about his background, because it may, in fact, be – and I've tried to raise this to him as well – if he is not mentally healthy, he should not, in my estimation, under the law, ever be executed; and the U.S. Supreme Court has not yet decided if someone who is mentally ill can be executed. The logic of that appears to escape Mr. Waldon, and the simplicity of it is what disturbs me.

(42ART 223.)

Russell then explained:

If that kind of simple concept is something he can't look at straight on, I am very disturbed for him because I think that he stands a very high probability of getting a death judgment in this case. The fire deaths were mother and daughter, and their family came in and testified at the prelim and were crying, and I consider those people not to be sufficiently healed from the emotional scars so that no matter when the trial is held in this case, it's going to be a very devastating day in court for those people and for the jury. I don't think Mr. Waldon can appreciate the emotional scope of what's involved in this case.

The third person who died – I have videotaped the scene of that homicide case as well. I've talked to the person's son. He testified at the prelim. He was almost beside himself when I went to his house. Those kinds of things are what appeal to a jury. And Mr. Waldon doesn't understand he's got to pit himself against that emotional framework.

(42ART 224-225.)

Russell said that she had explained the situation to appellant as many as 18 months previously, asking how he wanted to deal with the problems in the case she had identified. (42ART 225.)

Zumwalt asked appellant if he wanted to say anything concerning why she should discharge Russell and Khoury. (*Ibid.*) Appellant

complained that before he filed the February 1987 motion, no one from the defense had informed him Khoury was appointed as second counsel, nor had Khoury visited him. (*Id.* at 226.) Appellant was disappointed with this lack of communication. (*Id.* at 227-228.) Appellant mentioned that any complaints about Khoury's representation involved the "*Marsden* hearing complaints" that appellant had withdrawn. (*Id.* at 228.) The court continued to probe, "is there anything he should have done . . .[or that he] has done that you don't think he should have done. . .?" (*Ibid.*) Appellant retorted, "he has done numerous things, but I don't wish to delineate them." (*Ibid.*)

The court invited Khoury to respond. (42ART 228.) Khoury set forth his various attempts to communicate with appellant, and then Khoury and Russell delineated the work they had done in preparing and filing motions, handling the section 1368 proceeding, and preparing for trial in the case. (*Id.* at 228-240.)

Russell then summed up her views on the dispute between appellant and herself:

> I think, in terms of my concern about the record, if I could just indicate, that there are defense matters that are of grave concern to me that Mr. Waldon won't confront and they have to do with development of a defense for the homicide charges. . . .
>
> We have done everything humanly possible to pursue all possible defenses, both in person with Mr. Waldon and by investigative work both here and in Oklahoma. We have developed everything we can with and without his help, but his inability to act in a rational manner is perhaps more tied into the pro per, but is ultimately tied into his rational behavior for the conduct of this case in trial . . .

(*Id.* at 240.) Zumwalt discouraged Russell from speaking, stating that she was "trying to stick to the motion." (*Ibid.*) Russell responded:

> I know, and the problem is it's very – someone, if it's not me, it will be someone else – will have to let the trial court know what the problem is if there are not further mental proceedings because his current posture makes it impossible for anyone to make a definitive decision about what to do because of his – his state of mind.

(*Ibid.*) Appellant offered nothing further. Judge Zumwalt explained that she had given appellant, as the movant, the chance to have the "last word." (*Id.* at 241.)

In open court on March 8, 1988, Judge Zumwalt indicated that proceedings on "the *Marsden*/motion to dismiss attorney" had been completed and her ruling was pending. (43ART 250.) Appellant stated he had withdrawn his request for a *Marsden* hearing; the court stated, "I understand it. But you wanted to proceed on a motion to dismiss your attorney, and that is what we did. We heard the motion to dismiss his attorney." (43ART 252.) Appellant answered, "[N]o, your Honor, I did not wish to proceed on it. It was the court that wished to proceed on it." (*Ibid.*) Zumwalt said, "[f]ine, sir. The record has been established." (*Ibid.*)

Back outside the prosecutor's presence, the court addressed appellant's pro se motion to expand the scope of advisory counsel's representation, so that Sanchez could advise appellant regarding appellant's desire to file criminal charges against inmates John Maier and David Lucas.[67] (43ART 257-261.) The court denied the motion without prejudice to its renewal after the *Faretta* proceeding was completed. (*Id.* at 261.) Russell argued again that appellant's effort in wanting to call witnesses at the *Faretta* hearing was to elicit their opinions that he was competent, which would "negate the possibility of a psychiatric defense at trial . . .

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[67]As appellant explains below, appellant alleged that Maier and Lucas attacked him in the San Diego jail.

either in the guilt phase or the penalty phase." (*Id.* at 277-278.) Appellant explained that he wanted to call Mr. Patrick (who had been the prosecutor in the case previously) to say, as he had in an appellate brief, that the evidence showed appellant was mentally competent and had striven only to avoid being "manipulated by [his] attorneys." (*Id.* at 281-282.)

The prosecutors agreed to absent themselves from the examination of appellant's witnesses, with the understanding that the record of those proceedings would be sealed. (43ART 306-312.) Appellant then questioned Gloria Renas and Joan Williams, his former computer instructors, along with Bernice Garrett, a retired family counselor, George Max Brande, a retired teacher, and William Schwarz, a computer technician, all of whom had met appellant through the Esperanto language movement; each witness found appellant to be competent in their personal dealings with him. (43ART 314-380.)

Faretta proceedings resumed on March 10, 1988, again outside the presence of the prosecutor. (44ART 386.) Russell called as a witness Dr. Koshkarian. (*Id.* at 394.) Koshkarian said he had been retained by defense counsel to give an opinion as to appellant's "state of mind" as it pertained to a defense to the charge and a potential penalty phase. (*Id.* at 395.) He had spoken to appellant a year prior about appellant's desire for "pro per" status; appellant believed that if "pro per" he would have advisory counsel and would not necessarily speak in court, and that he would be housed in a special cell and have phone privileges, a runner, and a typewriter. (*Id.* at 396-397.) Koshkarian was not convinced that appellant adequately could prepare a defense in the case. (*Id.* at 397-398.) He believed appellant had the intellectual capacity to understand the implications of waiving counsel, but was not capable of waiving his right to counsel "on the basis of an intelligent or knowing or eyes wide open or fully understanding the

implications." (*Id.* at 402.) In Koshkarian's opinion, appellant possibly understood potential psychiatric defenses, intellectually, but could not present them because his judgment was impaired on that subject. (*Id.* at 409-410.) Koshkarian admitted, however, that he had never discussed appellant's defense strategy with appellant. (*Id.* at 411.)

Russell asked Dr. Koshkarian:

> If [the defendant] was faced with a choice of having to present psychiatric evidence and confront psychiatric issues that may relate to his background and his potential punishment in this case, do you feel that he could rationally present that kind of information, either in the first phase of the case or in the penalty phase of the case?
>
> Could he face up to the issue of presenting psychiatric evidence as a rational decision and go forward with that in either phase of a death penalty trial?

(*Id.* at 412.) Koshkarian replied, "I don't think so." (*Ibid.*)

Appellant then asked Koshkarian whether Koshkarian would withhold his intended defense strategies from his own attorney, if that attorney had "committed upon [him] numerous crimes and . . . acts of deceitfulness[.]" (44A RT 413.) Koshkarian replied, "if I felt that about somebody who is representing me, I would probably ask for somebody else to represent me." (*Id.* at 414.) Judge Zumwalt ordered appellant to turn over to the court Dr. Koshkarian's notes, which Koshkarian had provided to appellant not knowing of appellant's adversarial stance to Russell, and placed them under seal. (*Id.* at 419-420.)

The hearing on the *Faretta* motion continued on March 15, 1988, in sealed proceedings, with Russell calling as a witness Dr. Katherine Di Francesca, a psychologist who had interviewed appellant and administered a battery of tests in 1987. (45ART 424.) Di Francesca gave two "independent conclusions," viz., that appellant was not competent to waive

his right to counsel, nor was he competent to represent himself at trial. (*Id.* at 430.) Di Francesca said that the standard she used to assess appellant's "competence to waive counsel" was whether he "could waive [his] right to counsel with [his] eyes wide open, understanding the full ramification of what [he was] doing." (*Id.* at 435.) She further explained:

> I don't think that [he] is thinking clearly regarding [his] case. It is my opinion that rather than being able to think clearly on [his] case, [he gets] involved in a lot of nonrelevant side issues because being involved directly on [his] case is very anxiety-producing. During the time that I was attempting to evaluate [him, he] seemed unable to concentrate on anything that got even close to discussing the cases at hand. I believe that [he doesn't] understand those dynamics about [himself] and that [he's] not taking that into consideration when [he thinks] about representing [himself].

(*Id.* at 436.) Di Francesca stated that when she spoke with appellant about self-representation, he always seemed to be talking about going as "co-counsel" and not completely "pro per" in the case. (*Id.* at 438.)

On March 15, 1988, appellant, through advisory counsel Sanchez, submitted a "motion for self-representation and waiver of right to representation of counsel" that included a "*Lopez* waiver."[68] (8CT 1564-1570.) The motion and waiver described appellant's background and his understanding of his legal rights, the advantages of having a lawyer, and the disadvantages of self-representation, and it included several handwritten modifications. (*Id.* at 1564-1566.) In section 1(d), regarding whether he

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[68]A *Lopez* waiver is a form sometimes used in California trial courts in connection with granting *Faretta* status; its content is based on the opinion in *People v. Lopez* (1977) 71 Cal.App.3d 568, in which the court set forth several elements that trial courts advisedly would include in granting pro se status and entering a waiver of the right to counsel. The significance of *Lopez* and *Lopez* waivers generally and in this case is discussed in detail below.

had background experience in having been represented by a lawyer, appellant had written on the line for "this case": "In these cases I've had only ineffective assistance of counsel." (*Id.* at 1565.) In section 4 regarding "Disadvantages of Self-Representation," appellant altered the text to read "I understand that by representing myself I am probably *not* making the likelihood of my conviction and punishment much greater than if I had a lawyer." (*Id.* at 1569, emphasis added.) He had altered the next paragraph as well, so that the text read: "I understand that if I am convicted I will be able to complain on any appeal that I did not effectively represent myself. However, if I am represented by a lawyer I may complain on appeal that I was ineffectively represented." (*Ibid.* [crossing out the word "not" so text read "will be able" instead of "will not be able"].) In section 7 regarding "Waiver," appellant had altered the language to read "I make this waiver freely and voluntarily. I have not been promised any benefit, *but I do* expect *a* benefit, for making this waiver." (*Id.* at 1570, emphasis added [substituting "but I do expect a benefit" for the standard words "nor do I expect any benefit"].) Finally, at the end of the form appellant had added these handwritten words:

> I am waiving my right to counsel, if and only if my request to proceed 'in propria persona' with full assistance of counsel (with the restriction that counsel be prohibited from doing or saying anything without my permission) (and obey me) has been denied by the court.

(*Ibid.*)

Judge Zumwalt concluded the sealed hearing and heard argument from counsel on the *Faretta* issue. (45ART 460-494.) The court discussed the contents of appellant's written motion with him on the record, but did not put him under oath because it was not taking a "waiver" at that time. (*Id.* at 473.) Zumwalt asked, "do you understand by representing yourself,

you would, in all likelihood, make your conviction and punishment possibility much greater than if you had a lawyer?" (*Id.* at 480.) Appellant retorted, "your Honor, I believe that's a matter of opinion. I understand that's the court's opinion." (*Ibid.*) As to whether appellant could, after proceeding pro se, "complain on appeal" that he had lacked effective representation, appellant insisted that he could raise the complaint on appeal but conceded that it would be rejected. (*Id.* at 481.) On Russell's insistence, appellant took an affirmation and then stated that he understood the charges against him and the potential penalties. (*Id.* at 485-486.)

As to his handwritten caveat on the waiver language, appellant asked the court to first rule on his request "to proceed in propria persona with full assistance of counsel," with the restriction that counsel be prohibited from doing or saying anything without his permission and that counsel be required to obey him. (45ART 486.) Appellant explained that only upon denial of that request would he make his alternative request to represent himself. (*Ibid.*) Zumwalt did not rule on the initial request. (*Ibid.*)

The court again excluded the prosecutor, and took the testimony of appellant's advisory counsel Sanchez, who stated, in response to questions by appellant, that he was able to communicate with appellant very well without any trouble, that appellant had taken much advice Sanchez had given him, and that in years of practice having worked with nine to ten pro per defendants, appellant was the most "mentally competent" of them. (45ART 495-497.) Sanchez opined that appellant was capable of waiving counsel and representing himself. (*Id.* at 497-498.) In spite of Russell's arguments that doing so would undermine any potential psychiatric defense because the documents could be used by the prosecutor, appellant insisted on submitting documents including his resume which showed his

educational and work history. (*Id.* at 506-509.) It was marked as exhibit "N" and sealed. (*Id.* at 510.)

Appellant sought to introduce a document pertaining to the "criminal activity going on between Russell and her lover/client John Maier, with whom she's even discussed marriage . . . that included an attempt on my life that nearly succeeded." (45ART 512.) He claimed the document proved Russell's "motives for being so opposed to my pro per motion, since she knows exactly what I'm going to do when I go pro per, which is file criminal charges against her and her lover/client." (*Id.* at 513.) Judge Zumwalt denied the request. (*Id.* at 512.) Appellant said the Russell/Maier situation presented a "valid conflict of interest." (*Id.* at 513.) The hearing recessed until March 16, 1988. (*Ibid.*)

On March 15, 1988, Russell petitioned this Court for review of the Court of Appeal's denial of the competency writ in D007429.

3. Judge Zumwalt Deemed Appellant's *Marsden* Motion Withdrawn, Denied his Motion to Dismiss Russell, and Denied his Motion for Self-Representation Based on the Voluntariness of his Waiver of Counsel and his Incapacity to Make his own Defense

The next day, March 16, 1988, Judge Zumwalt entered a written Memorandum of Decision on the motion to dismiss counsel and for self representation. (8CT 1572-1577.) It stated that appellant "withdrew" the *Marsden* motion at the time of hearing "but went forward with a motion to dismiss his attorneys." (*Id.* at 1573.) The court found that appellant's reasons stated in camera for his motion to dismiss counsel were "totally inadequate," at most showing his subjective dissatisfaction with counsel and a personality conflict. (*Ibid.*) Appellant had demonstrated a "refusal to cooperate" and an "intransigence in his relations with his defense team and in his disagreement with their strategy and tactics." (*Ibid.*) The court

believed appellant's conduct had been "designed to delay proceedings." (*Ibid.*) It said that appellant could cooperate with counsel "should he cho[ose] to do so," and that the "breakdown in the attorney-client relationship [would] not make it impossible" for Russell and Khoury to properly represent him. (*Ibid.*) The court found that appellant could "consult with counsel" in the future if he would choose "not to be willfully recalcitrant and defiant." (*Id.* at 1573-1574.)

Zumwalt denied the *Faretta* motion:

> Defendant Waldon's motion to represent himself (*Faretta* motion) is denied.
>
> The court finds he is incapable of voluntarily exercising an informed waiver of his right to counsel, further, his request to the court to represent himself only on certain conditions shows he does not rationally perceive his situation.
>
> The court finds from this hearing's testimony, especially that of Doctors Kalish and Koshkarian and the testimony at the Pen. Code Sec. 1368 hearing that is part of this record, that defendant has a mental disorder, illness or deficiency which impairs his free will to such a degree that his decision to request to represent himself is not voluntary; he has a mental disorder, illness or deficiency which has adversely affected his powers of reason, judgment and communication. He does not realize the probable risks and consequences of his action. His request to waive counsel is, therefore, not an exercise of his informed free will. While Waldon has the cognitive ability to understand the proceedings, he cannot formulate and present his defense with an appropriate awareness of all ramifications.
>
> The witnesses called by Defendant Waldon (with the exception of Dr. Koshkarian) were not competent to give an opinion of his ability to waive counsel and the court finds their testimony deserving of very little weight.

(8CT 1574-1575.)

4. Russell Moved to be Relieved as Counsel and Judge Zumwalt Denied the Motion

On March 24, 1988, the case came before Judge Malkus and Russell said she was moving to be relieved. (46ART 3, 5.) Russell said she had refrained from filing the motion pending receipt of Judge Zumwalt's ruling on the defendant's motion regarding counsel and motion to proceed pro se. (*Id.* at 3-5.) Russell and the prosecutor informed Malkus they would be back before Judge Zumwalt on March 30 after Zumwalt returned from a trip, and requested the case be set back before Judge Malkus on March 31. (*Id.* at 5-7.) Judge Malkus postponed addressing whether to set a trial date, until the March 31 hearing. (*Ibid.*) A couple of hours later, the case came on before Judge Greer. (47ART 1.) The prosecutor explained that the case had been prevented from further hearing on March 16, 1988, because of a sewage problem in the court, and then by Judge Zumwalt's departure from town shortly thereafter. (*Ibid.*) Counsel explained that Russell had moved to be relieved, and there was some question as to whether certain sealed proceedings should be considered in addressing that motion and the prosecutor's statements regarding the existence of a conflict. (*Id.* at 2.)

Russell filed a motion to be relieved as counsel and supporting declaration on March 25, 1988. (8CT 1583.) Russell declared that, based on the recent in camera hearings before Zumwalt, appellant's desire to have her relieved as counsel showed an irreparable breakdown of the attorney-client relationship. (*Id.* at 1587.) She argued that appellant's lack of cooperation with her created "at least the appearance of" a conflict because she could not "effectively represent [appellant] until and unless he receive[d] appropriate medical and psychiatric treatment." (*Ibid.*)

On March 30, 1988, Judge Zumwalt heardRussell's motion to be relieved. (48ART 514.) The prosecutor said the record should show the

court considered potential issues related to a conflict between appellant and Russell including the jail assault by Mr. Maier, a misunderstanding concerning counsel's exploration of psychiatric matters, that Russell had opposed in writingappellant's motion to proceed pro se, and that appellant had refused to communicate with his attorneys for a year. (*Id.* at 517.) He argued that if the court ruled that similar problems would occur with any appointed counsel, it should deny the motion. (*Id.* at 518.)

Zumwalt heard from Russell outside the presence of the prosecutor. (48ART 520-529.) Russell argued that withdrawal was warranted based on appellant's personal hostility toward her, his desire to file criminal charges against her and Mr. Maier, and his refusal to communicate with Russell which stemmed from a psychiatric mental condition for which appellant required medical attention. (*Id.* at 521-522.) Russell explained that she could not keep representing appellant given his hostility and abusive behavior toward her based on his untreated mental illness. (*Id.* at 523-528.) Zumwalt said she would review the sealed transcripts of the proceedings on the *Marsden* motion and to proceed pro per, in ruling on the motion to withdraw. (*Id.* at 529.)

Zumwalt then stated on the record her reasons for denying Russell's motion. (48ART 530; 8CT 1602-1608.) Zumwalt said she had reviewed the in camera testimony, and that she sympathized with Russell, toward whom appellant had been abusive, but would not grant the motion. (8CT 1602.) She commended Russell for the excellence of her representation of appellant, stating that Russell offered appellant "as good a representation as [he] could buy for love or money." (*Id.* at 1602-1603.) Zumwalt said that nothing about Russell's representation of Mr. Maier would affect her ability to represent appellant; that any conflict over whether Russell should explore psychiatric defenses was no basis for removal; that the position Russell took

with respect to the pro se motion was not necessarily "opposition to" the motion; and that appellant's refusals to communicate would extend to other lawyers and were "not really specific to any individual lawyer." (*Id.* at 1603-1604.) Zumwalt cited appellant's acute need for a lawyer for his defense: "He, above all people in the system, now needs a lawyer [like Russell] who can focus on the task at hand." (*Id.* at 1604.) At Russell's suggestion, Zumwalt called the prosecutor into the hearing and had the clerk read to him her ruling and the reasons for it. (48ART 533-534.)

5. The Parties Sought Review of Judge Zumwalt's Rulings

On April 12, 1988, Russell filed a petition for writ of mandate in the Court of Appeal, D007850, regarding Judge Zumwalt's March 16, 1988, Memorandum of Decision and her March 30, 1988 denial of Russell's motion to be relieved as counsel. (72CT 15509.) Regarding the *Faretta* and *Marsden* rulings, Russell asked the appellate court to review the record "in the spirit of *People v. Wende*." (*Id.* at 15520.) Russell argued that her withdrawal as counsel was necessary because of the ethical dilemma posed by appellant's determination not to cooperate with her, and that the attorney-client relationship had broken down so much that appellant's right to the effective assistance of counsel was substantially impaired. (*Id.* at 15524-15525.)

On April 14, 1988, the prosecutor filed a petition for writ of mandate, D007873, seeking review of the denial of appellant's *Marsden* and *Faretta* motions. (45CT 9867.) The prosecutor requested consolidation of proceedings D007850 and D007873. (*Id.* at 9873-9874.)

On Monday, May 2, 1988, the case came before Judge Malkus in the trial court, who learned that appellant also intended to seek review of Zumwalt's rulings. (49ART 1-2.) Appellant agreed to waive time for two

weeks and the case was set for hearing on May 16, 1988. (*Id.* at 3.) Appellant complained on behalf of his ex-wife that Russell's investigators had forced their way into her house; the court said any relief in that regard could be pursued only in a separate, civil proceeding or through complaint to the police. (*Id.* at 3-4.)

On May 9, 1988, appellant filed a pro se writ challenging the denial of the *Faretta* motion.[69] On May 10, 1988, Russell wrote to the Court of Appeal asking that appellant's May 9 pro se writ, D008026, be sealed because appellant's mental illness prevented him from understanding how damaging its contents could be to his criminal case. (62CT 13991-13992.)

On May 10, 1988, Russell wrote to the Court of Appeal regarding D007850 and D007873, urging that if the court decided she should be relieved as lead counsel, the order should be limited to the criminal proceedings and not include her status as counsel in the pending competency writ and case. (62CT 13993.) On May 11, 1988, defense counsel filed a memorandum reminding the trial court of appellant's represented status in the case and his very limited rights of independent action while represented, and requesting that the court not permit appellant to plead or speak independently other than through advisory counsel. (8CT 1668-1672.)

On May 12, 1988, the Court of Appeal ordered the pro se petition in D008026 stricken and all related documents returned to petitioner, expressing concern that attorney-client privilege or superior court sealing orders might have been breached. (10CT 1950.) It directed appellant and advisory counsel to confer with Russell regarding matters to be edited or omitted, prior to re-submission of the petition, in order to preserve

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[69]There is no copy of this filing in the record.

attorney/client privilege and honor trial court sealing orders. (*Ibid.*) If appellant and Sanchez were unable to reach agreement with Russell regarding materials to be submitted to the Court of Appeal, they were directed to provide Russell with five days' advance review of the resubmitted petition. (*Ibid.*) No replacement petition was ever filed. (See September 1988 proceedings in the trial court, below).

6. This Court Granted Review in the Competency Writ; the Court of Appeal Issued a Joint Alternative Writ in D007850 and D007873 but set no Hearing on the Competency Writ

On May 15, 1988, this Court granted review in the competency writ, D007429, and ordered the Court of Appeal to issue an alternative writ to be heard when the Court of Appeal set the matter on calendar. (62CT 13989.)

On May 26, 1988, the Court of Appeal issued a joint alternative writ (OSC) in D007850 and D007873. (9CT 1773.) On June 8, 1988, the prosecutor filed an answer to the alternative writ. (72CT 15541.)

On July 1, 1988, defense counsel Russell submitted in all three of the then-pending writ proceedings (D007429, D007850, and D007873) the transcript of a June 10, 1988, hearing in which appellant complained about the assistance he was receiving from Sanchez as advisory counsel. (62CT 13925.) In a separate letter brief of that same date, defense counsel Russell proffered a previously sealed transcript of a September 22, 1986, in camera hearing and supplemental briefing. (*Id.* at 13920.)[70]

On August 12, 1988, D007850 and D007873 were argued in the Court of Appeal, while the competency writ remained off calendar despite Russell's objections. (72CT 15673, 15683.) On August 19, 1988, Russell

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[70]There is no transcript of this proceeding in the record. The proceeding is documented in a minute order dated September 22, 1986. (1CT 25.)

filed a second supplemental letter brief in the three pending cases, arguing that the Court of Appeal should resolve the competency writ before addressing the motion to be relieved. (62CT 13792-13800.) Counsel argued that there was no legal conflict of interest between herself and appellant, that asserted grounds of "conflict" arose directly from appellant's rejection of his lawyers for performing their Sixth Amendment duty to have his mental health and competence assessed, and that disagreement between client and counsel as to the client's competence does not permit the removal of counsel. (*Id.* at 13794-13795.) Russell argued that her appointment as appellant's counsel should continue with respect to the pending competency writ. (*Id.* at 13796.)

While the writ proceedings were under submission after argument, the parties appeared before Judge Malkus in the trial court on September 8, 1988. (55ART 1-5.) Appellant demanded that he be permitted to dismiss his counsel and proceed pro per, stating that Russell did not represent him, that his family had fled the United States because of Russell's harassment, and that he was receiving ineffective assistance from advisory counsel Sanchez. (*Id.* at 1.) The court observed that appellant was "somewhat excited" as he made these comments, and the prosecutor said Malkus should be warned that outbursts from appellant could be expected. (*Id.* at 2.) The court refused to hear appellant, because appellant had counsel. The transcript of a portion of this hearing (the "outburst portion") was sealed by the court. (*Ibid.*; see 38CT 8222-8223 [Sealed Declaration of Counsel in Support of Order for Release of Sealed Transcript of Proceedings Held on September 8, 1988].)

7. The Court of Appeal Affirmed Denial of the *Marsden* Motion, the Motion to Dismiss Russell, and Appellant's Motion for Self-Representation, but Reversed the Denial of Russell's Request to be Relieved and Directed the Trial Court to Substitute new Defense Counsel in all Proceedings

On September 12, 1988, the Court of Appeal issued its decision in D007850 and D007873. (10CT 1920.) It denied relief in D007873, noting that neither the prosecutor nor appellant had assigned any specific error in the trial court's denial of the *Marsden* and *Faretta* motions. (10CT 1920.) It declined to conduct an independent review of the record under *Wende*, and noted that the trial court had found that Russell had represented appellant in an extremely competent manner. (*Id.* at 1920-1924.)

The Court of Appeal granted relief in D007850, ordering Russell's removal as counsel because, in its view, there had been a complete breakdown in the attorney-client relationship. (10CT 1926.) Noting settled precedent that a client's willful refusal to cooperate does not constitute grounds for removal of counsel, the Court of Appeal found nonetheless that the breakdown of communication in this case, stemming in part from appellant's refusal to permit his mental state and psychiatric history to be used to defend him, deprived appellant of the effective assistance of counsel. (*Ibid.*) The Court of Appeal assigned great weight to appellant's apparent belief that Russell broke a promise not to use certain psychiatric records in pursuing his case, and to Russell's vigorous opposition, based on assertions of legal incompetency, to appellant's efforts to represent himself, noting that Russell had a concurrently pending petition challenging the trial court's competency determination. (*Ibid.*)

The Court of Appeal noted that "ordinarily" counsel has the power to control the court proceedings subject to certain fundamental rights of the defendant, and that by law this includes advocating doubts about

competency over the client's objections. (10CT 1926-1927.) Therefore, disagreement over whether to assert a psychiatric defense, or counsel's opposition to a request for self-representation, do not "normally" create a conflict of interest sufficient to require a court to relieve counsel. (*Ibid.*) Herein, however, Russell's vigorous advocacy on appellant's capacity to waive counsel, which included calling witnesses and cross-examining appellant's witnesses rather than simply allowing the court to hear the court-appointed expert and appellant's witnesses, showed she was in a "truly adversarial position" to her client. (*Ibid.*) The court said that while the *Faretta* hearing did not necessarily result in a breakdown in the relationship jeopardizing effective assistance, it did exacerbate appellant's distrust of Russell and preclude any possibility of rapprochement. (*Id.* at 1927-1928.)

The Court of Appeal also found the alleged jail assault, and appellant's belief that Russell was responsible for the assault given Russell's concurrent representation of appellant's alleged assailant, were important. (10CT 1927-1928.) While disavowing any belief that appellant's allegation of Russell's involvement was true, the court reasoned that what mattered was not what the court believed, but what appellant believed. (*Id.* at 1928-1929.) Appellant's continuing belief in Russell's involvement and his attempt to file criminal charges against her stemming from the assault, coupled with Russell's continuing representation of the alleged assailant, could further contribute to his distrust and refusal to cooperate with her. The court believed the situation was an "important consideration[ ]" in its decision that Russell should be relieved. (*Id.* at 1929.) Under the totality of the circumstances, the trial court had abused its discretion in failing to relieve Russell because, unlike a "simple disagreement" over trial tactics or strategy, the breakdown of the

relationship was so substantial that it jeopardized appellant's right to effective assistance of counsel. (*Ibid.*) The Court of Appeal disagreed with the trial court's findings that substituting counsel would not result in improved communications because appellant's distrust was general, rather than being specific to Russell. (*Id.* at 1930.) The court noted appellant's ability to communicate with his advisory counsel, Sanchez, and said it was possible that such "apparent cooperation" would carry over to newly appointed lead counsel. (*Ibid.*)

Turning to Russell's request to remain as counsel on the pending competency writ, the Court of Appeal reasoned that Russell should be removed from representing appellant in that proceeding also, so that newly appointed defense counsel could determine what arguments to advance therein. (10CT 1931.) The court rejected Russell's argument that it had to resolve the competency writ before it could rule on the question of her continuing representation, stating: "The procedure followed here further allows new counsel the opportunity to fully brief and argue all issues relating to the competency hearing including those that may not yet have been raised." (*Id.* at 1932.) Thus, the court granted a peremptory writ that Russell be relieved, with this order:

> The superior court is further directed to appoint substitute lead counsel forthwith. Substitute counsel shall have thirty days following appointment to consult with his or her client and to file whatever additional briefing he or she deems necessary in writ proceedings in *Waldon v. Superior Court* No. D007429 pending before this court. In all other respects, the petitions are denied.

(*Id.* at 1933.)

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8. Russell's Petition for Rehearing on Whether her Representation Would Continue on the Pending Competency Writ was Denied; Appellant Objected to any Further Involvement by Russell; Appellant Petitioned the Court of Appeal Challenging the Denial of his Motion for Self-Representation, Claiming Zumwalt Never Reached his Request to Have Pro Se Status and the Simultaneous Assistance of Counsel

By letter dated September 16, 1988, Judge Zumwalt informed the parties she would refrain from relieving Russell until the remittitur issued, because she had learned that Russell intended to petition the Court of Appeal for rehearing. (10CT 1940.)

On September 22, 1988, Judge Malkus ordered Sanchez to stay on as appellant's advisory counsel and directed Sanchez to buy appellant a typewriter for use in the jail. (56A-1RT 7.)

On September 27, 1988, Russell filed a petition for rehearing in the Court of Appeal (72CT 15552), objecting to being relieved and disputing that court's statement in its opinion that "all parties apparently concur in Russell's motion to be relieved." (72CT 15573.) Russell appended, to the petition, the sealed transcript of the September 8, 1988, hearing and asked that the record be augmented to include it. (72CT 15559; see fn 3.) On October 6, 1988, the Court of Appeal denied rehearing and augmentation, noting Russell's prior ambivalence, including at oral argument, about wanting to be relieved. (*Id.* at 15603-15606.) The court refused to hear further argument that the competency writ should be resolved before counsel was relieved. (*Ibid.*) On October 24, 1988, Russell petitioned this Court to review the Court of Appeal's decision. (72CT 15561.)

On October 26, 1988, Russell filed a declaration objecting to appellant having a typewriter in the jail, arguing that appellant did not have

Faretta status and he had not appealed Zumwalt's decision denying him such, and attaching a copy of the Court of Appeal's May 12, 1988 order striking the pro se petition challenging Zumwalt's order. (10CT 1946-1949.) Russell urged that appellant would use the typewriter to write material harmful to his defense, and that providing a typewriter to appellant would be "tantamount to giving him a loaded weapon." (*Id.* at 1948.)

On October 27, 1988, the parties appeared before Judge Malkus. (57ART 1.) Appellant asked that Russell be removed immediately and that there be an emergency *Marsden* hearing; the court noted that Russell was still the attorney or record, that appellant had Benjamin Sanchez as advisory counsel and that the court did not yet know what the outcome of the Court of Appeal decision relieving Russell would be. (*Id.* at ?.) Appellant claimed Russell was a psychopath who wanted him killed and had ordered his murder, and that he was bleeding because he had been assaulted a few minutes previously by members of a gang controlled by Russell's lover. (*Id.* at 1-2, 4.) Malkus said he was convinced that appellant could not go without counsel. (*Id.* at 3.) Appellant demanded *Marsden* relief with respect to Sanchez, which the court denied. (*Id.* at 13-19.) Appellant complained that Sanchez had refused to file a petition in this Court for him and asked that he be ordered to do so. (*Id.* at 18.) Malkus advised him that appellant had previously been ordered to provide pleadings to Russell before he filed them. Appellant asserted that this order did not apply to filings with the California Supreme Court. Malkus advised him that matters regarding appellant's "own self-representation" were pending in the Court of Appeal, the court was satisfied with present counsel, and representation by present counsel was in appellant's best interests. (*Ibid.*)

On November 17, Russell filed a request for an order preventing appellant from making further courtroom outbursts that threatened to harm

his defense and asked that the case be continued until the remittitur issued. (10CT 1983.) In court on November 21, Judge Malkus noted that Russell's petition for review was pending in the Court of Appeal and proposed setting a hearing date in 1989. (58ART 3, 6.) Appellant objected and moved for "emergency" *Marsden* relief. (*Id.* at 6.) When appellant spoke out during the hearing, over Russell's objection, Malkus threatened to have appellant gagged unless he spoke through counsel only. (*Id.* at 2-5.)

On December 12, 1988, appellant (with Sanchez) filed a petition for writ of habeas corpus in the Court of Appeal, D009282, challenging Judge Zumwalt's denial of his motion for self-representation, and stressing that appellant sought "self-representation with the full assistance of counsel" and Zumwalt never had ruled on that request. (52CT 11025.246, 11025.250.)

Appellant entitled the petition "**URGENT AND EMERGENCY**," in capital letters and extra lines. (52CT 11025.246, original emphasis.) Appellant claimed that his Sixth Amendment right to "assistance" of counsel was violated, because "effective assistance," by definition, should be provided by a "subservient," and appellant's counsel refused to accept subordination to appellant. (*Id.* at 11025.279-292.) It also claimed error based on Russell's "clandestine influence-peddling" to have Judge Malkus removed (*id.* at 11025.293-295); based on the denial of appellant's peremptory challenge against Zumwalt (*id.* at 11025.296-303); in Zumwalt's refusal to disqualify herself based on her prior relationship with defense counsel (*id.* at 11025.304-305); in Zumwalt's ruling that a lay witness was not qualified to render expert opinion on competency to waive counsel (*id.* at 11025.306-308); in Zumwalt's violation of the Thirteenth Amendment's prohibition of involuntary servitude by subjecting appellant to the domination of Russell (*id.* at 11025.309-314); in Zumwalt's having

conducted ex parte proceedings which excluded the prosecutor and public without appellant's personal approval (*id.* at 11025.315-319); and in Zumwalt's violation of appellant's First Amendment religious freedom rights, because his "religious beliefs require[d]" him to "represent [himself] in propria persona" (*id.* at 11025.320-323); and in Zumwalt's handling of his motion to disqualify her (*id.* at 11025.324-11025.326.) Appellant also appended a list of 24 "Further Issues and Arguments" including an assignment of error in not providing a more timely hearing on his *Marsden* motion. (*Id.* at 11025.334-341.)

Appellant accused Russell of sexual promiscuity with her clients and of dominating her client partners with constraining devices and whips. (52CT 11025.257.) He stated that Russell was like a "Marine Corp Drill Sargent [*sic*]" with her co-workers, and that she dominated and blackmailed judges, having tape recorded herself having sex with multiple judges, both male and female. (*Id.* at 11025.257, 11025.265, 11025.297.) He claimed Russell was trying to kill him and had commanded her "lover client" John Maier to attack him in the jail and use Maier's gang position to kill appellant because appellant refused to be dominated by Russell. (52CT 11025.259-11025.261.) He claimed that Russell had helped Maier smuggle in cocaine and marijuana in a lubricated condom (*id.* at 11025.260), and that she had bought one of her inmate lovers a Porsche as a "get-out-of-jail gift." (*Id.* at 11025.269.) Appellant claimed Russell was the "brilliant rich mafia attorney" of murderer Ronaldo Ayala, and was in his thrall. (*Id.* at 11025.262.) He claimed that due to Russell's failure to protect him from inmate attackers, he had been "showered" by urine and other body fluids over 50 or 100 times. (*Id.* at 11025.263-11025.264.) He labeled Russell a "mafia octopus" and a "cold-blooded killer,", an "omnivaginal" prostitute, a "totalitarian dictator" and a "brilliant Machiavellian teller of untruths." (*Id.*

at 11025.265, 11025.266, 11025.269, 11025.296.) She was an FBI agent who had sex with jail staff (*id.* at 11025.265) and a "man trapped in a women's body." (*Id.* at 11025.267.)

Appellant deemed Russell a "living master of flirtation" who tried to sexually seduce him out of asserting his trial rights; she walked in a "stalking predatory fashion, with eyes flashing from left to right as if searching for men to conquer, control devour and seduce"; she was a "Tyrannasaurus Rex(ine)" who demanded sexual control. (52CT 11025.271.) He accused her of keeping him from receiving documents to support his request for pro per status. (*Id.* at 11025.272-11025.276.) Appellant compared Russell to "Himmler" and Judge Mudd (who presided at the preliminary hearing) to "Hitler." (*Id.* at 11025.288.) He accused Russell of making appellant into a slave. (*Id.* at 11025.313.) He also asserted that Russell had been "'told' to seek and take [appellant's] case by the authorities when [appellant] was a fugitive." (*Id.* at 11025.272.)

Appellant also criticized Charles Khoury and Alex Landon, calling Landon "small, physically weak, mild mannered, effeminate, docile," and a "perfect wife" for the domineering Russell. (52CT 11025.267.) He asserted that Landon's client, David Lucas, conspired to kill appellant. (*Id.* at 11025.266.) Appellant called Khoury a "callous ghoul" who kept his identity secret from appellant and wanted to "zombify" appellant because he was afraid of a law suit. (*Id.* at 11025.277.)

On December 15, 1988, this Court denied review of Russell's petition challenging the Court of Appeal's ruling that Russell be relieved. (45CT 9917.)

9. The Court of Appeal Issued the Remittitur Directing that Russell be Relieved and Substitute Counsel be Appointed, and Advised Appellant that any Issues not Moot due to the Finality of its Prior Rulings on Zumwalt's Self-Representation Decision Should be Raised in the Trial Court by new Counsel to be Appointed for Appellant

On December 23, 1988, the Court of Appeal issued its remittitur in D007850 and D007873. (45CT 9914.)

On January 6, 1989, the Court of Appeal issued the following order in appellant's petition D009282 challenging Zumwalt's denial of his self-representation motion:

> The petition for writ of habeas corpus has been read and considered by Justices Work, Benke and Froehlich. It appears the issues raised in this petition which are not moot by reason of the finality of our consolidated decision in *Waldon v. Superior Court*, D007850, and *People v. Superior Court*, D007873, filed September 12, 1988, may be presented to the superior court by new counsel appointed pursuant to our decision. The petition is denied.

(51CT 11025.235.)

On January 9, Russell filed a motion and declaration in the trial court, in opposition to being removed as lead counsel. (10CT 2007.) On January 12, appellant, with Sanchez, filed another petition for writ of mandate in the Court of Appeal, D009343, this time making explicit appellant's position that he had filed a motion, which was preliminary to the *Faretta* motion, upon which Judge Zumwalt never ruled. (42CT 9516.) Appellant explained that he wanted to waive his right to counsel under *Faretta,* if and only if Zumwalt denied him leave to proceed in pro per with the full assistance of counsel who would "obey" him. (*Id.* at 9519-9520.) Thus, he argued, Zumwalt had erred by addressing appellant's "*Faretta*

motion to waive counsel," without first ruling on the motion to proceed pro per with obedient appointed counsel. (*Ibid.*)

On January 17, the matter came before Judge Exharos who relieved Russell as counsel, recused himself from deciding who new counsel should be, and transferred the case to the presiding judge in Department 1 for appointment of new counsel. (60ART 14-15.) The case instead went to Judge McConnell, who continued the question of appointing counsel three days hence for consideration by Judge Wagner, and refused appellant's request for 20-30 phone calls per day from jail and granted appellant permission to make three calls per day. (61ART 1-3.)

On January 20, the case came before Judge Wagner, who said he had spoken to John Cotsirilos about being appointed as counsel and continued the matter for Cotsirilos to be present. (62ART 3.) Wagner refused to let appellant personally address the court. (*Ibid.*)

On January 25, Judge Zumwalt issued an ex parte order stating that Russell had been relieved and new counsel had been appointed, and thus the Court of Appeal's order had been fulfilled and no further action was required. (24CT 5452.)

10. The Trial Court Decided to Delay Appointing Counsel to Replace Russell and Instead Appointed Bloom in Addition to Sanchez for the Limited Purpose of Aiding Appellant in a new Motion Concerning Representation

On January 27, 1989, the parties appeared back before Judge Wagner. (62ART 6.) Cotsirilos appeared and declared a conflict. (62ART 6-7.) Sanchez was also present. (*Id.* at 10.) The court stated it was "in a quandary," and that a further continuance would be required so it could find a lawyer to appoint to represent appellant. (*Id.* at 7.)

Forward came attorney Allen Bloom, claiming to make a "special appearance for Mr. Waldon," with a proposal that, he averred, would relieve the court of its quandary. Bloom argued:

> It appears that this matter – this case has been before appellate courts for a number of reasons and one of the issues which has been before the court of appeal was Mr. Waldon's request to represent himself, to first become – in effect, become lead counsel and have secondary counsel on his capital case or just represent himself pursuant to *[Faretta]* and there was a decision regarding that and the trial court – that request was denied and then that matter, that decision was taken to the appellate court by way of a writ and the appellate court ruled on that writ.
>
> That is they referred to another decision they made some three months before having to do with Mr. Waldon's case, but not exactly on that issue and they indicated that this issue of pro per status can be raised by whoever new counsel was.
>
> The DCA knew there would be new counsel because it was the DCA's decision that removed prior – confirmed the removal of Miss Russell from the case. So they knew there had to be new counsel and the DCA issued an opinion as to whether or not the question of Mr. – whether he should go pro per would have to be addressed again and whoever was new counsel could raise that.

(*Id.* at 7-8.)

Bloom urged the court to skip appointing counsel and instead appoint Bloom himself for the "limited purpose" of helping appellant seek self-representation:

> Sounds as if to me that would be the first order of business, whoever new counsel is going to be; namely, Mr. Waldon's request to represent himself or take this lead counsel position. So I have been contacted with regards to accepting appointment on this case and I am not willing or able at this time to accept a general appointment for all purposes, but I'm here to indicate to the court that I'm willing to accept an appointment for that limited purpose of dealing

with that first issue off – off the starting gate; namely, the question of Mr. Waldon's self-representation.

Mr. Cotsirilos has indicated in other cases – and nothing to do with this one, but in other cases such a procedure has been followed where he was appointed for that limited purpose and it seems to make sense to me. There have been some – I guess some concerns about finding a qualified attorney at the proper level who is available and willing to take the appointment and seems to me that one logical solution to that would be first deal with the pro per issue. If Mr. Waldon's motion to be named his own counsel is granted, then there wouldn't have to be a further search for a class six lawyer who is free who doesn't have a conflict to take the case.

So what we are – what I would suggest at this point, if the court's inclined to do so, is to accept the appointment for that limited purpose, set a hearing for that purpose – for that purpose of dealing with that pro per/*Feretta* [*sic*] issue. I don't believe that – I'm not saying that the hearing should be necessarily in court. I shouldn't imagine it would be, but wherever it would go, maybe in Department Nine to be assigned out or perhaps Judge Malkus . . . probably we'll set a hearing for that and then deal with that issue. If the motion is granted, then there is no need to look for a class six attorney. Mr. Waldon will be –

(62ART 8-9.)

Judge Wagner cut off Bloom's further comments, heard the prosecutor's statement that he was against the motion, and denied the motion, soundly rejecting Bloom's novel suggestion:

At this point in time in this proceeding, I believe Mr. Waldon is in a position where he needs an attorney appointed for all purposes. One of those purposes may well in fact be the motion that you have indicated should be made. Whether or not that motion is made will be between Mr. Waldon and whatever attorney is appointed to represent him.

At this point in time, I think it would be contrary to the existing status of the case to appoint an attorney for a special purpose and that request is denied.

(62ART 10.)

Judge Wagner proposed appointing Bloom to represent appellant for all purposes, but Bloom refused such appointment. (62ART 10.) The court put the matter over to January 31, 1989, for the purpose of naming appointed counsel. (62ART 10-11.)

On January 30, 1989, the parties appeared before Judge Malkus with Sanchez speaking for appellant, who was absent. (63ART 1.) Malkus said: "I want to make certain that Mr. Waldon has an attorney. If no one else is going to appoint an attorney for him I'll contact Department 1 or 9 and get an attorney appointed for him." (*Ibid.*) Malkus proposed to continue the case 30 days, to give new counsel a chance to be appointed and become familiar with the case. (*Id.* at 2.) Sanchez related that appellant wished to renew his "pro per status motion again," and that the Court of Appeal had indicated that such issue should be presented by new counsel to be appointed. (*Ibid.*) Sanchez mused on whether Judge Malkus would hear such motion, stating "I don't know what the new attorney's position would be with respect to that motion. I do know that Mr. Waldon wishes to bring that motion." (*Ibid.*) Judge Malkus said, "I'll hear anything that is brought in front of me that will facilitate any case assigned to me," and put the matter over to February 10, before him. (*Id.* at 2-3.)

On January 31, 1989, the parties came before Judge Revak; appellant was present. (64ART 1.) Appellant stated that Bloom had been willing to be appointed for him but Wagner refused, that he opposed any delay, and that he wanted to renew his request for pro per status. (*Id.* at 3.) Mr. Edwards, a prospective appointee as counsel, was present and refused the appointment. (*Id.* at 2.) Judge Revak put the case over to the next day to see if the conflicts panel could send over a lawyer qualified to try a capital case, available for appointment. (*Id.* at 3.)

On February 1, 1989, the parties appeared again before Judge Revak; Sanchez appeared as "advisory counsel"; appellant demanded an "emergency *Marsden* hearing" concerning Sanchez and asked the court to substitute Bloom for Sanchez. (65ART 5.) Revak was told that two panel attorneys, Mark Wolf and Ted Bumer, might be available for appointment, and put the matter over to the next days for Wolf and Bumer to be present. (*Id.* at 7-8.)

On February 2, 1989, the parties appeared along with Sanchez, Bloom, and Wolf, before Judge Revak. (66ART 9.) Bloom said that "the first thing that would be decided" in the case once proceedings were underway would be appellant's "motion to represent himself," which was "left open for consideration" by the "decision of the district Court of Appeal." (*Ibid.*) Bloom said that Sanchez had been assisting in that regard but Bloom was willing to substitute for Sanchez for that limited purpose. (*Id.* at 9-10.) Sanchez said that the motion for self-representation would be heard by Judge Malkus on February 10. (*Id.* at 10.)

The prosecutor objected, explaining that the Court of Appeal's order required, as an initial matter, the appointment of an attorney as counsel for appellant for all purposes. (66ART 11.) Judge Revak ordered that Sanchez and Bloom both were appointed to represent appellant in the *Faretta* motion and that Wolf was appointed "to represent Mr. Waldon as trial counsel if that comes to that status [viz., if the motion for *Faretta* status were denied], in other words, if in fact there is going to be a trial counsel conducting the trial it will be Mr. Wolf." (*Id.* at 13.) Appellant posited that Bloom should be the "new counsel" which the Court of Appeal had said should "raise" his "issues" at the superior court level. (*Id.* at 14.)

Wolf sought to confirm his understanding of what Judge Revak had ordered, stating, "at this point . . . I am not appointed on the case but that

[the court is] indicating an intention to appoint [me]." (66ART 15.) Wolf asked whether he had a "current responsibility to exercise independent judgment as general counsel," or whether, alternatively, his status as general counsel would "be in the future potentially." (*Id.* at 16.) Judge Revak said he intended the latter alternative, a present order to appoint Wolf in the future if pro se status was denied: "Yes. We will cross that bridge when we get to it." (*Ibid.*)

The prosecutor made one last attempt to convince Judge Revak that general counsel should be appointed and should decide what to do about the pending competency writ proceeding, prior to the court considering the question of appellant representing himself. (66ART 16-17.) Under the persuasion of Bloom and Wolf, Judge Revak reiterated that Wolf's appointment was provisional, to commence only if the *Faretta* motion was denied; if, instead, the *Faretta* motion were granted, then appellant would be his own lawyer and could decide himself what action to take regarding the competency writ. (*Id.* at 18-19.)

On February 10, 1989, the parties appeared before Judge Malkus, and Bloom and the prosecutor advised Malkus that they had disputed, before Judge Revak, whether the pro se motion should be heard before or after the appointment of counsel for all purposes, and that Revak had sided with Bloom and ordered that the first order of business was to hear the pro se motion. (67ART 2-3.) Judge Malkus said he would follow Revak's directive, but that the case would be continued to March 13, 1989, because it seemed likely that Judge Greer, Presiding Judge of the Superior Court, would soon change policies regarding whether motions would be heard by the assigned trial judge or different judicial officers. (*Id.* at 4.) Malkus set the case on Judge Greer's calendar for February 15. (*Id.* at 5.)

On February 12, 1989, the Court of Appeal wrote the following letter to Mr. Sanchez, sending copies to appellant, Judge Zumwalt, Judge Malkus, Judge Greer, the prosecutor, and Mr. Khoury:

> Dear Mr. Sanchez:
>
> > As advisory counsel you filed the referenced petition [D009343] for Mr. Waldon challenging the trial court's denial of his request to represent himself. It has come to the court's attention Mr. Waldon now has a second motion to represent himself pending in the trial court.
> >
> > This is to inform you this court intends to hold Mr. Waldon's petition in abeyance pending disposition of the motion in the trial court.

(42CT 9512.)

On February 15, Judge Greer called the case, and Bloom appeared and informed the court he was appearing in a limited capacity on appellant's motion to represent himself. (68ART 1, 5.) The court informed the parties that the case had been reassigned from Judge Malkus to Judge Kennedy, for all purposes except law and motion matters, which would be heard by Judge Langford. (*Id.* at 1.) Appellant, speaking for himself, attempted to challenge Judge Kennedy *for cause*, and Greer denied the challenge on the ground that all 170.6 challenges had been used. (*Id.* at 2.)

On February 17, the parties appeared before Judge Kennedy. (69ART 1.) The prosecutor attempted to bring Judge Kennedy "up to date," advising him that the Court of Appeal had ordered Ms. Russell be relieved, that the attorney to replace Russell would have 30 days to determine what to do with the pending competency appeal, and that before the remittitur the Court of Appeal issued an order stating "nothing we've said would degrade or detract from Mr. Waldon's right to seek pro per status." (*Id.* at 2.) The prosecutor explained that Judge Revak had ordered that Wolf would become appellant's counsel "if and when [appellant's] pro per motion" was

denied; in the meantime, Sanchez and Bloom were representing appellant in seeking his pro per status. (*Ibid.*) The prosecutor stated that "the first order of business is the pending pro per motion," pursuant to an order the Court of Appeal issued "in that regard." (*Id.* at pp. 2-3.) Judge Kennedy acquiesced to the status quo as presented, and set a hearing on the pro se motion for March 17. (*Id.* at 6-7.)

11. Appellant Challenged Judge Kennedy for Cause Alleging Kennedy was Biased Because he had Reviewed the Record of Prior Proceedings

On March 17, the case came before the court and, at Bloom's request and with no opposition of the prosecutor, the hearing on appellant's motion for self-representation was continued to April 10. (70ART 10.) Judge Kennedy suggested that he might order a psychiatric examination of appellant in advance of hearing the motion, but Bloom convinced the judge that doing so would be premature. (*Id.* at 9.) Bloom requested the court order jail staff to give appellant access to a word processor and permit him to make six daily confidential phone calls, in connection with his preparation of the motion to proceed pro se. (*Id.* at 10-12.)[71] Judge Kennedy asked counsel to confer with jail staff to ascertain their position on those requests and report back to the court. (*Id.* at 14-17.) On March 22, 1989, Judge Kennedy heard from jail staff that giving appellant the word processor and phone privileges would be quite burdensome. (71ART 1-8.) Judge Kennedy continued hearing on the issue to April 10, 1989. (*Id.* at 8.) Appellant objected to the delay, stating that the phone calls and word

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[71]In connection with this request, Mr. Bloom argued that the Court of Appeal had, in relieving Russell, suggested Russell acted improperly in adopting certain positions, contrary to appellant, on various matters (such as appellant having a word processor in the jail). (70ART 12.)

processor were a prerequisite to him receiving a fair hearing on his motion for pro per status. (*Ibid.*)

On April 10, 1989, the parties again appeared before Judge Kennedy. (72ART 1.) Immediately after appearances were made, Bloom stated that appellant wished to challenge Judge Kennedy for cause on grounds related to (1) appellant's written allegations that Russell, his former counsel, had been sexually involved with the court's judicial officers, including Kennedy; (2) Kennedy's denial of appellant's 170.6 challenge against him; (3) Kennedy's review of the record of prior proceedings, which appellant alleged the Court of Appeal had ordered "null and void"; and (4) allegations that Kennedy had been rude to appellant in court on March 22. (*Id.* at 2-5.) Judge Kennedy recessed, read the 13-page declaration prepared by appellant on the challenge for cause,[72] stated his position that appellant's motion and

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[72]Appellant's "Statement of Objection and Disqualification" expanded on his allegations against Russell and broadened the scope of the claimed sexual cabal to include Judge Kennedy. (10CT 2097-2109.) Appellant alleged, inter alia, that Russell had "provided Judge Kennedy with sexual favors in return for judicial favors for her lover/client Maier." (*Id.* at p. 2102.) He accused Russell of cheating at law school by getting Alex Landon to do her work for her. (*Id.* at 2106.) He accused Russell of contaminating the court file with materials creating a record that "falsely portray[ed him] as a mental defective," demanding that "no judge should read false information about me generated by Geraldine Russell" and claiming that any judge having read such information would bear a "subconscious prejudice" against him. (*Id.* at 2105; see also *id.* at 2128 [transcript of argument by Bloom during April 10, 1988, trial court hearing].) Judge Kennedy filed a verified answer to the challenge on April 14, 1989, which included a statement that appellant lacked the mental capacity to file the motion because his "mental competency" had been the "subject of rulings with which he apparently disagrees." (*Id.* at 2112-2123.) On April 26, 1989, Sanchez filed for appellant an amended response to Kennedy's answer explaining that appellant had standing to file the challenge in his own capacity because no counsel had been appointed to

(continued...)

declaration were "specious," and referred the motion to Department 9 pursuant to sections 170.1 and 170.5 of the Code of Civil Procedure. (*Id.* at 8-14.)

Still on April 10, 1989, before Judge Exharos, Bloom stated that appellant would not stipulate to any judge in that superior court hearing the challenge. (73ART 1.) Judge Exharos put the matter over to April 20, for Judge Kennedy to file a written response. (*Id.* at 2.) Exharos commented, "[n]ot that we don't have enough attorneys in this case, we're about to run out of judges." (*Id.* at 3.) On April 20, 1989, the matter was continued to April 21, 1989. (74ART 1.)

On April 21, 1989, before Judge McConnell, at Bloom's request, the matter was continued to April 28, 1989, so that written materials (including the response that Judge Kennedy had prepared) could be settled upon for submission to the Judicial Council, which would assign a judge to hear the motion. (75ART 1-3.)

On April 28, 1989, before Judge Greer, the parties appeared together with deputy county counsel Baird appearing for Judge Kennedy. The parties agreed upon the record that would be forwarded to the Judicial Council, with the understanding that a declaration by Russell submitted by counsel for Judge Kennedy would be reserved pending the Judicial Council's decision to consider it. (76ART 1-9.)

On May 25, 1989, Judge Rouse of the San Bernardino County Superior Court (assigned by the Chair of the Judicial Council to hear the

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[72](...continued)
represent him for general purposes. (11CT 2238-2244.) Attached thereto was Sanchez's declaration stating that he was assigned only for a limited purpose and was not appellant's "attorney of record," and Bloom's declaration that he represented appellant only "for a limited purpose." (*Id.* at 2245, 2247.)

matter) denied the motion to disqualify Judge Kennedy on the ground that there was insufficient evidence of bias or the appearance of bias to warrant appellant's motion. (11CT 2364.)

The case came before Judge Kennedy on May 31, 1989; Bloom stated that henceforth he would refer to appellant as "Mr. Sequoyah," at appellant's request. (77ART 1.) Bloom stated that the for cause challenge had been denied, and the case was on calendar for setting of a hearing on appellant's motion to proceed pro se. (*Id.* at 1-2.) The prosecutor advised the court that the competency writ, filed by Russell, remained pending in the Court of Appeal, and that Judge Revak had decided that a "full-blown pro per motion," which might give appellant the status to decide, as his own attorney, what to do with the competency writ, would be the first order of business. (*Id.* at 5.) Hearing on the motion to proceed pro per was set for June 22 and 23, with the understanding that Bloom would file appellant's papers by June 5. (*Id.* at 7-8.)

12. Appellant Moved for a Hybrid Representation Status, That is, Expanded Powers for Himself Together With Assistance of Counsel; Judge Langford Heard and Denied Appellant's Motion for Appointment of Attorneys who Would Obey him and Take Direction From him

On June 5, 1989, appellant (through Bloom) filed a separate written motion in case number CR82986 (the capital case) entitled "Motion to: 1) Assign Two Counsel to Defendant's Case, Both of Whom Will Take Direction from Defendant or (if that Motion is Denied) 2) Allow Defendant to Act as His Own Lead Counsel and Appoint Second Counsel to Work Under Defendant's Direction." (12CT 2492-2501.) This motion also included an "Acknowledge[ment] and Waiver" similar to a *Lopez* waiver in some respects but not others. (*Id.* at 2502-2506.) The same date he filed a

similar motion in CR82985, his non-capital case, requesting appointment of one obedient attorney therein, rather than two. (11CT 2344-2359.)

On June 19, 1989, the prosecutor filed "Points and Authorities in Response to Motion to Proceed in Propria Persona" which argued that appellant did have a right to represent himself, but that if the court decided to grant appellant's motion it should require him to read, fill out, and sign a *Lopez* waiver (a blank copy of which was attached as exhibit B) and should revisit the question of self-representation in the event that a death penalty trial became necessary (citing *People v. Teron* (1979) 23 Cal.3d 103, 111, 115, fn. 7). (11CT 2367-2387.)

On June 22, 1989, the parties appeared in Judge Kennedy's department and learned that the case had been transferred. (78ART 3.) The parties then appeared before Judge Exharos who informed them that he already had recused himself. (79ART 3-4.) The parties then appeared before Judge Greer, who told them that he did not know why Kennedy was no longer on the case, but that they would appear before Judge Langford on the motions and that another judge would have to be selected for other matters. (78ART 4.)[73]

The case then landed in the courtroom of Judge Langford, for hearing on appellant's motions regarding representation.[74] (See 78ART 5.)

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[73]The appearances before Judge Kennedy and Judge Greer are not reported. Rather, Bloom later reported to Judge Langford that when the parties arrived in Judge Kennedy's chambers, they were informed that the case had been transferred and when they then appeared before Judge Exharos, he told them that he had recused himself. (78ART 3.) Bloom stated that they then appeared before Greer, who sent them to Langford. (*Ibid.*) Appellant's requests to settle the proceeding before Kennedy and Greer were denied. (70CT 15447-15448.)

[74]The presiding judge, Judge Greer, assigned Langford to hear

(continued...)

Charles Khoury was present, and although his standing as counsel for appellant was not recognized by the court, he explained his position that no *Faretta* motion should go forward until the competency writ in the Court of Appeal was resolved.[75] (78ART 9-11; see also 78ART 45 [as there was no first chair serving at that time, Khoury lacked any standing as "second chair"].)

Judge Langford observed that the case was a "terrible tangle." (78ART 14.) Langford took up the first request in the motions filed in the capital and non-capital case, respectively, seeking appointment of attorneys (one in the non-capital case and two in the capital case) who would take their direction from appellant and be required to obey him. (*Id.* at 26.) Judge Langford denied the motion on the ground that the Sixth Amendment does not entitle a criminal defendant to an attorney who, notwithstanding his ethical duties, would give the defendant the power to control decisions in the case (apart from those decisions designated as being under the defendant's personal control, viz., the right to testify, to plead, to waive time, to confront his accusers, to have a defense supported by credible

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[74](...continued)
pretrial motions in the case when Judge Kennedy was assigned as trial judge. (68ART 1.) Originally, Judge Kennedy was supposed to hear the self-representation motion, as well as the trial. (*Ibid.*) When the case was transferred from Judge Kennedy, Langford took over responsibility for ruling on the self-representation motion, stating that he had the "jurisdiction" to do so no matter what the status was of "all these people before me." (78ART 14.) Recall that Russell had used a preemptory challenge on Judge Langford in relation to his presiding over the 1368 trial. (1ART 1.)

[75] Judge Langford concurred that the removal of lead counsel would seem to implicitly terminate the appointment of that attorney's second counsel, and Khoury clarified that he was appearing as amicus to inform the court of problems arising from the history of the case. (78ART 11, 43-44.)

evidence presented if it his sole defense in the guilt phase of a capital trial.) (*Id.* at 26-35.) Turning to the second request in each of the written motions (viz., to permit appellant to represent himself, assisted by advisory counsel in the non-capital case and "second counsel" in the capital case), Bloom advised the court that he would be calling approximately 30 witnesses to support appellant's position. (*Id.* at 38-40.) Judge Langford said he preferred to take those witnesses' evidence by affidavit rather than oral testimony. (*Id.* at 41-42.) The motion was put over to July 21, 1989, with Mr. Bloom to submit papers by July 14. (*Id.* at 46.)

13. The Case was Reassigned to Judge Boyle, who Heard the Pending Motions Related to Representation After Agreeing not to Review the File, and Granted Appellant Leave to act as his own Attorney

On June 26, 1989, Judge Greer assigned the entire case, motions and trial, to Judge Boyle.[76] (79A-2RT 1.) Bloom explained to Boyle that he was assigned "not as full-purpose counsel," but rather "for the purpose of assisting [appellant] in his efforts to become pro per." (79A-3RT 3.) Bloom explained that the written motions before the court each had two parts, the first of which had been ruled on by Judge Langford. (*Ibid.*)

Judge Boyle asked if there was anything pending from the section 1368 proceeding in the case; Bloom said "[i]t is very remotely pending. It is not pending in this Court and may be pending in some sorts of writs." (79ART 5.) Boyle said "that bridge will be crossed after we decide the lawyer issue." (*Ibid.*) Judge Boyle directed Bloom to submit witness affidavits, and confirmed that the motion was on calendar for hearing on

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[76]Bloom stated that appellant challenged Boyle both peremptorily under 170.6 and for cause; Boyle rejected the challenge. (79A-3RT 3-4.)

July 21, 1989. (*Id.* at 7.) Appellant's objection to the delay was overruled. (*Id.* at 8.)

The prosecutor suggested that Judge Boyle start going through the file, noting that it was large, perhaps four boxes. (79A-3RT 8.) Judge Boyle replied:

> We can only do one thing at a time and the only thing we can do is decide on his right and the exercising thereof of his right to represent himself and that is the first bridge and, until we cross that bridge, I will take no further action on this case.

(*Ibid.*)

The prosecutor insisted it would be best if Judge Boyle review the file:

> The only reason I mention that, your Honor, is because this is the – if I may classify it – pro per to you two. We have been through pro per one, and I thought the Court might want to refresh itself, if it has the opportunity, and look at some of the things that went through those initial proceedings with respect to this motion.

(73A-3RT 8.)

Bloom, on the other hand, discouraged the court from reviewing the file:

> [The defendant] wishes to request that the Court limit its review to the pending motion. The review of prior materials, he thinks, we believe, could possibly be prejudicial. We have papers on this current motion. We would ask this Court to limit its review to this current motion.

(73A-3RT 9.) Judge Boyle confirmed that Bloom "join[ed] in" appellant's request that he *not* review the file, and granted the request, agreeing to take up the motion on the briefing only. (*Id.* at 9.)

In a status hearing on July 14, 1989, Judge Boyle and the parties concurred that Judge Langford had denied the first request presented in

appellant's papers, viz., to appoint one counsel in the noncapital case and two counsel in the capital case who would serve under appellant's direction and obey him. (80ART 12-15.) As he turned to appellant's still-pending request (the second part of the written motion in each of the two cases), Judge Boyle commented on the awkwardness posed by his ignorance of the record:

> [A]t the request of the defendant and concurrence [*sic*] of his counsel, I have – I hate to say this on the record, but – intentionally kept myself ignorant of the history of this case. So don't assume that I have been following this case along and understand what has happened before, because I don't know anything about what's happened before.

(*Id.* at 15-16.)

Boyle posited that the witness affidavits to be submitted would address appellant's "competency to represent himself," but Bloom corrected the judge's terminology, insisting the only question was "whether or not [appellant could] understand those rights and waive those rights with regard to having other counsel." (80ART 16.)

The court conceded to Bloom's request that the hearing be postponed for several weeks, and Bloom requested that the July 21, 1989, date be kept on the court's calendar for a "status" of sorts. (80ART 17-20.) Bloom indicated that on that date, he would ask the court to address whether the court would order that appellant be permitted to have telephone contact with witnesses in connection with preparing the affidavits, and to consider ordering former attorney Russell to turn over the case file, which she refused to release. (*Ibid.*) Judge Boyle asked why Russell refused to release the file, and the prosecutor explained: "I think the problem for Miss Russell . . . is [that] she has been relieved and there has been no lead counsel appointed, no new counsel to replace her, so she doesn't know what to do with the file." (*Id.* at 20.)

The court addressed the dilemma Russell faced:

> THE COURT: Maybe she has to be protected by an order.
>
> [The prosecutor]: And I think that she is awaiting an order from a Court as to – I mean, if you were to order it, would you order it to Mr. Waldon? He is not his own attorney yet.
>
> THE COURT: That is why we are going to solve it as best we can, but it's true that these two attorneys present here, Mr. Bloom and Mr. Sanchez, have been appointed for a limited purpose but it is for a limited purpose in the sense of mission. As far as I am concerned, both of you are the attorneys for the defendant completely and 100 percent at this point in time and would certainly be a correct repository of any files or information if you were to request it the next time . . .

(80ART 20-21.)

Judge Boyle prepared to conclude that day's session with plans to meet back a week later; appellant spoke on his own behalf stating that he "objected to any delay in this matter." (80ART 22.) Boyle addressed Bloom and Sanchez: "What does that mean? You are his attorney[s]. We have a statement on the record by the defendant he objects to any delay. There is lots of delay in this case and there is a motion pending and I am just confirming next week's date." (*Ibid.*) Sanchez and Bloom both refused to comment. (*Ibid.*)

Before Judge Boyle on July 21, Bloom requested the matter be continued to August 18 for a paper review to confirm that the court had all necessary documents to consider in connection with the motion, and to set a hearing on the motion. (81ART 25-27.) The court then addressed Bloom's desire for discovery in the case, from both the prosecutor and from the case file that Russell refused to turn over. (*Id.* at 27-28.) Bloom, paraphrasing the court's statements at the preceding hearing, said that he and Sanchez

were in the status of "general counsel for a limited purpose," to wit, appellant's motion to represent himself. (*Id.* at 29.) Judge Boyle said he had reviewed the case law and that he had seen no similar cases, where the court had used taxpayer money to appoint attorneys to "assist the Court and, primarily, the defendant in making an intelligent choice to go pro per in a case." (*Ibid.*) At the same time, the court mused that:

> [T]here is no question that only one person, even though we have two lawyers on this kind of a case, but only one person can be in charge of the representation of a charged defendant . . . and that is either the defendant in an authorized pro per status or his attorneys. There cannot be two captains leading that ship.
>
> At this particular point in time, the captains leading the legal ship here are co-counsel, the two attorneys appointed to represent the defendant and assist him and also, therefore, the Court in making a decision to be sure he is aware of what he is doing when he requests to be pro per.

(*Ibid.*)

After much discussion concerning logistics, the court ordered that the prosecutor would make its discovery available to the defense at defense expense, and that it would not at that time order Russell to turn over her case file to Bloom, Sanchez, or appellant. (81ART 36-37.) Bloom conceded that receiving the file would not be necessary for preparation of the pro per issue within the scope of his limited assignment. (*Id.* at 37.)

On August 18, before Judge Boyle, Sanchez requested that the matter be put over because more time was needed to obtain the affidavits to support appellant's motion. (82ART 40.) The court and counsel agreed to continue it to September 14, 1989. (*Id.* at 41-42.) Appellant personally voiced his objection to the delay, which the court noted for the record. (*Id.* at 42.)

On September 14, 1989, the parties appeared before Judge Boyle and Boyle set November 3, 1989, to hear argument on the motion, with all affidavits in support of the motion to be submitted to the court (but not to the prosecutor, who would not be privy to them) by October 20, 1989. (83ART 45-47.) Sanchez requested the court order permission for appellant to have papers in his jail cell, and Judge Boyle granted appellant leave to possess, "papers relating directly to these proceedings on pro per status." (*Id.* at 49.) Boyle reiterated that before him were "limited proceedings where attorneys are here representing the defendant fully but for a limited purpose, which is to assist the Court and the defendant in a serious matter in determining whether or not [appellant] should be allowed to proceed without counsel." (*Id.* at 50.)

Finally, Bloom submitted a number of declarations in support of appellant's motion for self-representation. Most of the declarations were lay declarations; some were witness responses to a "questionnaire." (38CT 8230-8277.) All of the witnesses knew appellant in relation to his activities as an Esperantist in Los Angeles, Europe and/or Asia. (*Ibid.*) Most of them stated that appellant was "mentally capable of knowingly, intelligently, and voluntarily waiving the right to be represented by an attorney" and/or had "the present ability to understand or learn the mechanics of preparing a trial defense." (*Ibid.*)[77] None of the witnesses indicated that he or she had

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[77]See: 38CT 8231-8232 [Declaration of Roland J. Glossop]; 38CT 8233-8234 [Declaration of Joseph H. Gamble]; 38CT 8235 [Declaration of Jack K. Lesh]; 38CT 8250 [Affidavit of William R. Harmon]; 38CT 8251-8253 [Declaration of Bernice Garrett]; 38CT 8254-8255 [Declaration of Douglas Robert Witscher]; 38CT 8256-8257 [Declaration of Bernice G. Acers]; 38CT 8258-8261 [Declaration of Derek Roff]; 38CT 8262-8263 [Questionnaire Response of Joel Brozovsky]; 38CT 8264-8267 [Affidavit of Kathy Carter-White]; 38CT 8268-8272 [Questionnaire Response of Max (continued...)

discussed with appellant any possible defenses to the pending charges. (*Ibid.*) Several of the witnesses made statements reflecting a view that the court was questioning appellant's mental competence to represent himself *because of* his identity as, or commitment to being, an Esperantist and/or a Native American. (*Id.* at 8260, 8263, 8270, 8275.)

Declarations also were submitted from psychiatrist Dr. Ernst Giraldi and psychologist Dr. Ricardo Weinstein. Giraldi stated the opinion that appellant was "competent to waive his right to counsel with his eyes wide open and represent himself." (38CT 8237, 8243.) Weinstein stated that there was "no impediment in [appellant's] psychological capacities to prevent him from representing himself." (*Id.* at 8244, 8249.) Both Giraldi and Weinstein said their conclusions were based on solely what appellant had told them, including appellant's denial of being depressed, of suffering concentration or memory problems, or of experiencing hallucinations. (*Id.* at 8243, 8248 .) Dr. Giraldi did not review any documents and appellant had refused to let him ask about anything prior to one year previous. (*Id.* at 8243.) Dr. Weinstein had made the evaluation "while limit[ing] the focus of the information that [appellant] would make available," and "the information obtained was mainly on what ha[d] happened to [appellant] in the past year." (*Id.* at 8248.) According to the Weinstein declaration, appellant had refused to reveal the reasons for his incarceration. (*Id.* at 8248.) Both Dr. Giraldi and Dr. Weinstein referred to appellant as "Stephen Midas," the name under which appellant had been arrested. (*Id.* at 8243, 8248.)

When court convened before Judge Boyle on November 3, Bloom submitted on appellant's behalf a statement of objection and

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[77](...continued)
Brande]; 38CT 8276-8377 [Questionnaire Response of Beatrice Garrett].

disqualification of Boyle from sitting on the case. (84ART 52-53.) Judge Boyle declined to review them, stating that he was on the case for "one reason only, on a pro per motion." (*Id.* at 53.) He noted "[t]his case is becoming insane in its practice and procedure." (*Ibid.*) Bloom asked the court to attach a new face sheet to the pending motions, showing appellant's name as "N.I. Sequoyah"; the court agreed to do so. (*Id.* at 54-55.) Judge Boyle granted appellant pro per status, stating his rationale for so ruling on the record, and appointed attorneys Sanchez and Wolf as "second chair" counsel to assist appellant in the case. (*Id.* at 79-80.)

Boyle put the case over to November 8 to complete the steps to appointing the two lawyers and, after Boyle advised it was a "new ball game" and all his prior objections to delay preserved the issue, appellant agreed to a limited waiver of time in that regard. (84ART 80-82.)

On November 8, 1989, the parties appeared before Judge Boyle and he again appointed Sanchez and Wolf as "second-chair, advisory counsel." (85ART 87.) Boyle clarified that the two attorneys were not "working for [appellant] as, basically, employees," but they would "fill in as counsel," without "giv[ing] up whatever rights they have as attorneys and professionals to deal with the defendant." (*Id.* at 88.) Boyle said, "[t]he defendant . . . has the right to direct the case because he is his own lead attorney, but [Sanchez and Wolf] are far different than . . . mere employee[s] of the defendant." (*Ibid.*)

The prosecutor mentioned the pendency of the competency writ, and the court set a hearing on December 8, 1989, to provide time for appellant, Sanchez and Wolf to determine and then advise the trial court what steps would be taken with respect to the pending writ. (85ART 90-92.) Bloom indicated he would turn over to Sanchez the thousands of pages of discovery he had received from the prosecutor. (*Id.* at 92.) Appellant

lodged an objection to Elliott Lande (who was involved in the referral of Sanchez and Wolfe from the indigent defense panel for appointment) "having anything to do with me or my case."[78] (*Id.* at 93.) The court noted the objection for the record, and appellant entered a limited waiver of his speedy trial rights for the 30-day continuance. (*Id.* at 91-92.)

B. Judge Revak Erred in Allowing Appellant's *Faretta* Motion to be Reconsidered Because Appellant Already had a Fair Hearing Before Judge Zumwalt and There was no Change of Circumstances

1. Judge Revak's Discretion to Revisit Judge Zumwalt's Decision was Limited

The path that lead to Judge Boyle's grant of pro se status to appellant began with Judge Revak's decision that he could consider appellant's motion to represent himself before he appointed counsel following the removal of Russell. Judge Revak's consideration of the motion was an abuse of discretion because Judge Zumwalt had already had a lengthy, fair, hearing on the issue and there were no new grounds for the motion to be reconsidered.

"It is a fundamental principle of jurisprudence . . . that a question of fact or of law distinctly put in issue and directly determined by a [criminal or civil] court of competent jurisdiction cannot afterwards be disputed between the same parties." (*Frank v. Mangum* (1915) 237 U.S. 309, 334.) As such, the power of one judge to vacate an order made by another judge

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[78]Appellant objected to Lande on grounds that Judge Lisa Guy-Schall had ordered that Lande could not serve as his attorney because he had a conflict. (85ART 93.) On June 20, 1986, appellant appeared before Judge Guy-Schall. There is no reporter's transcript of this appearance. However, the record was settled to state that at that hearing Defender's Inc. and Elliot Lande were appointed to represent appellant. (1CT 30; 70CT 15441.) At the next hearing, on June 26, 1986, Defender's Inc. was relieved and Geraldine Russell appointed. (1CT 31.)

is limited. (*Greene v. State Farm Fire & Casualty Co.* (1990) 224 Cal.App.3d 1583, 1588; *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 713.) The rule that one superior court judge may not reconsider the previous ruling of another superior court judge applies in a variety of settings, in both criminal and civil cases. (*People v. Madrigal* (1995) 37 Cal.App.4th 791, 795-797 [ruling of second judge imposing a prison sentence after probation violation hearing is unlawful when first judge had earlier reinstated probation]; *Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 630-631 [second judge without power to vacate default judgment entered by first judge].)

A trial court generally has the authority to correct its own prejudgment errors. (*In re Alberto* (2002) 102 Cal.App.4th 421, 426.) However, the general rule does not apply when it is a different judge who is reconsidering the interim ruling. (*Id.* at p. 427; see *People v. Konow* (2004) 32 Cal.4th 995, 1021 [affirming *Alberto* principle, but distinguishing case before it].) The principle that a second judge may not generally reconsider the decision of a first judge is founded on the inherent difference between a judge and a court and is designed to ensure the orderly administration of justice:

> If the rule were otherwise, it would be only a matter of days until we would have a rule of man rather than a rule of law. To affirm the action taken in this case would lead directly to forum shopping, since if one judge should deny relief, defendants would try another and another judge until finally they found one who would grant what they were seeking. Such a procedure would instantly breed lack of confidence in the integrity of the courts.

(*People v. Scofield* (1967) 249 Cal.App.2d 727, 734 [first judge's ruling upholding search warrant was binding on second judge; order granting § 995 motion reversed].) "For one superior court judge, no matter how well

intentioned, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court." (*In re Alberto*, *supra*, 102 Cal.App.4th 421, 427.) Unless "the first order was made through inadvertence, mistake, or fraud [citations]," or there has been a reversal and remand by the appellate court, the second judge has limited discretion to re-decide issues. (*Id.* at p. 430, citing *Sheldon v. Superior Court, Los Angeles County, Long Beach Department* (1941) 42 Cal.App.2d 406, 408.) In fact, it is error for a second judge to change the decision of a first judge even where the second judge's decision is legally incorrect because it is improper for the for the second judge "no matter how well inten[tioned], to act without authority as a "one-judge appellate court." (*People v. Garcia* (2006) 147 Cal.App.4th 913, 917; citing *In re Alberto*, *supra*, 102 Cal.App.4th 421, 427; *Goodwillie* (2007) 147 Cal.App.4th 695, 714 [where trial judge exercised discretion to appoint advisory counsel, second judge did not have authority to nullify the order].) To allow a second judicial officer to look at the same facts and reach an opposite conclusion on the ground that the first judicial officer should have more closely considered what it was doing would improperly "undermine the integrity of final judicial rulings." (*In re Kasaundra D.* (2004) 121 Cal.App.4th 533, 542, citing *In re Alberto*, *supra*, 102 Cal.App.4th 421, 428.)

The Court of Appeal has emphasized the need for keeping the same judge on proceedings: "We point out the obvious: Once a designated trial court hears a matter, it should continue to hear it, including retrials, until final judgment is rendered. Presiding and supervising trial court judges could alleviate the potential of conflicting decisions and perceived 'overruling' of one trial court decision by another trial court if this course is followed. We realize that there may be instances where this is not possible.

. . . But, in the vast majority of cases, it would seem prudent that a designated trial court should continue to hear the matter until final judgment is rendered. Avoidance of the potential for conflicting decisions should be a legitimate goal of the judiciary." (*People v. Sons* (2008) 164 Cal.App.4th 90, 100, fn. 7.)

A trial judge's decision to reconsider the previous ruling of another judge is reviewed for abuse of discretion. (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 210; *Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.)

2. The Decision to Revisit Judge Zumwalt's Ruling was Error

In this case, it was an abuse of discretion for Judge Revak to revisit Judge Zumwalt's decision that appellant could not represent himself. First, there was no showing before Judge Revak that appellant's case fell into one of the limited areas where a judge may reconsider another judge's ruling. There was no reversal and remand from an appellate court on the issue and no showing that the original ruling was the result of inadvertence, mistake, or fraud. (*Goodwillie*, *supra*, 147 Cal.App.4th 695, 714.)

Without a showing of extraordinary circumstances, a party is not entitled to two evidentiary hearings before two superior court judges on the same issue. (*People v. Clark* (1992) 3 Cal.4th 41, 119 [although ruling on pretrial motion is not always binding on trial court, defendant is not entitled to two separate evidentiary hearings before two superior court judges on the issue]; see Code Civ. Proc., § 1008, subd. (a) [a motion for reconsideration may only be brought if the party moving for reconsideration can offer "new or different facts, circumstances, or law" which it could not, with reasonable diligence, have discovered and produced at the time of the prior motion.]) Appellant made no factual showing justifying a decision to

reopen the issue of self-representation before Judge Revak decided to do so. In fact, Judge Revak does not appear even to have known that Judge Zumwalt had previously decided the issue.[79] Judge Zumwalt's decision on appellant's self-representation was not mentioned by any party in any proceeding before the judge.[80] Rather, Judge Revak relied upon appellant's assertion (through advisory counsel Bloom) that the sole issue before him was whether the trial could should decide the issue of who should be appellant's counsel for trial before or after he decided the issue of self-representation. (66ART 17.) He never addressed the issue of whether there were grounds to reopen Judge Zumwalt's consideration of the issue, all of the parties seemingly taking it for granted that the motion could be reopened.

In his various appearances before different judges, appellant never alleged facts justifying a reopening of the self-representation motion before any of the judges who considered it. Appellant's motion was considered by Judge Langford, who refused to reconsider Judge Revak's decision to go ahead with the motion for self-representation, holding that it was "law of the case."[81] He took it for granted that he had to proceed the way in which

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[79]Of course, the failure of the superior court to understand the procedural history of the case could easily have been avoided if appellant's motion had been returned to Judge Zumwalt, the judge who first heard it.

[80]Judge Zumwalt's name is not mentioned at the proceedings before Judge Revak except in connection with her previous appointment of Sanchez as appellant's advisory counsel. (See 65ART 14.)

[81]Judge Langford was not in fact bound by "law of the case." The doctrine of law of the case is about the precedential value of a court of appeal decision. The doctrine of the law of the case holds that where an appellate court states in its opinion a principle of law necessary to the decision, that principle becomes law of the case and must be adhered to in

(continued...)

Judge Revak had decided without requiring appellant to make any factual showing justifying reopening the issue. Appellant did not allege any reasons why the motion for self-representation should be reconsidered before Judge Boyle. Appellant's request for new counsel was accompanied by no memorandum of facts whatsoever, and certainly did not show that there were facts either that could have been, but were not, considered by Judge Zumwalt. (See 11CT 2344-2354.) Nor did the application show that there was a change of facts or law justifying reconsideration of Judge Zumwalt's decision.

In one of the proceedings before Judge Langford, attorney Bloom alleged that it was possible for a defendant not to be able to represent himself at one time and then later be able to do so. (78ART 39.) However, Bloom did not substantiate his assertion with any facts about appellant that showed that appellant was somehow different and now able to represent himself, when he had been unable to do so earlier; Bloom did not allege that he now had facts that appellant had been unable to allege before Judge Zumwalt, nor did he show that there was a change in the law justifying reopening the issue. Although appellant presented different evidence at the second hearing before Judge Boyle than he had when he made his case in

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[81](...continued)
all subsequent proceedings. (*Roden v. Amerisource Bergen Corp.* (2007) 155 Cal.App.4th 1548, 1576.) The doctrine of law of the case does not apply to pretrial rulings. (*Sons, supra*, 164 Cal.App.4th 90, 100, citing 9 Witkin, Cal. Procedure (4th ed.1997)Appeal, § 896, p. 930 and *Providence v. Valley Clerks Trust Fund* (1984) 163 Cal.App.3d 249, 256.) In any event, the law of the case doctrine does not apply when application of the doctrine will result in an unjust decision. (*People v. Cooper* (2007) 149 Cal.App.4th 500, 524.) Since Revak's decision was based on an inadequate consideration of the facts insofar as he was unaware of Judge Zumwalt's prior decision, even if Langford was bound by law of the case, he was free to revisit the previous judge's decision.

front of Judge Zumwalt, this evidence was not a "change in circumstances" justifying a new hearing before Boyle. Appellant made no showing before the judge considering his renewed motion that he was unable earlier to produce for Judge Zumwalt the evidence he ultimately presented to Judge Boyle.

Moreover, appellant's case for self-representation before Judge Boyle was not different in kind than the case he put on before Judge Zumwalt. Much of appellant's case before Boyle consisted of declarations from lay people who each declared that he or she knew appellant and believed that he was competent to represent himself. (38CT 8230-8277.) So too, much of appellant's case before Judge Zumwalt was evidence from people who knew him and who stated that they that believed he was competent to stand trial. (43ART 326, 333-335, 372-377; 314-320; 378-380.) In fact, appellant's evidence of lay witnesses was something that Judge Zumwalt had considered but had discounted in her decision denying appellant's self-representation. (73CT 15741.) She did not discount the witnesses because she disbelieved them; rather, she thought they were not competent to judge appellant's ability to represent himself, relying instead upon the professional testimony of the psychiatrists. (*Id.* at 15741.) Given that Zumwalt chose to rely upon professional witnesses, appellant's additional lay witnesses would have made no difference to Judge Zumwalt's evaluation of the evidence.

Appellant offered the declaration of two mental health professionals, psychiatrist Dr. Ernst Giraldi and psychologist Dr. Ricardo Weinstein. (38CT 8243; 38CT 8249.) However, not only did appellant offer no reason why these two men did not testify at the hearing before Judge Zumwalt, but more importantly, neither Giraldi nor Weinstein had reviewed any records from appellant; neither knew what sort of crimes appellant had been

accused of or anything at all about appellant's psychiatric difficulties. (38CT 8243, 8248.) It is unlikely that Judge Zumwalt would have been persuaded by psychiatric experts who had such limited information, when she had at her disposal testimony from three mental health professionals, Drs. Kalish, Koshkarian and Di Francesca, all of whom had reviewed relevant mental health records, interviewed appellant and who knew what appellant's attitudes towards counsel and his case were. Moreover, appellant already had in the record testimony from two psychiatrists, Drs. Strauss and Vargas, both of whom had concluded that appellant did not have a mental illness that interfered with his ability to cooperate with counsel and was competent to stand trial. (See 30ART 922-977; 29ART 834-891.) Judge Zumwalt was not likely to have been persuaded by additional doctors who knew even less about the case than Drs. Strauss and Vargas.

A trial court may revisit its own interim decision to avoid an unjust outcome. (*In re Alberto*, *supra*, 102 Cal.App.4th 421, 426-427 [in criminal cases a trial judge may act to correct its own prejudgement errors to avoid an unfair disposition]; see *Sons*, *supra*, 164 Cal.App.4th 90 [trial court had duty to correct erroneous jury instruction of previous trial judge].) Here it appears that Judge Boyle's actions were not because he believed that there was something unfair or unjust about Zumwalt's decision. Judge Boyle himself stated that he knew nothing about the previous proceedings in the case. (80ART 15-16.)

Moreover, had Judge Boyle reviewed Judge Zumwalt's proceedings he would have found nothing unfair about the procedure employed by Judge Zumwalt. Zumwalt held a lengthy hearing on the issue of self-representation. It lasted seven days and involved the testimony of three psychiatrists, as well as the lay testimony appellant offered with the help of

advisory counsel Sanchez. Judge Zumwalt also reviewed and weighed the testimony from the six-day competency trial, including testimony from mental health experts presented by both the prosecution and the defense. (73CT 15740.)

Thus, as part of her review of the 1368 hearing, Judge Zumwalt reviewed the testimony of both Drs. Vargas and Strauss, both of whom testified for the prosecution at the 1368 trial. (See 28ART 834-891 [Vargas testimony]; 30ART 922-977 [Strauss testimony].) Judge Zumwalt denied appellant's motion to call these experts as witnesses, on the grounds that neither doctor had examined appellant because appellant had refused to see them at the time of the competency trial. (44ART 391, 393.) Zumwalt did not credit appellant's offer of proof concerning testimony he wanted to introduce of Judge Levitt (who had presided over the competency trial) and Charles Patrick, who had been the prosecutor at the 1368 trial. (*Id.* at 391-392.) However, since several of the psychiatrists already testified about appellant's behavior at the hearing, there is little either of these witnesses would have added. After the hearing, the judge wrote a six page considered decision in which she articulated the basis for her decision.

Clearly, Judge Zumwalt held a comprehensive hearing at which appellant was allowed to put on significant evidence. The only reason appellant brought the motion again was because he was dissatisfied with the outcome. This is classic forum shopping which the rule limiting the power of a second judge to overturn the decision of the first is designed to prevent. (See, e.g., *People v. Woodard* (1982) 131 Cal.App.3d 107, 111 [defendant not permitted to seek plea bargain rejected by one judge before a second judge].)

The decision of a judge may be revisited by a second judge if there is a statutory basis for such. (*Konow, supra*, 32 Cal.4th 995, 1020;

Goodwillie, *supra*, 147 Cal.App.4th 695, 714, fn. 12.) However, there is no statute that provides that a second *Faretta* motion should be considered absent a change in circumstances. If anything, in the interests of justice, once it had been determined appellant was not able to waive his rights to counsel, the presumption should have been that appellant required the counsel to which he was entitled under the Sixth Amendment. It is solid federal law that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights," (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464), and only a knowing and intelligent waiver of the right to counsel is effective (see *Faretta v. California* (1975) 422 U.S. 806, 835). Since the record before Judge Revak was that appellant's mental impairment made his waiver of counsel other than knowing, intelligent, and voluntary, Revak could not reconsider the issue absent a showing that something was different.

Moreover, as appellant discusses below, the evidence that was presented at Judge Boyle's hearing was much more restricted than the evidence Judge Zumwalt had before her, consisting only of evidence sharply circumscribed by appellant himself in order to protect himself from any glimmer of a recognition that he might have any psychological problems. As such, the hearing before Zumwalt, which provided the evidence necessary and appropriate for a court to rule fairly on the issue before it, was far more protective of appellant's right to counsel, than the hearing before Judge Boyle.

Even if there had been evidence that the motion should be reconsidered, it should have been presented to Judge Zumwalt. (See *Alvarez v. Superior Court* (2004) 117 Cal.App.4th 1107, 1111 [general rule that same judge must reconsider issue unless trial judge not available].) There was no evidence that Zumwalt was not available to consider a

renewed motion. The prosecution had used its peremptory challenge against the judge, so that she could not sit as a judge on appellant's section 1368 trial. (See 2MHRT 1-3; 7CT 1403.) However, this does not mean that she had been challenged for purposes of the criminal trial. As the appellate court ruled in this case, parties have two peremptory challenges, one for the 1368 trial and one for the criminal trial. (*Waldon v. Superior Court* (1987) 169 Cal.App.3d 809, 812-813.) The prosecution had used its peremptory against Zumwalt only in the 1368 case – not in the criminal trial. Moreover, the prosecution did not object when the *Faretta* matter was reassigned to Judge Zumwalt after the 1368 hearing. The proper procedure on Judge Revak's part when presented with the "renewed motion is for the second judge to direct the moving party to the judge who ruled on the first motion." (*Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232.) As such, if anyone were to rehear the self-representation motion, it should have been Judge Zumwalt.

Appellant had an adequate legal remedy following Judge Zumwalt's decision, so there was no need for Judge Revak or the other judges to revisit her decision in the interests of justice. If a first judge's ruling is not "reviewable on appeal or is so egregiously wrong and prejudicial the injured party cannot wait for an appeal, there is always the remedy of an extraordinary writ in this [the appellate] court." (*People v. Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 668 [petition for writ of mandate challenging trial court's *Miranda* ruling]; *People v. Riva* (2003) 112 Cal.App.4th 981, 991; *Woodard, supra*, 131 Cal.App.3d 107, 111 [proper procedure to enforce plea promise of previous judge was by way of petition for writ of mandate].) In fact, in this case, considerable use was made of these remedies. Two petitions for writ of mandate were taken following Judge Zumwalt's decision, D007850 and D007873. These were both

denied. (10CT 1922-1923.) Appellant himself was given the opportunity to file a petition for writ of mandate, having only to show the petition to Russell to assure that it did not contain confidential information and that it did not violate the trial court's sealing orders. (62CT 14028.) Appellant, even though advised by Sanchez, never availed himself of this opportunity, even after this Court denied his petition for review on the issue of whether the court of appeal could require Russell to review his petition to assure that no confidential information was revealed. (62CT 13984.)

Moreover, appellant ultimately filed a petition for writ of habeas corpus, D009282, challenging Judge Zumwalt's decision. (52CT 11025.241-11025.343.) In that petition, appellant asked the Court of Appeal to review the legality of Judge Zumwalt's decision not to let him represent himself.[82] The Court of Appeal denied appellant's petition for writ of habeas corpus, as well it should have, since it presented outlandish legal claims, like appellant's "involuntary servitude," because Russell refused to do everything he asked (52CT 11025.309-11025.314), and that appellant's religious rights were denied because his religion (unnamed) required him to represent himself. (52CT 11025.320-323.)

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[82]Claims concerning a defendant's *Faretta* rights are properly considered by way of petition for writ of mandate. (See *People v. Superior Court (George)* (1994) 24 Cal.App.4th 350, 352 [considering prosecution's petition for writ of mandate following denial of defendant's request for pro per status].) Nevertheless, the court of appeal overlooked appellant's labeling irregularities and treated appellant's petition as a petition for writ of mandate. (*In re Stier* (2007) 152 Cal.App.4th 63, 84 [court of appeal has power to treat a writ of habeas corpus as a petition for writ of mandate]; *Escamilla v. Dept. of Corrections and Rehabilitation* (2006) 141 Cal.App.4th 498, 511 [the label given a petition [for writ of habeas corpus], action or other pleading is not determinative].)")

3. Judge Revak's Decision Violated Due Process

Judge Revak's decision to permit appellant to have a second hearing on the self-representation motion was also a violation of appellant's right to due process under the Fourteenth Amendment. In holding that appellant could represent himself, Boyle was either ignorant of, or simply ignored the findings of Judge Zumwalt. If Judge Boyle was aware of the prior ruling, there was no mention of it, including that he did not even bother to assert that the earlier decision was erroneous or that the circumstances of the case had changed. This kind of unauthorized second-guessing is impermissibly arbitrary and amounts to a violation of due process, where it leads to a fundamentally unfair trial. (*Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098 [second judge reversed first judge's decision to give critical defense instruction].)

4. The Error Requires Reversal

Appellant has shown that Judge Revak's decision to revisit appellant's motion for self representation was error. The only judgment before this Court is the one that is the result of the improper order by Judge Revak reopening the self-representation proceedings. This judgment, and the sentence based upon this judgment must be reversed – without a showing of prejudice. (See *Woodard, supra*, 131 Cal.App.3d 107, 111 ["The only judgment before us at this time is based on the unauthorized action of [the trial judge] . . . and that judgment must be, and is, reversed."].) The improper order permitting appellant to represent himself should be vacated and the case remanded for a new trial at which appellant is represented by counsel. (See *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 397 [where second judge erroneously dismissed case, after first judge's denial of summary judgement motion, remedy was to vacate the judgment and remand for a trial on material issues]; *Butler v.*

Superior Court (2002) 104 Cal.App.4th 979, 983 [remedy for erroneous grant of reconsideration motion was to vacate the order granting reconsideration and restore parties to position before motion granted]; *In re Kasaundra D., supra*, 121 Cal.App.4th 533, 542-543 [improper orders made upon motion for reconsideration reversed].)

Moreover, the error requires reversal without a showing of prejudice because Judge Revak's error directly resulted in appellant's trial, and ultimate conviction and death sentence without the benefit of counsel, when there were substantial doubts about whether his waiver of counsel was knowing, intelligent and voluntary as required by *Faretta*. Prejudice is presumed where there is an actual or constructive denial of counsel at a critical stage of the proceedings. (*Strickland v. Washington* (1984) 466 U.S. 668, 692; *Javor v. U.S.* (9th Cir. 1984) 724 F.2d 831, 834.). However, even if appellant's verdict and sentence are not reversible without a showing of error, the error requires reversal. (See *Goodwillie, supra*, 147 Cal.App.4th 695, 714 [where defendant not entitled to automatic reversal as a result of trial judge's erroneous reconsideration of prior judge's order, error evaluated for prejudicial effect].)

C. Although a Trial Court Has Discretion to Grant Limited Co-Counsel Status to a Represented Defendant, if Counsel Consents and a Substantial Justification has Been Shown, it Lacks Discretion to Appoint a Second Chair Attorney as Co-Counsel to a Self-Represented Defendant

In *People v. Hamilton*, this Court explored the parameters of a possible "hybrid" status, with a criminal defendant and his lawyer each carrying out tasks in a criminal proceeding and being recognized by the trial court. (*People v. Hamilton* (1989) 48 Cal.3d 1142.) The defendant in that case, who was represented by counsel and desired to remain so, asked the trial court to grant him co-counsel status over his attorney's objection. (*Id.*

at p. 1161.) The trial court refused, stating it had no discretion to grant co-counsel status unless *counsel* requested it, and the defendant appealed. (*Ibid.*) This Court held that the trial court had no discretion to sanction the requested arrangement because there was no "'substantial' showing" that it would have promoted "justice and judicial efficiency" in that particular case, and therefore defendant's motion properly was denied. (*Id.* at p. 1162.)

This Court explained:

> When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. 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.] Since a professionally represented defendant has no right, "fundamental" or otherwise, to act as cocounsel, the decision whether to proceed in that fashion is a matter of tactics for professional counsel to decide.

(*Hamilton, supra*, 48 Cal.3d 1142, 1163.)

The only two "basic categories" of representation are (1) professional representation, and (2) self-representation. (*Hamilton, supra*, 48 Cal.3d 1142, 1164, fn. 14.) A defendant choosing professional representation "waives tactical control" because *counsel* is at all times in charge of the case and bears responsibility for providing constitutionally effective assistance." (*Ibid.*) If the court, with *counsel's* consent, permits the accused a limited role as cocounsel, it is "professional counsel [who] retains complete control over the extent and nature of the defendant's participation, and of all tactical and procedural decisions." (*Ibid.*) The defendant later can claim he received the ineffective assistance of counsel, although of course he would be responsible for his own mistakes while

acting as co-counsel, unless the mistakes are "directly traceable to his attorney." (*Ibid.*)

If the defendant elects self-representation under *Faretta*, however, he assumes primary *control over* and *responsibility for* his defense. (*Hamilton, supra*, 48 Cal.3d 1142, 1164, fn. 14, citing *McKaskle v. Wiggins* (1984) 465 U.S. 168, 176-178, emphasis added.) In this instance, the trial court may (and in some cases should) appoint counsel to "'assist in an advisory capacity if and when the accused requests help, or to serve in a standby role, available to represent the accused in the event that termination of the defendant's self-representation is necessary." (*Ibid.*, quoting *Faretta, supra*, 422 U.S. 806, 835 [internal quotations omitted].) The role of standby or advisory counsel may be expanded, where doing so serves the interests of justice and efficiency, so long as "defendant's right to present his case in his own way is not compromised." (*Ibid.*, citing *McKaskle, supra*, 465 U.S. 168, 176-177.) "On posttrial review, however, a self-represented defendant may only raise those narrow claims of 'ineffective assistance' which arise directly from *assisting counsel's* breach of the *limited* authority and responsibilities counsel has assumed." (*Ibid.*, citing *Faretta, supra*, 422 U.S. 806, 835, fn. 46 and *People v. Doane* (1988) 200 Cal.App.3d 852, 863-864, disapproved of by *People v. Barn*um (2003) 29 Cal.4th 1210, original emphasis.)

In this case, Judge Boyle purported to grant appellant the full rights of self-representation, and therefore the arrangement whereby a defendant can be "co-counsel" to the attorney appointed to represent him did not come into play. At the same time Boyle granted pro se status, however, he also appointed two attorneys in the capacity of "second chair" counsel. While Boyle permissibly could have appointed "advisory" or "standby" counsel to assist appellant and then expanded their powers in a designated and limited

way, that is not what he did. Boyle instead designated Sanchez and Wolf as second chair counsel to a pro se defendant, a role for which there is no precedent, and neglected to designate or delimit the role the lawyers were authorized to play in the defense. In so doing, Judge Boyle acted beyond his authority in violation of Sixth Amendment and *Faretta* principles guaranteeing mutually exclusive rights of representation by counsel and self-representation.

As this Court recently explained in *People v. Moore* (2011) 51 Cal.4th 1104, 1122-1123, appointment of co-counsel under *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430, as codified in section 987, subdivision (d), is improper where the capital defendant is pro per.

> Subdivision (d) provides, in relevant part, that "In a capital case, the court may appoint an additional attorney as a cocounsel upon a written request *of the first attorney appointed.* The request shall be supported by an affidavit *of the first attorney* setting forth in detail the reasons why a second attorney should be appointed." (§ 987, subd. (d), italics added.) A defendant proceeding in propria persona simply is not "the first attorney appointed," despite the circumstance that by choosing self-representation, such a defendant takes on the duties that would otherwise fall on his or her attorney. (See *Scott v. Superior Court* (1989) 212 Cal.App.3d 505, 511, 260 Cal.Rptr. 608 (*Scott*).) There is no indication in the statute—or anywhere else—that the Legislature intended to create, in effect, a statutory right to hybrid representation, and we reject defendant's contention that we should interpret the statute's plain language to reach such a result. (*People v. Birkett* (1999) 21 Cal.4th 226, 231, 87 Cal.Rptr.2d 205, 980 P.2d 912 ["We must follow the statute's plain meaning, if such appears, unless doing so would lead to absurd results the Legislature could not have intended."].)

(*Ibid.*, footnote omitted.)

By exceeding his authority and appointing second chair counsel, Boyle contributed to confusion and interfered with the entry of a knowing,

intelligent, and voluntary waiver of counsel. Neither Boyle's colloquy with appellant nor the written waiver set forth whether second chair counsel would have control over tactical, strategic, and procedural decisions in the case. While it appears that appellant wanted to exercise that control in his own right, it is far less clear that he intended second chair counsel to be relieved of *responsibility* in that regard. Boyle never advised appellant that he would be unable to claim on appeal that he had received the ineffective assistance of second chair counsel, nor does the record reflect appellant's understanding that such would be the case.

Further, as explained below, to the extent this Court concludes the trial court erred in terminology only, while actually appointing Sanchez and Wolf not as "second chair" counsel but merely as "advisory" or "standby" counsel with an expanded role, one of the lawyers who eventually stood in those shoes stepped outside those bounds and violated appellant's rights under *Faretta* and other cases. (See *McKaskle*, *supra*, 465 U.S. 168.) That in itself is another ground for reversal of the guilt and penalty trial.

D. Addressing the *Faretta* Motion Without First Appointing Counsel Violated Appellant's Right to Counsel Under *Cronic* and the Sixth Amendment

As explained above, the Sixth Amendment requires that criminal defendants have the assistance at all critical stages of proceedings against them. A *Faretta* hearing and the steps leading to it are a critical stage of a criminal trial. Therefore, the trial court violated appellant's right to counsel and to due process under the Fourteenth Amendment by entertaining appellant's motion to be designated as lead counsel, taking his purported waiver of counsel, and granting appellant pro se status without first substituting an attorney in the place of Russell to represent appellant. Sanchez and Bloom served in an advisory capacity under the direction of appellant during that period, and never assumed responsibility to employ

their professional skill and judgment in appellant's best interest as related to the waiver of counsel.

"The right to counsel is not a right confined to representation during the trial on the merits." (*Moore v. State of Michigan* (1957) 355 U.S. 155, 160.) "[A]ppointment of counsel for an indigent defendant is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." (*Mempa v. Rhay* (1967) 389 U.S. 128.) "The inability of [a defendant] on his own to realize the[ ] advantages of a lawyer's assistance" when facing "potential substantial prejudice to [his] rights[,] . . . and the ability of counsel to help avoid that prejudice," can signal a critical stage. (*Coleman v. Alabama* (1970) 399 U.S. 1, 9.) Thus, as one federal court has explained, "a *Cronic* critical stage [is determined by] (1) whether the failure to pursue strategies or remedies results in a loss of significant rights, (2) whether counsel would be useful in helping the defendant understand the legal issues, [and] (3) whether the proceeding tests the merits of the defendant's case." (*McNeal v. Adams* (9th Cir. 2010) 623 F.3d 1283, 1289 [noting that any one of these factors may be sufficient to make a proceeding a critical stage].) "At all critical stages the defendant is entitled to an attorney 'with the overarching duty to advocate the defendant's cause.'" (*King v. Superior Court* (2003) 107 Cal.App.4th 929, 950, quoting *Strickland, supra*, 466 U.S. 668, 688.)

The Court of Appeal ordered the trial court to relieve Russell and appoint a new attorney to represent appellant. On January 17, 1989, Russell was relieved (which also terminated Khoury's role in the case), but no new lawyer was appointed in her stead. Judges Wagner and Malkus said that appointing defense counsel for all purposes was necessary (see 62ART 10 and 63ART 1), but Judge Revak, at the urging of attorney Bloom, decided that the court instead should return to the possibility of granting appellant

pro se status. In the interim, Sanchez continued in, and Bloom was appointed for, only the limited purpose of helping appellant draft and litigate a new self-representation motion.

The *Faretta* hearing clearly was a "criminal proceeding where substantial rights" were affected. (*Mempa*, *supra*, 389 U.S. 128, 134.) Therefore it was a "critical stage" under which appellant's right to counsel was protected within the meaning of *Cronic*. (*Ibid.*) The proceeding directly affected appellant's right to counsel as well as his right to represent himself, both of which are "substantial." Thus full representation by counsel during that stage was essential to ensure that appellant's waiver of his right to counsel truly was knowing, intelligent, and voluntary.

For example, counsel could have dispelled the misunderstandings apparent in appellant's modified *Lopez* waiver and prevented problems that arose later at trial regarding appellant's pro per privileges, his expectations regarding funding and other resources, and the presentation of his intended defense. During proceedings before Boyle, appellant faced "potential substantial prejudice" to his rights to counsel and to present a defense and his right to claim ineffective assistance on appeal, among other rights, and he was unable "on his own to realize" the advantages of a lawyer's assistance in hashing out the role of advisory, standby, or second chair counsel. (*Coleman*, *supra*, 399 U.S. 1, 9.) Counsel would have been useful in helping appellant understand the legal issues related to the court's promise to appoint "second chair counsel" and understand what control and responsibility appellant was retaining and what he was giving up under the novel arrangement. (*McNeal*, *supra*, 623 F.3d 1283, 1289.) To the extent that the *Faretta* proceeding determined what defenses would be raised at trial, it bore directly on the merits of appellant's case. (*Ibid.*) The mess created over the meaning of appellant serving as "lead counsel" with

direction and control over "second chair counsel" demonstrates that the presence of Sanchez and Bloom, standing by with their hands tied by appellant and his limited and untrained understanding, did not satisfy the Sixth Amendment mandate of representation by counsel. Because appellant had no counsel during the critical stage of the proceedings, reversal is required without consideration of prejudice. (*U.S. v. Cronic* (1984) 466 U.S. 648.)

* * * * *

VIII.

APPELLANT DID NOT UNEQUIVOCALLY INVOKE HIS RIGHT TO SELF-REPRESENTATION, NOR DID HE ENTER A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF HIS RIGHT TO COUNSEL

Judge Boyle's grant of *Faretta* status to appellant on November 3, 1989, was error because appellant did not unequivocally invoke his right to self-representation and because appellant did not enter a knowing, intelligent and voluntary waiver of his right to counsel.

A. Legal Background

In *People v. Stanley*, this Court set forth the requirements for a defendant's invocation of his right to self-representation:

> A criminal defendant has a right to represent himself at trial under the Sixth Amendment to the United States Constitution. (*Faretta v. California* (1975) 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (*Faretta*); *People v. Marshall* (1997) 15 Cal.4th 1, 20, 61 Cal.Rptr.2d 84, 931 P.2d 262 (*Marshall*).) A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. (*Faretta, supra*, at p. 835, 95 S.Ct. 2525; *People v. Gallego* (1990) 52 Cal.3d 115, 161, 276 Cal.Rptr. 679, 802 P.2d 169; *People v. Bloom* (1989) 48 Cal.3d 1194, 1224–1225, 259 Cal.Rptr. 669, 774 P.2d 698.) Second, he must make his request unequivocally. (*Faretta, supra*, at p. 835, 95 S.Ct. 2525; *People v. Clark* (1992) 3 Cal.4th 41, 98, 10 Cal.Rptr.2d 554, 833 P.2d 561 (*Clark*).) Third, he must make his request within a reasonable time before trial. [Citations].

(*People v. Stanley* (2006) 39 Cal.4th 913, 931-933.)

In addressing a request for self-representation, it is the duty of a trial court to determine that the defendant's waiver of his Sixth Amendment right to counsel is unequivocal, and knowingly and intelligently made, drawing every reasonable inference against a waiver of the right to counsel:

> "When confronted with a request" for self-representation, "a trial court must make the defendant 'aware of the dangers and disadvantages of self-representation,' so that the record will establish that "he knows what he is doing and his choice is made with eyes open." (*Faretta, supra*, 422 U.S. at p. 835, 95 S.Ct. 2525.) Unlike the right to representation by counsel, "the right of self-representation is waived unless defendants articulately and unmistakably demand to proceed pro se." (*People v. Marshall* (1997) 15 Cal.4th 1, 21, 61 Cal.Rptr.2d 84, 931 P.2d 262 (*Marshall*); *id.* at p. 23, 61 Cal.Rptr.2d 84, 931 P.2d 262 ['*[T]he court should draw every reasonable inference against waiver of the right to counsel*']; see *Brewer v. Williams* (1977) 430 U.S. 387, 391, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 ['*courts indulge in every reasonable presumption against waiver' of the postarraignment right to counsel*].)

(*People v. Stanley, supra*, 39 Cal.4th 913, 931-933, emphasis added.) The trial court must consider the defendant's words and conduct, in context, to discern whether the defendant's intent to waive counsel is unequivocal:

> We have observed that "a [*Faretta*] motion made out of a temporary whim, or out of annoyance or frustration, is not unequivocal—even if the defendant has said he or she seeks self-representation." (*Marshall, supra*, 15 Cal.4th at p. 21, 61 Cal.Rptr.2d 84, 931 P.2d 262.) "Equivocation, which sometimes refers only to speech, is broader in the context of the Sixth Amendment, and takes into account conduct as well as other expressions of intent." (*Williams v. Bartlett* (2d Cir.1994) 44 F.3d 95, 100.)

(*Ibid.*)

Whether the defendant is competent to waive his right to counsel also factors into the equation:

> Before granting a *Faretta* motion, a trial court must determine the defendant is competent to waive his right to counsel, and must obtain his or her knowing and voluntary waiver of that right. (*Godinez v. Moran* (1993) 509 U.S. 389, 396-401, 113 S.Ct. 2680, 125 L.Ed.2d 321; *Faretta, supra*, 422 U.S. at p. 835, 95 S.Ct. 2525; *Marshall, supra*, 15 Cal.4th at p. 20, 61 Cal.Rptr.2d 84, 931 P.2d 262.) Courts must "indulge every

> reasonable inference against waiver of the right to counsel." (*Marshall, supra*, at p. 20, 61 Cal.Rptr.2d 84, 931 P.2d 262.)

(*Stanley, supra,* 39 Cal.4th 913, 931-933.)

The grant of *Faretta* status may be reversible on appeal if the waiver of counsel was not knowing, intelligent, and voluntary. "A defendant may challenge the grant of a motion for self-representation on the basis the record fails to show the defendant was made aware of the risks of self-representation." (*People v. Noriega* (1997) 59 Cal.App.4th 311, 319, citing *People v. Bloom* (1989) 48 Cal.3d 1194, 1224.) "'The purpose of the "knowing and voluntary" inquiry . . . is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced . . . . '" (*Ibid*, quoting *Godinez v. Moran* (1993) 509 U.S. 389, 400.)

This Court has relied on the test from *People v. Lopez* (1977) 71 Cal.App.3d 568, as describing the trial court's duty to make advisements and inquiries of the risks and dangers of self-representation, in order to ensure a defendant's knowing and voluntary waiver of counsel:

> First, the court [in *Lopez*] recommended the defendant be cautioned (a) that self-representation is "almost always unwise," and the defendant may conduct a defense "'ultimately to his own detriment'" [citation]; (b) that the defendant will receive no special indulgence by the court and is required to follow all the technical rules of substantive law, criminal procedure and evidence in making motions and objections, presenting evidence and argument, and conducting voir dire; (c) that the prosecution will be represented by a trained professional who will give the defendant no quarter on account of his lack of skill and experience; and (d) that the defendant will receive no more library privileges than those available to any other self-represented defendant, or any additional time to prepare. Second, the *Lopez* court recommended that trial judges inquire into the defendant's education and familiarity with legal procedures, suggesting a psychiatric examination in questionable cases. The *Lopez*

> court further suggested probing the defendant's understanding of the alternative to self-representation, i.e., the right to counsel, including court-appointed counsel at no cost to the defendant, and exploring the nature of the proceedings, potential defenses and potential punishments. The *Lopez* court advised warning the defendant that, in the event of misbehavior or disruption, his or her self-representation may be terminated. Finally, the court noted, the defendant should be made aware that in spite of his or her best (or worst) efforts, the defendant cannot afterwards claim inadequacy of representation. [Citations.] As indicated above, the purpose of the suggested *Lopez* admonitions is to ensure a clear record of a knowing and voluntary waiver of counsel, not to create a threshold of competency to waive counsel. [Citations.]

(*People v. Koontz* (2002) 27 Cal.4th 1041, 1070-1071.)

Further, the trial court should advise the appellant that he has no right to either standby, advisory, or co-counsel in the event he decides to represent himself. (*People v. Jones* (1991) 53 Cal.3d 1115, 1142.)

It is insufficient for the trial court simply to advise the defendant of the tautology that "by electing to represent himself he would be giving up the assistance of his appointed counsel." (*People v. Burgener* (2009) 46 Cal.4th 231, 243, citing *U.S. v. Crawford* (8th Cir. 2007) 487 F.3d 1101, 1106; *Barnum, supra*, 29 Cal.4th 1210, 1221.) The court must advise the defendant of the dangers and disadvantages of self-representation, including (1) that the district attorney would be an experienced and prepared adversary; (2) that the defendant would receive no special consideration or assistance from the court and would be treated like any other attorney; (3) that he would have no right to standby or advisory counsel; and (4) that he would be barred from challenging on appeal the adequacy of his representation. (*Burgener, supra*, 46 Cal.4th 231, 243.)

This Court summarized the law in *Burgener*, thusly:

> A defendant seeking to represent himself "should be made aware of the dangers and disadvantages of self-representation,

> so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' [Citation]." (*Faretta, supra*, 422 U.S. at p. 835[, 95 S.Ct. 2525].) "No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070[, 119 Cal.Rptr.2d 859, 46 P.3d 335].) Rather, "the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case. (*Ibid.*; accord, *People v. Lawley* (2002) 27 Cal.4th 102, 140[, 115 Cal.Rptr.2d 614, 38 P.3d 461]; *People v. Marshall* (1997) 15 Cal.4th 1, 24 [, 61 Cal.Rptr.2d 84, 931 P.2d 262].)" (*People v. Blair* (2005) 36 Cal.4th 686, 708, 31 Cal.Rptr.3d 485, 115 P.3d 1145.) Thus, "[a]s long as the record as a whole shows that the defendant understood the dangers of self-representation, no particular form of warning is required." (*People v. Pinholster* (1992) 1 Cal.4th 865, 928–929, 4 Cal.Rptr.2d 765, 824 P.2d 571; accord, *U.S. v. Lopez–Osuna* (9th Cir. 2001) 242 F.3d 1191, 1199 ["the focus should be on what the defendant understood, rather than on what the court said or understood"].)

(*Burgener, supra*, 46 Cal.4th 231, 240-241.)

In determining on appeal whether the defendant unequivocally invoked the right to self-representation, a reviewing court must "examine the entire record de novo." (*Ibid.*, citing *Marshall, supra*, 15 Cal.4th 1, 24–25, and *People v. Dent* (2003) 30 Cal.4th 213, 217–218.) A reviewing court also must make a de novo examination of the entire record in assessing whether a defendant's waiver of his right to counsel was intelligent, knowing and voluntary. (*Burgener, supra*, 46 Cal.4th 231, 241, citing *People v. Doolin* (2009) 45 Cal.4th 390, 453.)

B. The Trial Court Erred in Granting *Faretta* Status Because Appellant did not Make an Unequivocal Request to Represent Himself

A criminal defendant invokes his right to represent himself under *Faretta* by making a timely, unequivocal request and entering a knowing,

intelligent and voluntary waiver of his right to counsel. In this case, appellant's motion concerning representation in his capital case, heard on November 3, 1989, was not an unequivocal *Faretta* invocation because it made clear that appellant sought not to go it alone as his own attorney, but rather to have a hybrid arrangement where he would be "lead counsel" assisted by "second chair" counsel, appointed under *Keenan* and required to follow appellant's direction.

In requiring that a criminal defendant's request for self-representation be unequivocal, this Court has stated that it is much more than "the stability of judgments that is at stake." (*Marshall, supra*, 15 Cal.4th 1, 22-23.) "The defendant's constitutional right to the effective assistance of counsel also is at stake – a right that secures the protection of many other constitutional rights as well." (*Ibid.*) Therefore, a trial court addressing a *Faretta* request must "evaluate *all of the defendant's words and conduct* to decide whether he or she *truly wishes to give up the right to counsel* and represent himself or herself and *unequivocally* has made that clear." (*Id.* at pp. 25-26, emphasis added.) Thus, in *Marshall*, this Court held that the defendant's statement to the trial court did not convey the "unmistakable desire to *forego counsel*," and thus the trial court properly denied his *Faretta* request. (*Ibid.*, emphasis added.) A defendant's preoccupation with the court appointing advisory and/or co-counsel can create doubt as to his "sincere interest in waiving his right to counsel." (*Id.* at p. 26.)

In this case, consideration of *all* of appellant's words and conduct shows that while he did desire to take on the role of self-representation, he also wanted to have the assistance of counsel. Simply stated, appellant wanted *both* pro se status and the assistance of counsel. He did not present

the trial court with an *unequivocal* request both to assume the former and to forego the latter.

Appellant made a *conditional* request for self-representation before Judge Zumwalt in March of 1988, stating that he would waive his right to counsel "if and only if his request to proceed 'in propria persona' with the full assistance of counsel" who would obey him was denied by the court. (8CT 1570.) Indeed, the conditionality of that request was a factor in Zumwalt's decision to deny it. (*Id.* at 1574.)

Appellant repeated that his *Faretta* request was conditional in his December 12, 1988, petition in the court of appeal, D009282, which stated that Zumwalt never had ruled on his request for "self-representation with the full assistance of counsel." (52CT 11025.250.) The court of appeal denied that petition on January 6, 1989, indicating that any straight-up request for self-representation was moot by reason of the finality of Judge Zumwalt's ruling, but the hybrid request for pro per status with the assistance of counsel should be raised in the trial court. (51CT 11025.235.)

Appellant's January 12 petition in the court of appeal explained even more clearly that he would waive counsel under *Faretta* only as a last resort, if and only if the trial court would *not* grant him leave to proceed in pro per with the full assistance of counsel who would "obey" him. (42CT 9519-9520.)

In appellant's motion filed in the trial court on June 5, 1989, he requested first, for the court to assign two attorneys to his capital case, both of whom would take their direction from him and be required to obey him. (12CT 2492-2506.) Judge Langford denied the first part of this June 5 motion. (78ART 26-35.) The second part of appellant's motion introduced a new twist, that is, a request for the court to grant appellant leave to act as his own "lead counsel," with "second counsel" appointed to work under

appellant's direction. (12CT 2493.) This part of the written motion, unresolved by Judge Langford, was addressed and ruled upon by Judge Boyle on November 3, 1989. (84ART 79-80.) Appellant moved the court to "allow him to represent himself in the capacity as lead counsel and, since this is a capital case, appoint a second counsel to work under his direction." (12CT 2497.) While the motion referred to appellant's constitutional right under *Faretta* to "proceed without counsel," what it actually asked for was the designation of appellant as "lead attorney" to serve over the "second chair counsel" who was required to be appointed in this complex capital case under *Keenan v. Superior Court* (1982) 30 Cal.3d 750. (*Id.* at 2498, 2500-2501.)

The motion defined the roles of "lead" and "second counsel" as follows: "Lead counsel assumes primary control for the handling of the case and second counsel provides assistance, at the direction of lead counsel, in a variety of areas, including legal motions, research, investigation in the penalty phase, or any other of a number of other divisions of duties. However, the key is that second counsel is appointed and takes his/her basic direction from lead counsel." (12CT 2501.) Rather than expressing a desire to *waive* the benefits of being represented by counsel, the motion insisted that once named as lead counsel he wished to have what he asserted were "the same benefits as every other capital defendant in the county, i.e., to have a second chair counsel appointed on his case to follow his direction and assist him in the case." (*Id.* at 2501.)

A request to be named as "lead counsel" with second chair counsel providing assistance can hardly be said to comprise an unequivocal request for self-representation under *Faretta*. *Faretta* makes clear that the constitutional right to self-representation means giving up the Sixth Amendment right to representation by counsel, and that the two are

mutually exclusive. (*Faretta, supra*, 422 U.S. 806, 833-835.) Here, as further discussion below will show, what appellant requested and what the trial court was granting remained at all times to be a murky morass. Given this uncertainty and confusion it cannot be said that appellant unequivocally invoked his right to self-representation under *Faretta*.

C. The Grant of Self-Representation to Appellant was Error and Requires Reversal Because Appellant did not Enter a Knowing, Intelligent, and Voluntary Waiver of his Right to Counsel

Deficiencies in Judge Boyle's advisements and inquiries to appellant concerning the dangers of self-representation, and irregularities in the waiver form submitted by appellant, made the trial court's determination that appellant's waiver of counsel was knowing, intelligent, and voluntary error, under an extensive body of state precedent interpreting the requirements of the federal constitution.

During the November 3, 1989 hearing, Judge Boyle said that he had reviewed the 14 affidavits submitted by appellant, which were a "testament to [the defendant's] intelligence and competence," and commented that the declarations were "quite a remarkable group of documents by people of various professions in support of Mr. Waldon." (84ART 59.)

Judge Boyle said the only issue before him was whether appellant was making "an intelligent and knowing waiver of his right to counsel," and that the "wisdom of the move" was "absolutely irrelevant." (84ART 59-60.) Judge Boyle then turned immediately to the "connected problem" of what kind of assistance appellant would receive if acting pro se, stating that it was within the court's discretion to appoint stand-by or advisory counsel, that is, someone who "does advise the defendant and is available

. . . to assist him throughout the course of the trial based on his own legal knowledge and ability to get things done [that] the defendant otherwise [might] not be able to get done because he is in custody." (*Id.* at 60.)

Judge Boyle initiated the following exchange:

> THE COURT: I think it's become abundantly clear to Mr. Waldon that, if allowed to represent himself, the trial will proceed without further delay and that his pro per status is not an excuse to get continuances or further delays from the Court, and he is held to a very high standard as his own attorney. The case will move along and his own ignorance of the law or procedural difficulties will not be an excuse for delay. [¶] That's one of the prices he pays to exercise this right, which the Court has made clear that he has, to not allow the government to insert an attorney between him and the People. It's very clear – everybody in the business knows it – that self-representation is consistently, if not always, a detriment to the defendant's preparation of his own defense. [¶] Do you understand that that's our opinion, Mr. Waldon?
>
> THE DEFENDANT: Yes, your Honor.

THE COURT: Okay, Do you understand you will receive no special indulgence by the Court, be subject to the same rules and limitations as if you were an attorney? You understand that?

THE DEFENDANT: Yes, your Honor.

(84ART 61.)

Judge Boyle advised appellant:

> THE COURT: You understand, also, as I know you do, you are facing more experienced people in the law as far as practicing law in the Court; they may not be any smarter than you are, but they have been in the business and sometimes, as you know, from your own past work, experience sometimes means a lot, and we don't bring in someone that has your limited experience as a practicing attorney. Do you understand that?
>
> THE DEFENDANT: Yes, your Honor.

THE COURT: There is no question in this Court's mind of the defendant's ability to read and write, listen, be polite, and cooperate if he chooses to do so. [¶] Defendant should also understand that one aspect of being any attorney, let alone your own attorney, is to cooperate with the Court who tries the case, regardless of whether or not you agree with the ruling, that you state your objection, and the matter must proceed. If the Court makes a ruling and may direct, for example, you to cease a certain line of questioning, you have to stop then. The record then is clear. You have your appellate rights if they are appropriate, but you have to be willing to cooperate with the Court. [¶] Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you agree to do that?

THE DEFENDANT: Yes, your Honor.

(84ART 61-62.)

Judge Boyle said he intended to grant the motion and asked the prosecutor for any comment:

THE COURT: Now, just taking the issue of pro per status and setting aside for the moment the issue of the assistance to be provided, if any, to the defendant by a member of the bar, it is obvious from my tone and questions, I think, to both sides that I am inclined to grant this pro per motion request.

(84ART 62.)

The prosecutor raised the question of whether appellant would enter a written waiver:

MR. CARPENTER: No your Honor. Just one moment. . . . [¶] Mr. Ebert just reminded me, and I think that the Court was anticipating doing this, that, upon granting pro per status if it's to be granted, I would think it would be appropriate to have Mr. Waldon sign a waiver to that effect. I think that we filed such a waiver and acknowledgment months ago with responses thereto.

(84ART 63.)

Judge Boyle mentioned the *Lopez*-style form the court used to memorialize a *Faretta* waiver:

> THE COURT: We do have a form which was developed which basically goes over what I have been discussing with Mr. Waldon on the certain aspects of the case. [¶] Are you willing to go through this form with the assistance of the attorneys you have now and sign that waiver sir?

(84ART 63.)

Bloom referred to the written waiver in the court file[83]:

> MR. BLOOM: It's been signed, your Honor.
>
> THE COURT: He has?
>
> MR. BLOOM: On June 22nd, 1989, we filed with the motion an acknowledgment.
>
> MR. EBERT: I didn't get it.
>
> THE COURT: Can I see your copy just to see what it is? [¶] With the paper jungle we live in, that's not surprising. I have got a June 22nd, '89. We will make a copy for the D.A.
>
> MR. BLOOM: I must say, my recollection is we served the District Attorney, but they don't have it in front of them.
>
> THE COURT: That's understandable.
>
> MR. CARPENTER: I recall seeing such a signed document.
>
> THE COURT: I see a signed document. We will make a copy . . . for the D.A. and make sure we have one in our file, also. [¶] . . . [¶] Now, with that, anything further from the District Attorney?

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[83]As explained above, appellant submitted one waiver form in March of 1988 and a second form in June of 1989. The March 1988 submission was a standard "*Lopez*" waiver altered by hand; the June 1989 document was created from whole cloth, apparently using a *Lopez* waiver as a template. Neither Bloom nor anyone else pointed out to Judge Boyle the substantial differences between a standard *Lopez* form and the one submitted by appellant (which it is not clear that Boyle ever reviewed).

MR. CARPENTER: No, your Honor. Thank you.

THE COURT: Anything further from the defense on this?

MR. BLOOM: No.

THE COURT: All right, then. The Court does find that the defendant has made an intelligent and knowing request to represent himself, and I find that he is competent to make that request and that, under the law, I am required to grant that request and I do so and he enters a pro per status sort of in the next, mushy, few minutes here in the sense that I will still be addressing counsel.

(84ART 63-64.)

Judge Boyle immediately turned back to the issue of representational "assistance" for appellant:

> Let me just ask the lawyers a question, because I inherited this case and was requested by the defense and Mr. Sequoyah personally to not review the file so that I would focus narrowly on this issue of his pro per status. The next issue is going to be -- I guess what I am trying to say and figure out how to say this on the record so it doesn't look totally ridiculous, I am, therefore, ignorant of many things that have happened in the history of this case that both the defendant and the District Attorneys and you two gentlemen, to a certain extent, know about. [¶] Next comes the question of the assistance and I always tell you what I am inclined to do and then see what you want to argue for that. [¶] There was a preliminary denial, I believe, by Judge Langford of one of the requests, which was, in essence, was to have attorneys working for him sort of like employees. [¶] The D.A. is nodding his head. . . .

(84ART 64-65.)

Bloom explained that appellant sought to serve in the role of "lead attorney" to be assisted by "second chair" counsel in the capital case:

> MR. BLOOM: I am nodding in the other direction [from that of the prosecutor]. There was something like [attorneys

working for him sort of like employees], but not exactly. What we have asked at that time –

THE COURT: Were you in that hearing with him?

MR. BLOOM: Yes, sir, I was. It is this same motion that you have before you, portions of which were handled by Judge Langford before it was assigned to you. Only that portion has been ruled on. The Court now has ruled on some of what was left in balance.

THE COURT: What did Langford rule?

MR. BLOOM: He ruled that Mr. Sequoyah's request to be the . . . the lead person in his capital case and to have two lawyers representing him, a lead attorney and a second chair, both of them working for him at his direction, shall be denied.

THE COURT: That's what I thought I said. I guess I didn't say it very well.

MR. BLOOM: But Judge Langford did not rule on something which would be following, namely, that there could not be a second chair in his case.

THE COURT: Oh, I see, I guess I just don't express myself that clearly. I think we are cooking on the same burner here.

(84ART 65-66.)

Boyle and Bloom discussed at length the meaning of the terms second chair and advisory counsel, with Bloom making clear that appellant sought the appointment of an attorney responsible for representing him, in the role of "second chair"or *Keenan* counsel in the capital case. (84ART 67-68.) Boyle stated that he defined advisory counsel as "much more than a law clerk" and "subject to the direction of the pro per." (*Id.* at 69.) Boyle said it was important to define the term, because the lawyer to be appointed would be required to "concur in that role" given that appellant had "been given his rights under *Faretta*, et cetera, to not have the lawyer run the

show in a way that the defendant then feels he is not getting his defense presented to the jury." (*Ibid.*)

The judge continued:

> [T]he way you [Mr. Bloom] call it second chair . . . . [y]ou want advisory counsel or stand-by. What I call advisory, you may call second chair, but he is a lawyer, he or she has consented to work with the defendant. [¶] The defendant may say, I want you to cross-examine this witness, I want you to argue this, or whatever, so it's a concept. Stand-by is the person in the back room that, if the defendant gets ill or whatever, changes his mind, we don't have too much of a delay. So I think we are kind of talking about the same things, but we have been trapped by the labels put on these people by different courts.

(84ART 69-70.)

Bloom stressed the importance of second chair counsel having significant experience, and then turned to the question of who would take on the role and how he, she, or they would be located and appointed. (84ART 71-73.) Bloom stated that appellant preferred that the attorneys be Sanchez and Wolf. (*Id.* at 74.) Bloom emphasized to the court that *Keenan* counsel typically would be appointed in a complex capital case such as this. (*Id.* at 76.) Boyle said that, since *Keenan* counsel typically would be appointed, and "nothing says it is improper for the Court to appoint second counsel" to assist a defendant acting as his own lawyer, he therefore would appoint "two attorneys to assist the defendant." (*Id.* at 76-79; but see *Moore*, *supra*, 51 Cal.4th 1104, 1122.) Boyle reiterated his intent: "Whether we label them advisory, second chair, co-counsel, whatever, they will be more than law clerks; they will work with the defendant, subject to his control, because he represents himself, and that is the ruling of the Court." (*Id.* at 79-80.)

This detailed account shows that Judge Boyle did not satisfy the trial court's duties, set forth in *Lopez*, *supra*, 71 Cal.App.3d 568 and related cases, necessary to ensure appellant was entering a knowing, intelligent, and voluntary waiver of his right to counsel. Judge Boyle did give appellant some of the required admonitions, including that "self-representation is consistently, if not always, a detriment to the defendant's preparation of his own defense," and that appellant would "receive no special indulgence by the Court, [and would] be subject to the same rules and limitations as if [he] were an attorney." (84ART 61.) Boyle advised appellant that he would be required to cooperate with the court, but failed to explain that doing otherwise would cause self-representation status to be terminated. (*Id.* at 62; *Koontz*, *supra*, 27 Cal.4th 1041, 1070-1071.)

The trial court should have advised appellant that the prosecutor would be "represented by a trained professional who would give [appellant] no quarter on account of his lack of skill and experience." (*Koontz*, *supra*, 27 Cal.4th 1041, 1070.) Boyle came close to that, but glossed over the skill disparity appellant would face, saying that the prosecutor would be "more experienced" than appellant in "practicing law" and that "experience sometimes means a lot," while staying silent on the point that the prosecution would seize every benefit of that advantage. (84ART 61-62.)

Trial courts should advise defendants that the limitations they face due to incarceration will not earn them special treatment as litigants. (*Lopez*, *supra*, 71 Cal.App.3d 568, 572-573.) Judge Boyle neglected to do that, and the oversight proved telling given appellant's subsequent frustrations over lacking access to his legal materials and other conveniences as a pro per inmate, and the trial court's refusal to order such access. (See, e.g., 84ART 52-53 [complaint appellant had no access to a copy machine]; 11RT 797-799 [denial of appellant's request to be allowed

more than nine boxes of legal material in his cell]; 11RT 667 [denial of appellant's request to have extra copy of transcript]; 12RT 684 [denial of appellant's request to have court clothing dry cleaned]; 25CT 5633 [motion for 24-hour access to legal material denied]; 32RT 5174 [motion for extra time to study CALJIC denied]; 34RT 5923 [request to make phone call to out of state witness denied].)

Cases mandate that trial courts advise defendants, in taking a *Faretta* waiver, that they have no right to standby, advisory, or co-counsel if awarded pro se status. (*Jones*, *supra*, 53 Cal.3d 1115, 1142; *People v. Noriega, supra*, 59 Cal.App.3d 311, 319-320.) Here, Judge Boyle not only neglected to advise appellant on that score, but also sowed confusion by speaking ambiguously on the question of appellant receiving assistance from appointed counsel in some murky capacity. Appellant's motion makes clear that appellant sought, and believed he was entitled, to serve as "lead counsel" giving direction over "second chair counsel" appointed to assist him. When Boyle later trod over nuances between the terms advisory, standby, and co-counsel (see 84ART 69-70 ["what I call advisory, you may call second chair . . . so I think we are kind of talking about the same things, but we have been trapped by the labels put on these people by different courts"]), he sent the message that appellant was being awarded what he asked for: the status of a pro per defendant serving as "lead counsel" over the direction of counsel appointed to serve under him as second chair. This is the exact opposite of advising appellant that, at bottom, he was on his own and any assistance from counsel as the case moved forward would forever remain within the prerogative of the court.

Further, an effective waiver includes an advisement that while a represented defendant can claim on appeal that he received ineffective assistance of counsel, a pro se defendant granted *Faretta* status cannot

complain of the inadequacy of his representation on appeal. (*Faretta, supra*, 422 U.S. 806, 834, fn. 46; *People v. Carson* (2005) 35 Cal.4th 1, 8, citing *Faretta, supra*, 422 U.S. 806, 834; *Lopez, supra*, 71 Cal.App.3d 568, 568.) Boyle neglected to advise appellant of that fact. Although this Court held in *People v. Bloom, supra*, that no specific set of admonitions is required as a matter of course (48 Cal.3d 1194, 1225), that case easily is distinguishable because the defendant therein sought pro se status so that he could advocate *for* a death sentence, while appellant herein wanted to represent himself to *lessen* his chance for conviction and a death sentence. (*Id.* at pp. 1216-1217.) Appellant does not argue that the constitution required Judge Boyle to caution him according to some pre-written formula; rather, he contends that his waiver was not subjectively knowing, intelligent, and voluntary and the words Boyle used, and omitted, support a conclusion that it was not.

Nor did Boyle, as recommended in *Lopez*, inquire into appellant's familiarity with legal procedures. (*Lopez, supra*, 71 Cal.App.3d 568, 573.) On this score, the waiver and acknowledgment form submitted by appellant in June of 1989 states, in paragraph 3: "I have been a full time criminal investigator, policeman, and legal counselor. In this capacity, I supervised, instructed, and/or advised the accused and witnesses at over a hundred judicial hearings." (12CT 2405.) Had Judge Boyle known anything about defendant and the case, the obvious inaccuracy of this statement would have been a red flag that appellant might not be entering a knowing, intelligent, and voluntary waiver of counsel (assuming that Boyle read the form at all).

Importantly, given the facts of this case, Boyle failed to heed the suggestion in *Lopez* to explore with appellant his potential defenses. (*Lopez, supra*, 71 Cal.App.3d 568, 573 [exploration into possible defenses "will serve to point up to defendant just what he is getting himself into and

establish beyond question that 'he knows what he is doing and his choice is made with eyes open'"], quoting *Faretta*.) Judges Levitt and Zumwalt similarly had neglected to address this topic, by conducting a *Frierson*-type inquiry (i.e., asking appellant or counsel to describe the dispute or problems between them, see *People v. Frierson* (1985) 39 Cal.3d 803, 815-816, when addressing appellant's complaints that he was receiving effective assistance from Russell).

Had Boyle removed his blinders and considered the files available to him, he would have seen the many signs that appellant's mental capacity was likely to bear on possible defenses in the guilt and/or penalty trial and would have taken steps to ascertain that appellant intelligently and knowingly waived the assistance of counsel in presenting his defense. Boyle also might have learned of appellant's intended defense that he was abducted by agents and framed through a cointelpro plot to target him for Esperanto and Cherokee activism. (See, e.g., 54RT 10304 [appellant explains to trial judge that he was subjected to FBI and CIA cointelpro and that this is his entire defense]; 55-2RT 10795-10798 [appellant informs trial judge that cointelpro is his whole defense].) By failing to explore appellant's potential defenses with him the trial court contributed to a waiver of counsel that was not knowing, intelligent, and voluntary. (*Koontz*, *supra*, 27 Cal.4th 1041, 1070-1071; *Burgener*, *supra*, 46 Cal.4th 231, 241 ["the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the *risks and complexities of the particular case*," emphasis added].)

Boyle placed weight on appellant's submission of a written waiver. However, the contents of that very document, especially considered in the context of related portions of the case file, created doubt, rather than certainty, that appellant's waiver of counsel met constitutional standards.

Comparison of the March 1988 and June 1989 written waivers proves telling.

In the first waiver form appellant submitted to Judge Zumwalt in March of 1988, he altered the text by hand to say that representing himself would *not* make "the likelihood of [his] conviction and punishment much greater than if he had a lawyer," and that if convicted he "[would] be able to complain on appeal that [he] did not effectively represent himself." (8CT 1569.) That form also stated that appellant intended to waive his right to counsel if and only if the court denied him leave "to proceed 'in propria persona' with full assistance of counsel" who would obey him. (8CT 1570.) In the waiver appellant submitted in June of 1989, however, he went beyond merely altering the pre-printed *Lopez*-style form used by the court; that time, he submitted a typewritten waiver of his own composition that resembled a *Lopez* waiver on its face but changed the text significantly.

The earlier form acknowledges the disadvantages of proceeding without *any* lawyer, while the later form addresses the impact of foregoing only a "lead attorney." The March 1988 form, under the heading "Advantages of Having a Lawyer,"states: "I *understand* that if I had a lawyer to represent me," the lawyer would carry out various specific services on behalf of appellant. (8CT 1566.) Under the heading "Disadvantages of Self-Representation," it states: "I *understand* that without a lawyer I will have to do all those things which a lawyer would otherwise do for me," and "I also *understand* the judge will not help me to learn the rules, and it is not his job to teach me the law." (8CT 1568.)

The June 1989 form, in contrast, omits the headings "Advantages of Having a Lawyer" and "Disadvantages of Self-Representation" altogether. (12CT 2404-2408.) It never states any understanding that having a lawyer is an advantage to a defendant, and that appellant is electing self-

representation, which is a disadvantage to a defendant. In paragraph 6, it states: "I *have been advised and comprehend* that I have many legal rights including, but not limited to . . . [the r]ight to the effective assistance of a lawyer at all stages" and the right to an appointed lawyer if "I cannot afford a lawyer." (12CT 2405-2406.) Paragraph 7 states: "I *have been advised* that if I had a *lead attorney to represent me*," the lawyer would be "trained and experienced in legal proceedings" and would perform various specified legal services. (12CT 2406.) Paragraph 8 states: "I *understand* that if I am named lead counsel I will not have the benefit of *a lead counsel* to do all the forementioned [*sic*] things." (*Ibid.* [giving the suggestion that appellant understands that "second chair" counsel *will* do the aforementioned things for appellant].)

Next, the March 1988 form explicitly states an understanding that the prosecutor had a big advantage over a pro se defendant, but the June 1989 form stops short of that. The prior form stated: "I *understand* the prosecutor is a lawyer, and is trained and experienced in legal proceedings. I *understand* the prosecutor will not help me, but instead may hinder or prevent me from defending myself by making his own objections and motions. I *understand* the prosecutor's training, experience, and tactics *will probably* give him a great advantage over me." (8CT 1568, emphasis added.) The June 1989 waiver form, in contrast, reads: "I *have been advised* that the prosecution is represented by a lawyer, who is trained and experienced in legal proceedings and that he will not help me in any way and that he is my adversary who will be attempting to gain my conviction and to gain a verdict ordering my death. . . I *have been advised* that the prosecution lawyer's experience and training *may* give him a great advantage over me." (12CT 2407, emphasis added.) By using the words "I have been advised" rather than "I understand," appellant hedged on whether

he subjectively believed any of those things as to which he had been advised.

Further, the March 1988 form expressly admits the disadvantages of self-representation, while the June 1989 form splits hairs and never acknowledges a subjective understanding that self-representation was likely to yield a worse outcome in appellant's own case. The earlier form showed the standard language (prior to appellant's alteration): "I *understand* that by representing myself *I am probably making the likelihood of my conviction and punishment much greater than if I had a lawyer.*" (8CT 1569, emphasis added.) The June 1989 form, in contrast, stated: "I *have been advised that statistically* a person who represents himself is making the likelihood of his conviction and punishment greater." (12CT 2407, emphasis added.)

The March 1988 form is explicit about waiving the right to claim ineffective assistance of counsel on appeal. It shows this typical language: "I *understand* that if I am convicted I *will not be able to complain on any appeal that I did not effectively represent myself. However, if I am represented by a lawyer I may complain on appeal that I was ineffectively represented.*" (8CT 1569, emphasis added.) In contrast, the June 1989 form, paragraph 15, used this differing language: "I *have been advised* that if I am convicted any complaint on my appeal that I did not effectively represent myself will be denied if the appellate courts rule in accordance with the current law." (12CT 2407, emphasis added.) The form made no reference to giving up the right to claim ineffective representation *by counsel* on appeal (which suggests that appellant believed he would be able to claim ineffective assistance of second chair counsel on appeal).

The March 1988 form, under the heading "Co-Counsel or Advisory Attorney," reads: "I understand that although I may request the appointment

of co-counsel or an advisory attorney if I am allowed to represent myself, the Court may not grant such a request for co-counsel or an advisory attorney unless I am able to show a proper legal basis for such an appointment." (8CT 1569.) The June 1989 form, in contrast, makes no mention of whether the court was obliged to appoint co-counsel or advisory counsel.

The March 1988 form is explicit in its concluding waiver of counsel language. Under the heading "Waiver," the form (prior to alteration by appellant) stated: "I *hereby waive and give up my constitutional right to representation by a lawyer*. [¶] I make this waiver freely and voluntarily. I have not been promised any benefit, *nor do I expect a benefit*, for making this waiver. I have not been threatened, coerced, *or forced in any way* to make this waiver. . . . I have *read and understood*, and completed as necessary, all of the statements above." (8CT 1570, emphasis added.) In contrast, the June 1989 form reads: "I hereby waive and give up my constitutional right to have *a lead counsel* appointed on my behalf. [¶] I make this waiver freely and voluntarily. I have not been promised any benefit in exchange for this waiver, nor have I been threatened, or coerced to make this waiver." (12CT 2408, emphasis added.)

Judge Boyle did not go over the June 1989 waiver form with appellant in court. Indeed, given all of the irregularities contained in the document, the record strongly suggests that Boyle, in "finding" appellant made a knowing, intelligent, and voluntary waiver of counsel, never even read the form. At any rate, it cannot be gainsaid that Boyle failed to consider the document in its full context, where he abstained from reviewing the record of earlier proceedings.

More importantly, the content of the June 1989 form shows that appellant's waiver of counsel was not made with subjective understanding.

As explained in *Burgener*, *supra*, 46 Cal.4th 231, it is the defendant's understanding, not the judge's understanding, that determines whether a waiver of counsel holds up on review as being knowing, intelligent and voluntary. (*Burgener*, *supra*, 46 Cal.4th 231, 241, citing *Koontz*, *supra*, 27 Cal.4th 1041, 1070 ["test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case"] and *Lopez-Osuna*, *supra*, 242 F.3d 1191, 1199 ["the focus should be on what the defendant understood, rather than on what the court said or understood"].)

Here, the trial court during the 1987 competency trial had fomented appellant's confusion. As outlined above, the trial court, by permitting Deputy District Attorney Ebert to give an inaccurate statement of the "law" regarding the relative roles of a criminal defendant and his counsel, misled appellant to believe that the law gave him the power to control an attorney representing him. (30ART 1031-1032.) Ebert, with the blessing of Judge Levitt and over the objection of defense counsel, testified that a "defendant himself or herself has the right to control fundamental decisions made in the presentation of that individual's case" and that the defendant "retains that control even in situations where the defendant is represented by counsel." (*Id.* at 1031-1032.) Ebert further explained that the law guaranteed that "major decisions" such as whether to present any defenses related to the defendant's "mental" capacity were "left to the defendant" even where appointed counsel represented the defendant at trial. (*Id.* at 1033.) The prosecutor built on Ebert's misstatements during argument, stating that the law gave appellant, rather than his appointed lawyer, decision-making control over the case (31ART 1122-1124), and arguing that appellant's desire to control the case made sense given the "constitutional right" he

retained "to make the fundamental decisions in [the] case even where he is represented by an attorney." (*Id.* at 1124.)

This testimony and argument during the competency proceeding fomented appellant's confusion regarding how an appointed attorney provides effective assistance to a defendant in a criminal case. The situation as described by Ebert, with a fully-empowered defendant also gifted with a Sixth Amendment guarantee of effective assistance of counsel (and appeal rights thereon), sounds uncannily like the arrangement appellant sought, and likely believed he won, in November of 1989 – full status as "lead attorney" for himself together with the benefits and protections of appointed counsel serving as his "second chair." Due in part to Ebert's inaccurate testimony, the record shows appellant lacked subjective *understanding* of either what it meant to be represented by counsel, or what "self-representation" meant for a criminal defendant.

These seeds of confusion planted by Judge Levitt and Ebert during the competency proceedings put down root throughout the convoluted course of appellate and trial court proceedings between the competency verdict in fall of 1987 and the hearing before Judge Boyle two years later. During *Faretta* and *Marsden* related proceedings before Judge Zumwalt in February and March of 1988, appellant fixated on the confidentiality of "defense strategy," even after being advised by Judge Zumwalt that everything said during the in camera proceeding would be held in confidence. (41ART 197, 204.) Russell explained to Zumwalt that the core dispute with her client involved his desire to present an "irrational defense," as compared to her interest in developing evidence regarding his mental condition, whether as related to a defense to charged crimes, or to build a case in mitigation. (*Id.* at 202; 42ART 222-225, 240.) This suggests appellant believed that once Russell was removed he would exercise the

right to present his chosen defense to the jury without limitation, irrespective of whether the trial judge determined the defense to be colorable.

Appellant's handwritten modifications to the *Lopez* waiver submitted in March of 1988 showed the growing confusion regarding self-representation and the rights a defendant would waive when granted *Faretta* status. (8CT 1569-1570.) It made clear that what appellant wanted, first and foremost, was pro se status coupled with the full assistance of an attorney who would take direction from him. (*Id.* at 1570.) Appellant's colloquy with Judge Zumwalt on March 15, 1988 evidenced appellant's state of mind. When Zumwalt asked appellant whether he understood that by representing himself he would make the possibility of his conviction and punishment "much greater than if [he] had a lawyer," he responded that the fact was "a matter of opinion." (45ART 480.) Appellant insisted that he could complain on appeal that he had lacked effective assistance of counsel, while conceding that such claim would be rejected. (*Id.* at 481.) Appellant asked the court to grant him the assistance of an attorney who would be required to obey him. (*Id.* at 486.)

Early in 1989, the trial court's failure to substitute a new attorney to represent appellant for all purposes, after removing Russell, likely added to the confusion. Bloom and Sanchez, as "advisory" counsel for appellant from January through November of 1989, "obeyed" appellant, and said and did only what he directed them to do. Boyle muddied the water further, describing Bloom and Sanchez as appellant's attorneys "completely and 100 percent" yet for a limited purpose. (80ART 21.) Boyle also fed appellant's misunderstanding of the role of the court, viz., appellant's fixation on secrecy and his notion that any judge familiar with the court file was "prejudiced" against him, by agreeing to keep himself "intentionally

. . . ignorant of the history of [the] case." (79A-3RT 8-9; 80ART 12-16.)

What happened *after* Judge Boyle granted appellant pro per status further shows that appellant's purported waiver was an epic misunderstanding, rather than being knowingly, intelligently, and voluntarily made. Appellant soon began to complain that he was not getting the litigation privileges and support he deserved and that advisory/second chair counsel were performing ineffectively. On November 14, 1989, Boyle issued an order that appellant be afforded "pro per privileges" at the jail (12CT 2566); appellant responded by submitting a proposed order (which Boyle denied) that those privileges would include placement in an "X" cell on the second floor of the jail, 24-hour access to a telephone and word processor, and sufficient lighting in his cell to permit reading and writing 24 hours per day. (*Id.* at 2611-2619.) In appellant's December 4, 1989, request to the Court of Appeal for an extension to prepare a response to the competency writ, he complained about not having access to the court's files, his legal materials, and runners and paralegals; he also complained that advisory counsel had broken promises and was providing ineffective assistance of counsel. (*Id.* at 2628-2629.) The next day, "second chair" attorney Sanchez moved for clarification of his role. (*Id.* at 2630-2645.)

On December 6, 1989, the other "second chair" attorney, Wolf, moved to withdraw from the case (13CT 2649-2650) and appellant asked Judge Boyle to appoint Bloom to replace Wolf. Bloom hesitated, saying he doubted whether appellant "understood" the respective roles of advisory counsel, standby counsel or co-counsel with regard to a self-represented defendant. (86ART 11-16.) Boyle appointed Bloom on a temporary basis. (*Id.* at 16.) Appellant said he recognized the jurisdiction of neither the court nor the state. (*Id.* at 18.) Sanchez, over appellant's objection, requested to

be appointed as both advisory and standby counsel, so he would be authorized (and funded) independently to prepare a defense "in a professional manner" in parallel to appellant's own preparation of a defense. (*Id.* at 18-22.) Boyle denied the request, stating that Sanchez's duty was to be prepared; he did not necessarily have to be ready to run and could have a reasonable delay to get up to speed. (*Ibid.*)

In a hearing before Judge Revak on December 18, 1989, appellant objected to Sanchez speaking in court without appellant's permission, and complained again that he was without "effective advisory counsel." (87ART 3.) Discussion before Judge Revak showed great confusion about appellant's status under section 987.9 with respect to obtaining and managing funds to cover expenses in defending the case. (*Id.* at 24-25.) On January 3, 1990, appellant moved for a new advisory attorney to replace the temporarily-appointed Bloom (13CT 2721-2726), and on January 16 appellant complained that he was "entirely without effective assistance of advisory counsel" and requested that Mark Chambers be appointed. (88ART 4-8.)

Time and again appellant complained about the effectiveness of advisory counsel, and tried to prevent them from speaking with the court, the prosecutor, or each other without appellant's permission, or from taking action outside of his direction.[84] Appellant also labored under a

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[84]See 96ART 12-13; 96ART 5-43 (May 2, 1990); 1RT 150-171 (July 9, 1990); 1RT 176-178 (July 20, 1990); 8RT 1471 (January 7, 1991, motion to bar advisories from filing anything without appellant's permission and signature); 8RT 474-495 (February 1, 1991, motion to fire Chambers and for determination that Rosenfeld and investigator Atwell were ineffective); 9-1RT 531-536 (February 5, 1991 hearing on appellant's request to fire Chambers and discussion of whether appellant could claim ineffective assistance of advisory counsel); 9RT 542-560 (February 6, 1991, hearing on

(continued...)

misconception regarding the role of judges in the trial court. Appellant obviously believed that the provision of second counsel was not a matter of the judge's discretion. To the extent that such counsel as appellant was given by Boyle was advisory counsel, of course, the trial court had discretion to order or not order such counsel. (See *Bloom*, *supra*, 48 Cal.3d 1194, 1218 ["[A] self-represented defendant who wishes to obtain the assistance of an attorney in an advisory or other limited capacity, but without surrendering effective control over the presentation of the defense case, may do so only with the court's permission and upon a proper showing."]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1368 ["The court

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[84](...continued)
appellant's complaints of ineffective assistance by Rosenfeld); 9RT 576-598 (February 15, 1991, hearing on complaints about Rosenfeld); 80CT 17110-17127 (February 19, 1991, petition in court of appeal seeking "control" over advisory counsel, complaining that Chambers planned to get appellant's pro per status revoked, and "firing" Chambers); 80CT 17248 (February 25, 1991 order denying petition for mandate and regarding Chambers as "stand-by" counsel]); 10RT 642-667 (March 18, 1991, hearing on appellant's motions, wherein appellant said he had been unable to file motions because "Boyle's order relating to advisory counsel was not followed" and because appellant had not had access to legal material in the jail); 80CT 17249 (March 19, 1991, petition for review of court of appeal decision, stating that appellant's religion required he not recognize anyone who would interfere with his right to self-representation); 12RT 700-735 (March 28, 1991, hearing on motions, wherein appellant claimed that a severance motion violated his religion because it was "essentially produced" by an attorney rather than himself because the trial court would not order access to appellant's nine boxes of materials in jail, and said he would not use anything produced by Chambers, a "a prosecution agent"); 12RT 817 (April 8, 1991, hearing on appellant's access to boxes of materials, wherein appellant stated that his religion in the World Humanitarian Church required self-representation, but might permit submission of work for appellant by an attorney who recognized the self-representation tenet).

retains authority to exercise its judgment regarding the extent to which such advisory counsel may participate."].)

Rather, in appellant's eyes, the judge had an obligation both to assure that he got the counsel Boyle ordered and, on top of that, a duty to enforce the role appellant believed such counsel should play, i.e., that they must put on the case he wanted the way he wanted it without counsel's exercise of his or her own judgment. For instance, appellant reminded Judge Gill of Judge Boyle's order that he have counsel, and asserted that it was Gill's obligation to uphold that order and that such counsel could not be taken away from him without "due process of law." (9RT 542.) So too, appellant asserted that it was Judge Gill's obligation to enforce Boyle's order that his counsel acted only at his direction. As an example, appellant asked Judge Gill to order advisory counsel Sanchez not to speak with other counsel without appellant's permission. He asked Gill to order successor counsel Nancy Rosenberg to show appellant her billings on the case before they were submitted. (*Id.* at 542-543.) He repeatedly asked that Gill prevent advisory counsel from speaking in court without his permission. (See, e.g, 8RT 474; 9-3RT 621-622; 11RT 666; 12RT 817-818; 14RT 1252.) This is relevant because it illustrates appellant believed that, in waiving counsel, his role as "his own attorney" would be backed up with supporting counsel – and with a quiescent judge who would insist on counsel obeying him – no matter what appellant wished to do at his trial. This appellant did not get: Gill explicitly refused to order appellant's second counsel to give up their independent judgment.

D. The Error Requires Reversal

The error in failing to adequately advise appellant about the consequences of waiving his Sixth Amendment right to counsel requires reversal of the verdict. In *Burgener*, *supra*, this Court declined to rule on

whether the failure to adequately advise a defendant regarding the consequences of waiving counsel required reversal per se, because Burgener was entitled to relief "even if the error were subject to harmless-error review under *Chapman* in some form." (46 Cal.4th at p. 245.) However, in the past this Court has recognized that the type of error committed by the trial court here will result in automatic reversal. (*People v. Crayton* (2002) 28 Cal.4th 346, 364 [". . . a reversible per se rule may apply under California Constitution article VI, section 13, when a defendant erroneously is denied the right to counsel or never has knowingly or voluntarily waived that right. . . "]; see also *People v. Hall* (1990) 218 Cal.App.3d 1102, 1108-1109 [observing that the right to self-representation is found in the Sixth Amendment right to counsel and cannot be asserted without knowingly and intelligently waiving the right to counsel, and holding that "[w]here a defendant is permitted to represent himself or herself without knowingly waiving the right to counsel and all its attendant benefits, the right to counsel has been violated"].)

This view is compelled by a series of rulings of the United States Supreme Court recognizing that "some errors necessarily render a trial fundamentally unfair" and the denial of the right to counsel is one such error. (*Rose v. Clark* (1986) 478 U.S. 570, 577, citing *Gideon v. Wainwright* (1963) 372 U.S. 335; *Penson v. Ohio* (1988) 488 U.S. 75, 88 [denial of counsel on appeal presumptively prejudicial]; *Cronic*, *supra*, 466 U.S. 648, 659 [holding that "a trial is unfair if the accused is denied counsel at a critical stage of his trial"]; *Chapman v. California* (1967) 386 U.S. 18, 23 [recognizing that the right to counsel is "so basic to a fair trial that [its] infraction can never be treated as harmless error"]; see also *Cordova v. Baca* (9th Cir. 2003) 346 F.3d 924, 930 [holding "that if a criminal defendant is put on trial without counsel, and his right to counsel has not

been effectively waived, he is entitled to an automatic reversal of the conviction"].)

Moreover, the error was not harmless. One cannot say beyond a reasonable doubt that defendant would have waived the assistance of counsel if the trial court had adequately advised him regarding what he was waiving and what he could expect at trial if he went without counsel. When Judge Gill learned that appellant's intended defense was that the prosecution had fabricated the entire case against appellant as part of a plot to cointelpro him as a martyr for the causes of Esperanto, Native American autonomy and Poliespo, Gill barred appellant from putting on that defense. If Judge Boyle had conducted a reasonable inquiry into what defense appellant wanted to present as anticipated by *Frierson*, it would have learned of appellant's intended "cointelpro" defense – once appellant was freed of what he thought was the impossible burden of counsel who insisted that he present a defense related to the facts of the offense. Appellant's real reason for obtaining *Faretta* status was to present the cointelpro defense. The prosecution cannot show beyond a reasonable doubt that had appellant understood that he would not be permitted to put on a cointelpro defense, would not be permitted counsel who would unquestioningly help him do so, and would not have a judge who would have supported the defense, he would not have waived counsel. Hence reversal is required.

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IX.

JUDGE BOYLE'S TREATMENT OF APPELLANT'S *FARETTA* MOTION WAS DEFICIENT IN LIGHT OF QUESTIONS CONCERNING APPELLANT'S MENTAL CONDITION AS RELATED TO THE WAIVER OF COUNSEL AND APPELLANT'S COMPETENCE TO REPRESENT HIMSELF, AND BECAUSE COMPETENCE TO STAND TRIAL HAD NOT BEEN DETERMINED RELIABLY

A. Introduction

There were significant questions concerning appellant's mental state at the time Judge Boyle granted him *Faretta* status in November of 1989. Addressing the same questions in 1987 and 1988, Judge Zumwalt ordered a psychiatric evaluation of appellant and considered the psychiatric evidence in reaching her conclusion that appellant's waiver of counsel was not voluntary because of his mental impairments. Because appellant's mental state was at issue as related to the *Faretta* motion, it was constitutional error for Judge Boyle to ignore the case file and address the *Faretta* motion based only on appellant's moving papers, and to neglect the trial court's special duties of considering the opinions of court-appointed psychiatrists in connection with the inquiry into whether the waiver of counsel was knowing, intelligent, and voluntary. Judge Boyle further erred because he never considered whether appellant suffered mental defects compromising his competence to represent himself during trial. Breaching these duties violated appellant's rights to due process, counsel, and a fair trial under the federal and state constitutions, and reversal is required.

B. Judge Boyle Erred by Agreeing to Review Only the Materials Submitted by Appellant on his Second *Faretta* Motion

The question of whether the defendant's waiver of counsel is knowing, intelligent and voluntary takes on great importance when there is

reason for the trial court to entertain doubt as to the defendant's mental status. (*Lopez*, *supra*, 71 Cal.App.3d 568, 573.) The trial court erred in agreeing to ignore what was in the file and to consider the *Faretta* motion based only on the materials submitted by appellant.

When Judge Boyle considered took up appellant's *Faretta* motion he knew of the prior competency proceedings, the pendency of a writ challenging the outcome therein, and Judge Zumwalt's prior denial of *Faretta* status based on consideration of appellant's mental state. Therefore he had a heightened responsibility to take appropriate steps to ensure appellant's waiver of counsel was knowing, intelligent, and voluntary. Yet, the record makes clear that Judge Boyle put on a blindfold of appellant's design, with the full agreement of the prosecutor, and agreed not to review the court file on any prior proceedings, buckling to the theory that doing so would be unfairly "prejudicial" to appellant. (79A-3RT 8-9, 80ART 12-16.)

This self-imposed ignorance was error. This Court recently has reiterated that a trial court addressing self-representation where the defendant's mental status is at issue must consider all available information. Irrespective of prior jury findings in a competency proceeding under section 1368, "[w]hether to deny self-representation due to mental incompetence is for the court, not a jury, to determine based on all of the information available to the court." (*People v. Johnson* (2012) 53 Cal.4th 519, 532, citing *Indiana v. Edwards* (2008) 554 U.S. 164, 177.) This Court's review of the *Faretta* grant is based on consideration of all materials in the record (see *Dent*, *supra*, 30 Cal.4th 213, 222 [in analyzing claim that *Faretta* was improperly denied Court conducted "independent review of the record"]), and as discussion below will demonstrate Judge Boyle's ruling based on appellant's selective submissions was an abuse of discretion and violated

appellant's right to counsel and due process under the Sixth and Fourteenth Amendments of the federal constitution.

Appellant's mental state clearly was in issue, given the section 1368 proceeding upon which writ review was pending, and Judge Zumwalt's previous denial of *Faretta* status based on appellant's mental condition – indeed, the case was tied up in proceedings related to appellant's mental state for over a year from February of 1987 to March of 1988. Proceedings before Judge Boyle gave further notice that appellant's mental condition should be considered; Judge Boyle himself noted that the case was "insane" in its practice and procedure. (84ART 53.)

Because Judge Boyle closed his eyes to the record, he never learned the substance of Judge Zumwalt's ruling on the *Faretta* motion in March 1988 and the reasons for it, nor did he take into consideration that Zumwalt had ordered a psychiatric examination, or the evaluation prepared based upon it. Nor did Boyle apprise himself of appellant's allegations of sexual conspiracies and self-representation as a religious mandate in his December 12, 1988 petition for habeas corpus (52CT 11025.246-11025.313), or appellant's April 10, 1989 claim that Judge Kennedy gave Russell judicial favors in exchange for sexual favors. (72ART 1-14.) This case history had direct bearing on the issues before Judge Boyle and yet Boyle inexplicably went out of his way to refrain from considering any of it, egregiously breaching his duties in violation of appellant's constitutional rights.

C. Judge Boyle Failed to Carry out the Trial Court's Special Duties, When the Defendant's Mental State is in Question, to Ensure that the Defendant in Fact is Making a Knowing, Intelligent, and Voluntary Waiver of his Right to Counsel

In March of 1988, Judge Zumwalt considered evidence from psychiatrists she had appointed for a mental examination of appellant, and

relied on that evidence in concluding that appellant's motion for self-representation should be denied based on his mental condition. When Judge Boyle granted appellant self-representation status in November of 1989, he explicitly refused to consider those psychiatric evaluations or anything else from the proceedings before Judge Zumwalt, nor did he make his own appointment of professionals to conduct a psychiatric evaluation in connection with the *Faretta* motion. Although the law has taken time to crystalize in full, as related to the procedures governing trial courts addressing self-representation motions when the defendant's mental condition is in issue, both current precedent and the precedent existing at the time of Judge Zumwalt's ruling make it clear that Judge Zumwalt acted appropriately in denying *Faretta* status and Judge Boyle's contrary decision to grant self-representation was in error.

1. Legal Background

In June of 1975, the United States Supreme Court issued its decision in *Faretta*, stating that the Sixth Amendment grants a criminal defendant the personal right to make his own defense without counsel, that is, a right to self-representation at trial. (*Faretta, supra*, 422 U.S. 806.) The Court noted that "although [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." (*Id.* at p. 834, internal quotation omitted.) The Court further explained:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel [under the Sixth Amendment]. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. *Johnson v. Zerbst*, 304 U.S., at 464-465, 58 S.Ct., at 1023. Cf. *Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and

> intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Adams v. U.S. ex rel. McCann* (1942) 317 U.S.269, at 279, 63 S.Ct., at 242.

(*Id.* at p. 835.)

Courts in this state interpreted the *Faretta* precedent broadly. For example, this Court in *People v. Windham* (1977) 19 Cal.3d 121, 127-128, characterized the right to self-representation under *Faretta* as "unconditional." Upholding a trial court's denial of a mid-trial motion for self-representation and noting that it presented an exception to the general rule, this Court stated these requirements for courts facing a *Faretta* request made pretrial:

> We hold therefore that in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial. [footnote omitted]. Accordingly, when a motion to proceed pro se is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be. Furthermore, the defendant's 'technical legal knowledge' is irrelevant to the court's assessment of the defendant's knowing exercise of the right to defend himself. (Faretta v. California, *supra*, 422 U.S. 806, 836, 95 S.Ct. 2525, 45 L.Ed.2d 562.)

(*Ibid.*)

A few months after *Windham* was decided, the court in *Lopez*, *supra*, 71 Cal.App.3d 568, considered this Court's words in *Windham*, specifically: "'a trial court must permit a defendant to represent himself *upon ascertaining that he has voluntarily and intelligently* elected to do so, irrespective of how unwise such a choice might appear to be.'" (71 Cal.App.3d at p. 571, quoting *Windham*, *supra*, 19 Cal.3d 121, emphasis in

Lopez.) Judge Gardner in *Lopez* stated that a trial court must ascertain that a defendant is making a "knowing and intelligent election" to represent himself, by following these steps: (1) making sure the defendant is aware of the dangers and disadvantages of self-representation; (2) making some inquiry into the defendant's "intellectual capacity" to make the "intelligent decision"; and (3) apprising the defendant that he cannot afterwards claim inadequacy of representation. (*Id.* at pp. 572-573.) As to the second step, "If there is any question in the court's mind as to a defendant's mental capacity it would appear obvious that a rather careful inquiry into that subject should be made – probably by way of a psychiatric examination." (*Id.* at p. 573.) In *Lopez* the reviewing court found that the trial court had failed under the first step of this test when it granted the defendant *Faretta* status during sentencing, and reversed and remanded for a re-sentencing.

A few months later in 1977, a court addressed the issue of whether, when a defendant's mental capacity is in question, competence to make a knowing and intelligent waiver of the right to counsel might consist of something more than competence to stand trial. (*Curry v. Superior Court* (1977) 75 Cal.App.3d 221.) The court held that the former standard was higher than the latter, citing *Westbrook v. Arizona* (1966) 384 U.S. 150, *Johnson, supra*, 304 U.S. 458, and a law review article, Silten & Tullis, *Mental Competency in Criminal Proceedings* (1977) 28 Hastings L.J. 1053, 1066. (*Id.* at p. 227.) Thus, "a defendant must be free of mental disorder which would so impair his free will that his decision to waive counsel would not be voluntary," and the requisite standard is met "if the trial court makes the factual determination that the defendant is free of such a mental disorder and indicates, on the record, that he is aware of the consequences of his request." (*Ibid.*) To aid that factual determination, a trial court could order a psychiatric evaluation to assess whether the defendant was

"competent to make the required waiver," which was *not* the same question at issue under Penal Code section 1368. (*Ibid.*) The court in *Curry* drew a bright line between a trial court's assessing the defendant's mental capacity to *waive* counsel, which it deemed permissible, and its consideration of whether the defendant was "mentally unable to represent himself," which it deemed impermissible. (*Id.* at pp. 228-229.) The lower court had denied *Faretta* status on the latter ground, and the reviewing court reversed and remanded for consideration of whether the evidence supported denying self-representation under the "proper" standard. (*Id.* at p. 229.) *Curry* cited *Lopez*, *supra*, 71 Cal.App.3d 568, as authority for the admonishments a trial court must give in granting self-representation. (*Ibid.*)

Shortly thereafter, in *People v. Zatko* (1978) 80 Cal.App.3d 534, 545, revd. *People v. Hightower* (1996) 41 Cal.App.4th 1108, the court held that "mental competency to stand trial under section 1368" was different from "competency to waive the right to the assistance of counsel," and yet a defendant's competency to represent himself was "irrelevant" during a *Faretta* hearing. It held that the defendant therein had "voluntarily and intelligently waived counsel and asserted his right of self-representation," because the trial court had "interrogated [him] at some length about the wisdom of acting as his own counsel," notwithstanding that the trial court knew the defendant had a history of schizophrenia and yet made no "further medical inquiry." (*Id.* at pp. 541, 544.) The court in *Zatko* cited *Windham*'s characterization of the right of self-representation as "unconditional," and said it was reaching the same conclusion on the question of competence to make the required waiver as had the court in *Curry*, *supra*, 75 Cal.App.3d 221, viz., that a psychiatric evaluation could assist a hearing judge on the issue of competence to make the required waiver, but whether "or not a defendant is competent to act as his own

lawyer is irrelevant." (*Id.* at p. 544-545.) The court in *Zatko* rejected decisions of other jurisdictions that considered mental illness to be an important factor in assessing the defendant's "mental capacity to conduct his own defense," reasoning that a robust interpretation of *Westbrook*, *supra*, 384 U.S. 150 as precedent might not survive *Faretta*'s subsequent recognition of a constitutional right of self-representation. (*Id.* at p. 544, fn. 4.)

In *Teron*, *supra*, 23 Cal.3d 103, 113, this Court adopted *Curry*'s holding that a trial court, before granting a defendant self-representation status, must "determine 'whether the defendant has the mental capacity to waive his constitutional right to counsel with a realization of the probable risks and consequences of his action.'" (*Ibid.*, citing *Curry*, *supra*, 75 Cal.App.3d 221, 226, *Zatko*, *supra*, 80 Cal.App.3d 534, 544-545, *Lopez*, *supra*, 71 Cal.App.3d 568, 572-574, and Silten & Tullis, *Mental Competency in Criminal Proceedings, supra,* 28 Hastings L.J. at pp. 1065-1069.) The trial court need not, however, test whether the defendant was "competent to serve as counsel in a criminal proceeding." (*Ibid.*) In *Teron* this Court also said it agreed with Judge Gardner's ruling in *People v. Lopez*, that: "If there is any question in the court's mind as to a defendant's mental capacity it would appear obvious that a rather careful inquiry into that subject should be made – probably by way of a psychiatric examination." (*Id.* at p. 114.) However, there was no basis for reversal on that ground; the trial court had not abused its discretion in determining the defendant's "competence to waive counsel" because there were no facts known to it at the time of the *Faretta* hearing to suggest the defendant's mental condition was impaired. (*Ibid.*)

Thus, according to *Curry*, *Zatko*, and *Teron*, a defendant's "competence to waive counsel" was something separate from, and higher

than, a mere competence to stand trial, and assessing that issue (1) could require a trial court to order a psychiatric evaluation pertaining to issues of voluntariness and free will in asserting self-representation rights, but (2) would never encompass an inquiry into a defendant's competency to serve as counsel and represent himself in a criminal proceeding.

In 1987, the Court of Appeal in *People v. Burnett* agreed with this body of precedent on the first of these issues, but disagreed with it on the second. (*People v. Burnett* (1987) 188 Cal.App.3d 1314, 1318-1321, 1323-1324, revd. *Hightower*, *supra*, 41 Cal.App.4th 1108.) It held that the question of a defendant's "competence to waive counsel" might require the consideration of a psychiatric evaluation *both* on the question of mental capacity in connection with entering a knowing, intelligent, and voluntary waiver, *and also* on the question of the defendant's competence to represent himself ably in the criminal proceedings. (*Ibid.*) On the first point, *Burnett* anchored the analysis firmly back to *Lopez*, *supra*, 71 Cal.App.3d 568 and step two of the test stated therein, and also relied on the authority of *Johnson*, *supra*, 304 U.S. 458, 464, *Westbrook*, *supra*, 384 U.S. 150, 151, and Justice Black's plurality opinion in *Von Moltke*, *supra*, 332 U.S. 708, 723-724.

On the second issue, the court in *Burnett* noted that *Curry* and *Zatko*, as well as *People v. Miller* (1980) 110 Cal.App.3d 327, 332-333, and footnote 6, stood against the premise that the defendant's competence to represent himself had any relevance. (*Id.* at p. 1323.) Still, it observed, many of the issues identified in *Lopez* demonstrated that the defendant's "mental ability to present a defense" indeed was something a trial court should consider. Relying for authority on *Adams*, *supra*, 317 U.S. 269 and *Massey v. Moore* (1954) 348 U.S. 105, the court in *Burnett* found that the

defendant's "ability to waive counsel" must include some minimal ability to present a defense. (*Id.* at p. 1324.)

The court in *Burnett* reasoned that the precedents of *Johnson v. Zerbst* and *Adams v. U.S. ex rel. McCann*, *supra*, must have survived the United States Supreme Court's decision in *Faretta,* because the Court had relied upon those very decisions in limning its opinion and never had suggested that they, or *Massey v. Moore, supra*, did not survive *Faretta.* (*Burnett*, *supra*, 188 Cal.App.3d 1314, 1324-1325.) Further, the court reasoned, *Faretta*'s teaching that self-representation sprang from "that respect for the individual which is the lifeblood of the law," would be at odds with the disrespectful situation that would result from granting self-representation to an individual "so mentally deficient or physically debilitated that he is unable to defend himself." (*Id.* at p. 1325.)

California courts were not alone in positing that competence to exercise *Faretta* rights must be higher than, or different from, competence to stand trial, and that there must be a limit on *Faretta* rights related to the defendant's competence to waive counsel and/or his competence to represent himself. For example, the Ninth Circuit worked out a precedent turning on the defendant's competence to waive counsel, stated thus in *Moran v. Godinez* (9th Cir. 1992) 972 F.2d 263, 266 rev'd, (1993) 509 U.S. 389:

> The legal standard used to determine a defendant's competency to stand trial is different from the standard used to determine competency to waive constitutional rights. A defendant is competent to waive counsel or plead guilty only if he has the capacity for "reasoned choice" among the alternatives available to him. By contrast, a defendant is competent to stand trial if he merely has a rational and factual understanding of the proceedings and is capable of assisting his counsel. Competency to waive constitutional rights

> requires a higher level of mental functioning than that required to stand trial.

(*Ibid.*, citations omitted.)

The United States Supreme Court granted certiorari, reversing the Ninth Circuit and at last providing some enlightenment on how courts should approach a *Faretta* hearing where the defendant's mental condition is in question. (*Godinez*, *supra*, 509 U.S. 389.) The Court held that the trial court acted properly in granting the defendant *Faretta* status and then accepting his guilty plea, notwithstanding evidence suggesting that he lacked the mental capacity to represent himself, and that the reviewing court had erred by imposing a higher standard for "competency to waive counsel" than that applicable for competency to stand trial. (*Ibid.*)

The Court in *Godinez* continued:

> A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. [Citations.] In this sense there *is* a "heightened" standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of *competence*.

(*Godinez*, *supra*, 509 U.S. 389, 400-401, emphasis in original.) It iterated that the focus of a competence inquiry is the defendant's mental capacity, that is whether he has the "*ability* to understand the proceedings," while the purpose of the "knowing and voluntary" inquiry is "to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." (*Id.* at p. 401, fn. 12, citing *Drope v. Missouri* (1975) 420 U.S. 162, 171, for the competency inquiry and *Faretta*, *supra*, 422 U.S. 806, 835, *Adams*, *supra*,

317 U.S. 269, 279, and *Boykin v. Alabama* (1969) 395 U.S. 238, 244, for the "knowing and voluntary" inquiry.)

The Court in *Godinez* further explained that such "two-part inquiry" was what it "had in mind in *Westbrook*," when it "distinguished between 'competence to stand trial' and 'competence to waive [the] constitutional right to the assistance of counsel.'" (*Godinez, supra*, 509 U.S. 389, 401.) The language "competence to waive" in *Westbrook* was intended "as a shorthand for the 'intelligent and competent waiver' requirement of *Johnson v. Zerbst.*" (*Ibid.*) The Court continued:

> This much is clear from the fact that we quoted that very language from *Zerbst* immediately after noting that the trial court had not determined whether the petitioner was competent to waive his right to counsel. See 384 U.S., at 150, 86 S.Ct., at 1320 ("'This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused'") (quoting *Johnson v. Zerbst*, 304 U.S., at 465, 58 S.Ct., at 1023). Thus, *Westbrook* stands only for the unremarkable proposition that when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted.

(*Id.* at pp. 401-402.)

Thus, by its plain language, the United States Supreme Court's decision in *Godinez* left open the door to trial courts obtaining psychiatric evaluations in connection with *Faretta* hearings, to assess the defendant's mental status as related to voluntariness and free will in waiving his right to counsel, so long as the evidence is applied to the "knowing and voluntary" inquiry rather than to the "competence to waive" inquiry.

California decisional law following *Godinez* does not address this point. In *People v. Hightower*, the appellate court considered whether, in light of the United States Supreme Court's decision in *Godinez*, as well al

Zatko and *Burnett*'s holding that the standard of competency for making the decision to represent oneself is "vaguely higher" than the standard for competence to stand trial, had continued vitality. (41 Cal.App.4th 1108.) The court concluded that it did not, where the holding relied on *Westbrook*, *supra*, 384 U.S. 150, which decision the *Godinez* Court made clear bears only on the question of whether a defendant's waiver is sufficiently "knowing and voluntary" for the trial court to accept it. (*Id.* at p. 1115.)

In *People v. Welch* (1999) 20 Cal.4th 701, 741-742, this Court similarly held that the trial court had erred under *Godinez* in finding the defendant competent to stand trial but then finding that he lacked "the mental capacity to truly waive his right to counsel." The majority decision in *Welch* quoted *Godinez* footnote 12 and its description of the two-part inquiry, but it had no occasion to consider the bearing that *Westbrook*, *supra*, 384 U.S. 150, *Johnson*, *supra*, 304 U.S. 458, and *Adams* might have on a trial court's use of psychiatric evaluations during the second part of the inquiry, testing whether the defendant *actually does* understand the significance and consequences of waiving counsel. (*Id.* at p. 733-734.) Justice Mosk's dissent in *Welch* cited the continuing reach of *Lopez*, *supra*, 71 Cal.App.3d 568 as leading authority for defining the "knowing and voluntary" inquiry, but without explanation characterized *Lopez* as focusing mainly on "the sufficiency of the trial court's effort to adequately warn defendant of the consequences of the waiver." (*Id.* at p. 783 [saying nothing about the second step of the three-part test set forth in *Lopez* itself, that is, a trial court's duty to make some inquiry into the defendant's mental capacity as related to making an "intelligent decision" to waive counsel].)

Thus, there is no California precedent, after *Godinez*, speaking directly to trial courts' use of psychiatric evaluations at *Faretta* hearings in connection with inquiring whether the defendant is entering a knowing and

voluntary waiver of his right to counsel. The question then is whether earlier precedent, upon which Zumwalt relied in this case, is still valid given what is now understood of federal constitutional law. Appellant shows below that it is and that Zumwalt's decision to withhold *Faretta* status from appellant was and is correct.

2. Application

In this case, Judge Zumwalt was the first trial court judge to take up appellant's *Faretta* motion. She appointed Dr. Kalish on April 13, 1987, to interview and evaluate appellant's "ability to represent himself" and his "ability to knowingly, intelligently, and competently waive his right to representation by an attorney and represent himself." (2CT 389-390.)

On April 23, 1987, the prosecutor filed Supplemental Points and Authorities in response to appellant's self-representation motion. (3CT 483-489.) The prosecutor analyzed *Burnett*, *supra*, 188 Cal.App.3d 1314, taking no issue with the first three of five points made therein, viz., that the three-part guideline enunciated in *Lopez*, *supra*, 71 Cal.App.3d 568, still was valid, that a court should order a psychiatric examination if a question arose as to a defendant's mental capacity to enter a meaningful waiver, and that such psychiatric evaluation should be conducted in conformity with the ABA Standing Committee on Association Standards "Criminal Justice Mental Health Standards." (3CT 484.) However, the prosecutor argued that there was no authority in *Burnett* for the premise that "the standard for determining competence to stand trial is lower than the standard for determining competence to waive counsel," and specifically that *Westbrook*, *supra*, 384 U.S. 150, provided no support for such conclusion. (*Id.* at 484-486.) It also attacked the conclusion in *Burnett* that "an accused is not competent to waive the right to counsel and proceed to trial unless *in addition* to realizing the probable risks and consequences of his action he

also possesses the mental ability to present a rudimentary defense," and argued that *Adams*, *supra*, 317 U.S. 269 and *Massey*, *supra*, 348 U.S. 105 offered no support for it. (*Id.* at 486-488.) It argued that *Burnett* lacked authority for its statement that a defendant should not be permitted to relinquish counsel if he is unable to understand the mechanics of a trial. (*Id.* at 488-489.)

Russell filed supplemental points and authorities in regards to appellant's *Faretta* motion as well. (3CT 508-511.) Her brief relied primarily on *Faretta* and its explicit statement that three grounds for properly denying a waiver of the right to counsel include that the waiver is not (1) intelligent, (2) knowing, and (3) voluntary. (*Id.* at 509-510.) She argued that the first requirement involved delving into the presence of possible mental disorders impairing the decision, as discussed in *Miller*, *supra*, 110 Cal.App.3d 327, and *Burnett*, *supra*, 188 Cal.App.3d 1314. The second requirement was based on all of the many factors urged in *Lopez*, *supra*, 71 Cal.App.3d 568. The third requirement involved the court's consideration of whether the defendant's motion for self-representation was made "under duress or compulsion or in expectation of some extraneous advantage." (*Id.* at 509-511.)

Russell filed another memorandum of points and authorities on appellant's motion to proceed in propria persona on February 23, 1988. (8CT 1535-1540.)

In her order denying appellant's *Faretta* motion, Zumwalt noted that a jury had found appellant to be competent to stand trial under Penal Code section 1368, and had found that appellant was "competent to cooperate with counsel should he cho[o]se to do so" and "if he chooses not to be willfully recalcitrant and defiant." (8CT 1573-1574.) Addressing the *Faretta* motion, Zumwalt stated:

> Defendant Waldon's motion to represent himself (Faretta motion) is denied.
>
> The court finds he is incapable of *voluntarily exercising an informed waiver of his right to counsel*, further, his request to the court to represent himself only on certain conditions shows he does not rationally perceive his situation.
>
> The court finds from this hearing's testimony, especially that of Doctors Kalish and Koshkarian and the testimony at the Pen. Code Sec. 1368 hearing that is part of this record, that *defendant has a mental disorder, illness or deficiency which impairs his free will to such a degree that his decision to request to represent himself is not voluntary*; he has a mental disorder, illness or deficiency which has adversely affected his powers of reason, judgment and communication. *He does not realize the probable risks and consequences of his action. His request to waive counsel is, therefore, not an exercise of his informed free will.* While Waldon has the cognitive ability to understand the proceedings, he cannot formulate and present his defense with an appropriate awareness of all ramifications.
>
> The witnesses called by Defendant Waldon (with the exception of Dr. Koshkarian) were not competent to give an opinion of his ability to waive counsel and the court finds their testimony deserving of very little weight.

(8CT 1574-1575, emphasis added.) Zumwalt cited no cases or other legal authority in support of her reasoning or her conclusion.

Judge Zumwalt's actions in appointing Dr. Kalish to conduct an evaluation and considering psychiatric testimony related to whether appellant was intelligently, knowingly, and voluntarily electing to represent himself was appropriate under *Lopez*, *supra*, 71 Cal.App.3d 568. Judge Gardner's test in that case states that a trial court, in addition to making sure the defendant is aware of the dangers and disadvantages of self-representation, should take the second step of inquiring into the defendant's "intellectual capacity" to make an "intelligent decision" to waive counsel. "If there is any question in the court's mind as to a defendant's mental

capacity it would appear obvious that a rather careful inquiry in that subject should be made – probably by way of a psychiatric examination." (*Lopez*, *supra*, 71 Cal.App.3d 568, 573.)

Through developing insight and the teachings of *Godinez*, *supra*, 509 U.S. 389, and *Edwards*, *supra*, 554 U.S. 164, it is clear that a trial court's focus on the defendant's mental "capacity" as the term is used in *Lopez*, must be construed not as bearing on the defendant's "competence" to waive counsel, but rather on whether the defendant, given his mental condition, in fact *does make a knowing, intelligent, and voluntary waiver of his right to counsel.* What the defendant has the "capacity" to do, in the opinion of the psychiatric professional, clearly is material to the trial judge's duty to assess, under the second part of the two-step process described in *Godinez,* what the defendant in fact *is doing*, that is, making a voluntary, knowing, and intelligent waiver of counsel. This comports with the principles in *Curry*, *supra*, 75 Cal.App.3d 221, that "a defendant must be free of mental disorder which would so impair his free will that his decision to waive counsel would not be voluntary." (*Id.* at p. 568.) The trial court's factual determination on that score guides its determination of whether the defendant "is aware of the consequences" of his request to waive counsel. (*Ibid.*)

The same principles were articulated by the court of appeal in *Zatko*, *supra*, 80 Cal.App.3d 534, and this Court in *Teron*, *supra*, 23 Cal.3d 103. In each of those cases, the reviewing court found no error in the trial court's failure to appoint a psychiatrist for a mental examination, because in those cases there were no specific facts known to the trial court at the time of the *Faretta* hearing suggesting the existence of mental illness impinging on the knowing, intelligent, and voluntary election to waive counsel. (*Zatko*, *supra*, 80 Cal.App.3d 534, 542-543; *Teron*, *supra*, 23 Cal.3d 103, 114.)

Here, in contrast, Zumwalt did know facts triggering her inquiry into defendant's mental condition. Thus, Zumwalt properly exercised her discretion – and met her duties under the federal constitution with its right to counsel and the lesser right of self-representation – in ordering the psychiatric evaluation and taking expert testimony during the *Faretta* hearing.

Having done so, Judge Zumwalt then entered findings that were prescient of *Godinez*'s subsequent explication of the scope of defendants' *Faretta* rights. Zumwalt found that appellant had "a mental disorder, illness or deficiency which impair[ed] his free will to such a degree that his decision to request to represent himself [was] not voluntary," and that he did "not realize the probable risks and consequences of his action" and his "request to waive counsel [was], therefore, not an exercise of his informed free will." (8CT 1574-1575.) Zumwalt did not base her decision on a determination that appellant lacked "competence" to waive counsel (a basis invalidated by the Court in *Godinez*). Rather, she determined he was unable to "*voluntarily* exercis[e] an *informed* waiver of his right to counsel," as demonstrated by his request to represent himself "only on certain conditions," which showed that he did not then presently "rationally perceive his situation." (*Ibid.*) Zumwalt focused on whether appellant actually *did* understand the significance and consequences of his decision to represent himself and whether the decision was uncoerced (i.e., not voluntary). This is exactly what trial courts should do under the second part of the two-step inquiry explicated in *Godinez*, *supra*, 509 U.S. 389, 400-401, fn. 12.)[85]

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[85]Zumwalt's reference to appellant's "mental capacity" in deeming him *incapable* of exercising the requisite intelligent and voluntary waiver (continued...)

Judge Zumwalt's determination that appellant's mental condition in fact did prevent him from voluntarily and intelligently waiving his right to counsel was legally correct and appropriate under the precedents of *Lopez*, *Curry*, *Zatko*, and *Teron,* and also under *Johnson v. Zerbst*, *Von Moltke*, and *Adams*, which were endorsed by *Faretta* itself. As *Godinez* teaches, Zumwalt made an apt reading of federal constitutional precedent and did precisely what the Sixth Amendment requires.

A year and a half later, Judge Boyle did the exact opposite during the *Faretta* hearing in November of 1989. Boyle knew that a competency trial had been held (and thus, that previous to the competency trial a doubt had been declared as to appellant's trial competence) and that writ review of the verdict was pending in the court of appeal. Such determination of competence to stand trial (which in itself displayed substantial flaws, as explained above) did not fulfill the inquiry required in a *Faretta* hearing under *Lopez* and other decisions, for as the Court in *Godinez* stated a trial court has a duty to "satisfy itself that the [defendant's] waiver of his constitutional rights is knowing and voluntary," *in addition to* determining that the defendant is competent. (*Godinez*, *supra*, 509 U.S. 389, 400-401 ["In this sense there *is* a 'heightened' standard for pleading guilty and for

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[85](...continued)
echoed some of the confusion in the jurisprudence of the time under which some courts erroneously dwelled on a defendant's "competence to waive counsel." Calling appellant "incapable" does not in itself signal legal error, however. Just as the United States Supreme Court mentioned "competence to waive" counsel in *Westbrook*, *supra*, 384 U.S. 150 only "as a shorthand for the 'intelligent and competent waiver' requirement of *Johnson v. Zerbst*" (*Godinez*, *supra*, 509 U.S. 389, 401), Zumwalt used the term "incapable" of exercising the requisite waiver as a shorthand for her factual finding that he *was not making* a voluntary and intelligent waiver of representation by counsel.

waiving the right to counsel, [although] it is not a heightened standard of *competence.*" (Original emphasis)].)

Judge Boyle abused his discretion by finding defendant made a knowing, intelligent, and voluntary waiver of his right to counsel, without considering the views of the psychiatrist appointed by Judge Zumwalt to evaluate appellant in connection with the *Faretta* hearing. That Boyle put on blinders, at the behest of appellant and the prosecutor, and reviewed nothing of the history of the case and appellant's actions and communications therein cannot absolve him of overlooking record evidence of mental infirmity. The trial court had a legal obligation to determine whether appellant was making a knowing, intelligent, and voluntary waiver of counsel and to conduct the needed inquiry to "satisfy itself" in that regard. (*Johnson*, *supra*, 304 U.S. 458, 464; *Von Moltke*, *supra*, 332 U.S. 708, 723-724 (plurality opinion).) The record before Boyle was even stronger than that before Zumwalt of the need for a rigorous *Lopez* step-two inquiry, because it included evidence of appellant's attack on Judge Kennedy and numerous other officers in that court – even judges who ruled as appellant sought for them to rule. (See, e.g., 10CT 2097-2109 [accusing Kennedy of sexual involvement with Russell]; 79A-3RT 1-9 [appellant's peremptory and cause challenge to Boyle, who granted the self-representation motion]; 52CT 11025.246 [appellant's accusation that advisory counsel Landon was "weak and effeminate"] 52CT 11025.277 [accusation that Khoury was a "ghoul"].)

Lopez and other decisions advise a trial court to consider ordering a psychiatric examination if the defendant's mental capacity is in doubt. (*Lopez*, *supra*, 71 Cal.App.3d 568, 573; *Teron*, *supra*, 23 Cal.3d 103, 114; see also *People v. Wolozon* (1982) 138 Cal.App.3d 456, 460-461; *Goodwillie*, *supra*, 147 Cal.App.4th 695, 705; *Koontz*, *supra*, 27 Cal.4th

1041, 1070-1071.) Here, not only did Boyle fail to order a psychiatric examination, but he also went further and agreed not to review the psychiatric evaluation, prepared by Dr. Kalish, that the trial court *had* previously ordered.[86] Boyle did not probe appellant's understanding of the alternative to self-representation, i.e., the right to counsel, including court-appointed counsel at no cost to the defendant, nor did he discuss with appellant his understanding of the nature of the proceedings and potential punishments, viz., that it was a capital case and that appellant could face the death penalty if convicted.

Nor did Judge Boyle apprise himself, by review of the file, that the appellant believed serving in pro se status to be mandated under his idiosyncratic "religious" beliefs, beliefs which he was unwilling to provide or eliminate when asked. (E.g., 52CT 11025.320-11025.323 [Russell appearing without appellant's permission was a violation of First Amendment religious freedom rights, because appellant's "religious beliefs require [him] to represent [him]self in propria persona."]; 14ART 34, 64 [Dr. Kalish's testimony that appellant stated he had a religious belief that prevented him from cooperating with a psychiatrist in court proceedings]; 27A RT 351 [same].) Such beliefs, held by a defendant who had insisted that his name be changed on the record for religious reasons (93ART 14; 2RT 256-258), again without explanation and who repeatedly insisted that the trial and appellate courts had no "jurisdiction" over him (see, e.g., 86ART 18), most certainly would bear on the question of whether

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[86]Judge Zumwalt, in contrast to Judge Boyle, had considered Dr. Kalish's testimony, together with other evidence, and had concluded that appellant had "a mental disorder, illness or deficiency which impair[ed] his free will to such a degree that his decision to request to represent himself [was] not voluntary," and that he did "not realize the probable risks and consequences of his action." (8CT 1574.)

appellant's waiver of his right to counsel in fact was knowing, intelligent, and voluntary, in light of his mental condition.

In granting appellant's *Faretta* request, Judge Boyle heavily credited appellant's declarations from witnesses. Interestingly, Judge Zumwalt heard live testimony on the same topics from some of these same witnesses (Bernice Garrett, Max Brande) (43ART 314-380), and concluded that they were "not competent to give an opinion" on appellant's capacity to waive counsel and found "their testimony deserving of very little weight." (8CT 1575.)

Judge Boyle's grant of pro se status was error. Appellant's mental state was in question yet Boyle did nothing to ensure the waiver of counsel was knowing, intelligent, and voluntary. Further, as shown below, Boyle additionally erred by refusing to consider whether appellant was competent to conduct trial proceedings without counsel.

D. Judge Boyle Erred in Ruling That he Lacked Discretion or Authority to Deny *Faretta* Status due to Appellant's Lack of Competence to Conduct Trial Proceedings Without Counsel

1. Legal Background

As discussed above in subclaim B, following the United States Supreme Court's decision in *Faretta*, *supra*, 422 U.S. 806, courts in this state and elsewhere struggled to discern whether and when a trial court could or should deny self-representation to a defendant based on concerns about his mental condition. Most courts assumed that the knowing, intelligent, and voluntary waiver requirement meant only that a trial court must make certain advisements (not that the defendant subjectively understood them or made free and rational choices informed by that subjective understanding) and cast about for some threshold higher than mere competence to stand trial that could protect the fundamental fair trial

rights of mentally ill defendants seeking pro se status. Thus, courts began to impose a "competence to waive counsel" requirement, and some of those courts read into that requirement a minimum threshold for a defendant's competence to carry out the task of self-representation. As has been made clear by the United States Supreme Court's decision in *Edwards*, *supra*, 554 U.S. 164, and more recently by this Court in *Johnson*, *supra*, 53 Cal.4th 519, the question of a mentally impaired defendant's faculty to carry out the tasks of self-representation indeed is something for trial courts to consider.

The *Curry* and *Zatko* decisions explicitly held that the grant of self-representation did not require that the defendant be "competent to represent himself," that is, capable of doing so with any soupçon of aptitude as a lawyer. (*Curry*, *supra*, 75 Cal.App.3d 221, 226-227 ["Whether or not a defendant is competent to act as his own lawyer is irrelevant."]; *Zatko*, *supra*, 80 Cal.App.3d 534, 542.) In *Teron*, *supra*, 23 Cal.3d 103, this Court followed suit and said that a trial court in a *Faretta* hearing need not test whether the defendant was "competent to serve as counsel in a criminal proceeding." (23 Cal.3d at p. 113.) As discussed above, the appellate court in *People v. Burnett* disagreed, reasoning that the defendant's competence to represent himself could not be "irrelevant," because many of the issues identified in *Lopez* demonstrated that the defendant's "mental ability to present a defense" indeed was something a trial court should consider. (*Burnett*, *supra*, 188 Cal.App.3d 1314, 1323.) Relying for authority on *Adams*, *supra*, 317 U.S. 269 and *Massey*, *supra*, 348 U.S. 105, the court in *Burnett* found that the defendant's "ability to waive counsel" must include some minimal ability to present a defense. (*Burnett*, *supra*, 188 Cal.App.3d 1314, 1324.)

The United State Supreme Court weighed in on the issue in *Godinez* where it held that competency to waive counsel was not a separate

requirement from competency to stand trial and that the trial court properly had granted the defendant *Faretta* status in that case without addressing whether he was competent to represent himself. (*Godinez*, *supra*, 509 U.S. 389, 399-400.)

Courts in this state read *Godinez* broadly, holding that the federal constitution required a court to close its eyes to evidence of the defendant's impaired mental capacity as bearing on his ability to carry out the tasks of self-representation, and to always grant *Faretta* status to trial competent defendants who knowingly, intelligently, and voluntarily waived counsel. In *People v. Poplawski* (1994) 25 Cal.App.4th 881, 894, the court held that the trial court had erred by denying *Faretta* status based on the defendant's incompetency to represent himself under the principles stated in *Burnett*, because, it reasoned, *Godinez* prohibited the imposition of any test higher than competency to stand trial. (See also *People v. Nauton* (1994) 29 Cal.App.4th 976, 980 [same holding].) In *Hightower*, *supra*, 41 Cal.App.4th 1108, 1115, the court held that California had not adopted a "more elaborate" standard for a defendant's competence to represent himself, that the standard under California law and the federal constitution were the same, and thus under *Godinez* any defendant competent to stand trial is competent to represent himself and therefore the trial court did not err in granting the defendant *Faretta* status.

In *Bradford*, *supra*, 15 Cal.4th 1229, 1364, this Court stated that the standard for competency to waive the constitutional right to assistance of counsel had been equated in *Godinez* with the standard for competency to stand trial. Subsequent decisions followed *Bradford* and read *Godinez* broadly. In *Welch*, *supra*, 20 Cal.4th 701, 740-741, this Court said that it had been error for the trial court to rely on *Burnett* and similar cases and take into consideration the defendant's mental capacity to represent himself,

when denying him *Faretta* status. In *People v. Halvorsen* (2007) 42 Cal.4th 379, 433, this Court reversed the conviction and held that the trial court, in 1987, had erred in denying the defendant the right to represent himself on the ground that he was incompetent to do so, because *Godinez* stood for the rule that imposing any standard higher than competency to stand trial is impermissible under the federal constitution, so long as the defendant knowingly, intelligently, and voluntarily waives counsel.

The United States Supreme Court's 2008 decision in *Edwards*, *supra*, 554 U.S. 164, however, made clear that *Godinez* never stated the bright-line rule attributed to it by this Court (and most other courts) on the significance of a defendant's competence to represent himself as a part of the *Faretta* hearing analysis. In *Edwards*, the United States Supreme Court held that the federal constitution does *not* forbid states from insisting upon representation by counsel, for a defendant competent enough to stand trial but whose mental capacity is so deficient that he is not competent to conduct trial proceedings by himself. (554 U.S. 164, 177-178.) It is important to consider *Edwards*' procedural background and its underpinning to understand the meaning of the decision and its significance to appellant's case.

In December of 2005, the trial court in *Edwards* denied the defendant leave to represent himself, finding that although he was competent to stand trial he was not mentally competent to represent himself. (*Edwards v. State* (Ind. App. 2006) 854 N.E.2d 42.) The state appellate court reversed, citing state precedent on the meaning of *Godinez*. The appellate court quoted the Indiana Supreme Court's decision in *Sherwood v. State*: "In *Godinez*, the Court concluded that the competency standard for waiving the right to counsel is not higher than the competency standard for standing trial. [Citation.] More specifically, '[t]he Court reiterated the

longstanding distinction between competence to choose self-representation, which is measured by competence to stand trial, and competence to represent oneself effectively, which the defendant is not required to demonstrate.'" (*Id.* at p. 47, quoting *Sherwood v. State* (Ind. 1999) 717 N.E.2d 131, 135 (analyzing and quoting *Godinez*, *supra*, 509 U.S. 389, 399-400.)

The Indiana Supreme Court affirmed the court of appeal. It noted that the opinions in *Martinez v. Court of Appeal of California, Fourth Appellate Dist.* (2000) 528 U.S. 152 (holding that a defendant has no constitutional right to represent himself on appeal) suggested that the federal constitution might favor limitations on defendants' *Faretta* rights at trial, but held that neither *Martinez* nor any other United States Supreme Court decision had overruled *Faretta* or *Godinez* and thus it was bound by those precedents to affirm reversal of the conviction for violation of the defendant's *Faretta* rights. (*Edwards*, *supra*, 854 N.E.2d 42.)

The State of Indiana petitioned the United States Supreme Court for certiorari, which it partially granted, vacating the judgment and remanding for further proceedings not inconsistent with the opinion. (*Edwards*, *supra*, 554 U.S. 164, 179.) The Court in *Edwards* stated that its precedent in *Drope*, *supra*, 420 U.S. 162, *Faretta*, and *Godinez* "framed the question presented" but did "not answer it." It noted that caselaw was clear that the *Faretta* right was subject to limitations:

> *Faretta* does not answer the question before us both because it did not consider the problem of mental competency (cf. 422 U.S., at 835, 95 S.Ct. 2525 (Faretta was "literate, competent, and understanding")), and because *Faretta* itself and later cases have made clear that the right of self-representation is not absolute. See *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 163 [citations omitted] (2000) (no right of self-representation on direct appeal in a criminal case); *McKaskle v. Wiggins*, 465 U.S. 168 [citations omitted]

> (1984) (appointment of standby counsel over self-represented defendant's objection is permissible); *Faretta*, 422 U.S., at 835, n. 46 [citations omitted] (no right "to abuse the dignity of the courtroom"); *ibid.* (no right to avoid compliance with "relevant rules of procedural and substantive law"); *id.* at 834, n. 46 (no right to "enag[e] in serious and obstructionist misconduct," referring to *Illinois v. Allen*, *supra).* The question here concerns a mental-illness-related limitation on the scope of the self-representation right.

(*Id.* at p. 171.)

The Court in *Edwards* noted that *Godinez* was its only prior decision to have "considered mental competence and self-representation together." (554 U.S. 164, 171.) It explained that *Godinez* did not answer the question before it in *Edwards* because (1) it related only to "the defendant's ability to proceed on his own to enter a guilty plea," and the defendant's "ability to conduct a defense at trial was expressly not at issue"; and (2) it involved a State that sought to *permit* a "gray-area" defendant to represent himself but the question in *Edwards* was whether a state could *deny* a gray-area defendant the right to represent himself. (*Ibid.*)

On the former point, the Court in *Edwards*, *supra*, 554 U.S. 164 stated that in *Godinez* its holding applied only to self-representation *when entering a plea*, and was not intended to bind state courts addressing self-representation *during a trial.* (*Id.* at p. 173, citing *Godinez*, *supra*, 509 U.S. 389, 399-400, fn. 10 ["We found our holding consistent with this Court's earlier statement in *Massey v. Moore*, 348 U.S. 105 [citations omitted] that "[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel."].) On the latter point, the *Edwards* Court indicated that *Godinez* "simply did not consider whether the [federal c]onstitution *requires* self-representation by gray-area defendants even in circumstances where the [s]tate seeks to disallow it." (*Id.* at p. 174.)

Thus, the Court in *Edwards* held that *Godinez* left open the question before it: Assuming a criminal defendant has sufficient mental competence to stand trial under *Dusky* and he insists on representing himself during that trial, does the federal constitution permit a state to "limit that defendant's self-representation right by insisting upon representation by counsel at trial on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented"? (*Edwards*, *supra*, 554 U.S. 164, 174.)

The Court in *Edwards* reasoned, first, that its precedent, though not definitive, "pointed slightly in the direction of an affirmative answer." (*Edwards*, *supra*, 554 U.S. 164, 174.) *Godinez* was neutral on the question. (*Ibid.*) However, the Court's "mental competency" cases (viz., *Dusky*, *Drope*) consistently set forth a test focusing on the defendant's "present ability to consult with his lawyer," and thus suggested (but did not hold) that a defendant's choice to forgo counsel at trial would "present a very different set of circumstances, which in our view, calls for a different standard." (*Id.* at pp. 174-175.) Similarly, *Faretta* itself, "the foundational self-representation case, rested its conclusion in part upon pre-existing state law set forth in cases all of which are consistent with, and at least two of which expressly adopt, a competency limitation on the self-representation right." (*Id.* at p. 175, citing *Faretta*, *supra*, 422 U.S. 806, 813 and fn. 9 [citing 16 state-court decisions and two secondary sources].)

The Court reasoned, second, that mental illness itself is not a unitary concept and "[i]n certain instances an individual may well be able to satisfy *Dusky*'s mental competence standard, for he may be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel." (*Edwards*, *supra*, 554 U.S. 164, 175-176.)

Third, the Court opined that "a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel," and that, to the contrary, the "spectacle that could well result" is "at least as likely to prove humiliating as ennobling." (*Edwards*, *supra*, 554 U.S. 164, 176.) Quoting *Wheat v. U.S.* (1988) 486 U.S. 153, the Court in *Edwards* noted that criminal proceedings not only must "be fair," but they also must "'appear fair to all who observe them.'" (*Id.* at p. 177.) While *Dusky*'s basic mental competency standard could help avoid such a "spectacle," given the "different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient." (*Ibid.*) Thus, it is the trial judge who "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." (*Ibid.*)

For all of those reasons, the Court in *Edwards* reached this conclusion:

> [T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

(554 U.S. 164, 177-178.)

The Supreme Court emphasized the difference in abilities identified by the competency to stand trial standard and those identified by its concern for the self-representation of a mentally ill defendant. It noted: "In certain instances an individual may well be able to satisfy *Dusky*'s mental competence standard, for he will be able to work with counsel at

trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel." (*Edwards*, *supra*, 554 U.S. 164, 175-176, citing Poythress et al., Adjudicative Competence: The MacArthur Studies (2002) p. 103.) The Court also cited its case *McKaskle*, *supra*, 465 U.S. 168, 174, for a set of critical tasks a self-represented defendant would be expected to carry out. These tasks are "trial tasks including organization of defense, making motions, arguing points of law, participating in *voir dire,* questioning witnesses, and addressing the court and jury." (*Id.* at p. 176.)

The Court declined to adopt a more specific standard which would preclude self-representation at trial "where the defendant cannot communicate coherently with the court or a jury," stating there was too much uncertainty as to how such test would work in practice to favor adopting it as a "federal constitutional standard here." (*Edwards*, *supra*, 554 U.S. 164, 178.) It also declined to overrule *Faretta*, reasoning that data suggests that unfair trials stemming from the defendant's self-representation are concentrated in "the 20 percent or so of self-representation cases where the mental competence of the defendant is also at issue," and that its decision therein, which "assur[ed] trial judges the authority to deal appropriately with cases" in that category, might well "alleviate . . . fair trial concerns." (*Id.* at pp. 178-179.)

Thus, in *Edwards* the Court held that a state trial court in 2005 did not run afoul of the federal constitution by denying *Faretta* rights to the defendant therein, because the *Faretta* guarantee is not absolute. With respect to the meaning of *Godinez*, *Edwards* held two things: (1) that *Godinez* said nothing about withholding *Faretta* status to defendants lacking mental competence to carry out the tasks of representing themselves during a trial; and (2) that *Godinez* addressed whether a trial court could

permit a mentally impaired defendant to represent himself (holding that under the federal constitution, it could), and said nothing about whether a trial court could *deny* a defendant's request for *Faretta* status.

Edwards teaches that the interpretation of *Godinez* by this state's Courts in *Poplawski*, *Nauton*, *Hightower*, *Bradford*, *Welch*, and *Halvorson* was wrong, just as the holding of the Indiana Supreme Court and that state's appellate court was wrong: *Godinez* did *not* preclude imposing a higher standard and denying *Faretta* status based on defendants' incapacity to conduct a trial defense without counsel. Further, as noted in *Edwards*, that case and *Godinez* are the only United States Supreme Court cases directly addressing a trial court's application of *Faretta* in the context of a defendant whose mental competence was in question. (*Edwards*, *supra*, 554 U.S. 164, 171.)

Pointedly, the Court in *Edwards* did not disagree with *Godinez*' statement that *Johnson*, *supra*, 304 U.S. 458 and *Westbrook*, *supra*, 384 U.S. 150 pertained to the question of voluntariness under the "knowing, intelligent, and voluntary waiver" part of the analysis. Moreover, the Court went further and suggested that *Massey* stood for a separate requirement that self-representation should not be granted to defendants lacking the mental competence to make their own defense at trial. The Court in *Edwards* both considered that the question in *Massey*, *supra*, 348 U.S. 105 was not the question presented in *Godinez* (*id.* at p. 173), and noted that *Massey* stood for this proposition: "No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who *by reason of his mental condition stands helpless* and alone before the court." (*Id.* at p. 177, citing *Massey*, *supra*, 348 U.S. 105, 108, emphasis added.)

This Court addressed *Edwards*, *supra*, 554 U.S. 164, in its decision in *People v. Taylor* (2009) 47 Cal.4th 850. In *Taylor*, the trial court in 1996

had granted defendant *Faretta* status for trial. (*Id.* at p. 868.) On appeal, defendant argued that the trial court had possessed discretion to deny the motion, had erred in ruling that it did not, and had erred in failing to exercise the discretion by denying his self-representation on the ground of that he lacked mental competence. (*Id.* at p. 866.) This Court in *Taylor* held that the trial court's ruling that it lacked discretion was consistent with *Godinez* as interpreted in *Poplawski*, *Nauton*, *Hightower*, *Bradford*, *Welch* and *Halvorson*. (*Id.* at pp. 874-876.) Observing that though *Edwards* in 2008 held that a state *could* deny a defendant *Faretta* status and not run afoul of *Godinez*, it did not hold that doing otherwise violated federal due process. This Court said:

> "In other words, *Edwards* did not alter the principle that the federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent."

(*Id.* at p. 878, quoting *State v. Connor* (Conn. 2009) 973 A.2d 627, 650.) Thus, this Court in *Taylor* held that *Edwards* did not support a claim that the trial court had committed federal constitutional error. (*Ibid.*)

The Court in *Taylor* then turned to the question of whether the trial court erred in failing to exercise discretion it had under state law to find the defendant incompetent to represent himself. It held that at the time the trial court had ruled, "definitive" federal case law (*Godinez*) rejected the idea that a criminal defendant's ability to represent himself had any bearing on his competency to choose self-representation. (*Taylor, supra*, 47 Cal.4th 850, 876-881) The Court observed that *Godinez* also cryptically suggested that state courts could adopt "more elaborate" standards, but *Poplawski* and *Nauton*, which were binding on the trial court under *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455, did not

do so. Thus, the trial court's assessment of then-governing California law (i.e., no discretion to deny self-representation so long as the defendant was competent to stand trial) was accurate. (*Ibid.*) *Burnett*, this Court held, which rested on a federal constitutional analysis, was not good law following the United States Supreme Court's decision in *Godinez.* (*Id.* at pp. 880-881.)

This Court recently turned again to the meaning of *Indiana v. Edwards, supra,* 554 U.S. 164, in *Johnson, supra*, 53 Cal.4th 519. In *Johnson*, a jury trial was held in October of 2008 on the defendant's competence to stand trial. (*Id.* at p. 524.) An attorney was appointed to represent the defendant, who had been acting pro se for seven months, in the competence trial. (*Id.* at p. 523.) A psychiatric expert testified there was strong evidence the defendant suffered a delusional thought disorder and conspiracy paranoia, which might impair his ability to cooperate with defense counsel in a rational manner, and that she believed it was "more likely than not" that he was not competent to stand trial. (*Id.* at p. 524.) She admitted that her opinion was somewhat speculative because the defendant had refused to participate in an interview. (*Ibid.*) Other experts testified that they could not form an opinion on competency without an interview, which defendant had refused to provide them also. (*Ibid.*) The jury found appellant competent to stand trial. (*Ibid.*)

Two days later, the trial court in *Johnson* addressed the defendant's ability to continue to represent himself in the criminal proceedings. (*Johnson, supra*, 53 Cal.4th 519, 525.) It noted that the United States Supreme Court's decision in *Edwards* in June 2008 held that judges may insist on representation by counsel for defendants who, though competent to stand trial, lack the mental capacity to represent themselves. Relying on the evidence from the competency trial, the court found the defendant met the

standard set forth in *Edwards* and revoked his *Faretta* status and appointed an attorney to represent him. (*Ibid.*) The defendant was convicted and appealed.

The Court of Appeal held that this Court had not affirmatively adopted a single standard for the questions of competency to stand trial and competency to represent oneself at trial, although it had, in cases predating *Edwards*, reasonably interpreted federal precedent to require a single competency standard and complied with that perceived standard. (*People v. Johnson* (Cal. Ct. App., Oct. 25, 2010, A124643) 2010 WL 4160678, unpublished/noncitable (Oct. 25, 2010), review granted (Feb. 16, 2011), *aff'd,* (2012) 53 Cal.4th 519, citing *Halvorsen*, *supra*, 42 Cal.4th 379, 422 and *Welch*, *supra*, 20 Cal.4th 701, 732.) Once the United States Supreme Court "clarified its precedent" in *Edwards*, *supra*, 554 U.S. 164, this Court had not yet stated whether trial courts could, or should, employ a higher competency standard for defendants conducting trials. (*Ibid.*) The Court of Appeal distinguished *Taylor*'s reasoning, both as to federal constitutional and state law claims of error, on the ground that the trial court therein had denied the defendant self-representation before the United States Supreme Court issued its decision in *Edwards*. (*Id.* at *15.) It held that the question of whether trial courts in the future *should* employ the *Edwards* standard was for this Court to decide, but that whether trial courts *could* employ the *Edwards* standard was an invitation opened in *Edwards* that the trial court had been free to accept. (*Ibid.* ["We express no opinion on whether trial courts in the future *should* employ the *Edwards* standard. That is a matter for our high court to decide. We find only that trial courts may employ the *Edwards* standard without offending the United States Constitution."].)

This Court held that refusing to recognize that California trial courts have discretion to deny self-representation to defendants under the *Edwards*

standard would be inconsistent with California's own law, as stated in *People v. Sharp* (1972) 7 Cal.3d 448 and *People v. Floyd* (1970) 1 Cal.3d 694, permitting denial of self-representation "citing among other factors, [the defendant's] youth, his low level of education, and his ignorance of the law." (*Johnson, supra*, 53 Cal.4th 519, 528.) These cases remained "good law under the California Constitution and Penal Code" for the premise that California law provides no statutory or constitutional right to self-representation. (*Id.* at p. 526.) "Denying self-representation when *Edwards* permits does not violate the Sixth Amendment right of self-representation," and, thus "[c]onsistent with long-established California law, we hold that trial courts may deny self-representation in those cases where *Edwards* permits such denial." (*Ibid.*)

This Court further held that when assessing whether to deny *Faretta* rights based on the defendant's incapacity to represent himself at trial, trial courts should employ the standard stated in *Edwards, supra*, 554 U.S. 164 itself, asking whether the defendant had the "ability 'to carry out the basic tasks needed to present [one's] own defense without the help of counsel.'" (*Johnson, supra*, 53 Cal.4th 519, 530, quoting *Edwards, supra*, 554 U.S. 164, 175-176.) The Court advised trial courts to apply the *Edwards* standard cautiously, because "[c]riminal defendants still generally have a Sixth Amendment right to represent themselves," which "may not be denied lightly." (*Id.* at p. 531.) A trial court is permitted to order a psychiatric or psychological examination to inquire into the question of a defendant's competence to represent himself. Indeed, it should be "cautious about making an incompetence finding without benefit of an expert evaluation," although a judge's "own observations of the defendant's in-court behavior also could provide key support for an incompetence finding and should be placed on the record." (*Ibid.* citing Marks, *State Competence Standards for*

Self–Representation in a Criminal Trial: Opportunity and Danger for State Courts after Indiana v. Edwards (2010) 44 U.S.F.L. Rev. 825, 849.) Finally, the Court in *Johnson* reiterated that a trial court "may deny self-representation *only* in those situations where *Edwards* permits it." (*Ibid.*, emphasis added.)

In *Johnson*, *supra*, 53 Cal.4th 519, this Court read *Edwards* too narrowly. *Edwards* did not state the limits of when the right to self-representation can be trumped by the due process right to a fair trial. Instead, it said that (a) *Godinez* does not define those limits and (b) we know from *Faretta*, *Martinez* and other cases that there clearly are limits. Moreover, as noted above, we know that a self-represented defendant must be permitted, and will be expected "to control the organization and content of [his or her] own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." (*McKaskle*, *supra*, 465 U.S. 168, 174.) Finally, we know that under the direct holding of *Edwards*, when a defendant does have a severe mental illness that makes him mentally incompetent to carry out the *McKaskle* tasks of self-representation, a trial court may and is encouraged to abridge the exercise of *Faretta* rights in the interest of fairness.

Taylor held that *Edwards* does not *create* a federal constitutional guarantee that mentally impaired defendants *must* be represented. (*Taylor*, *supra*, 47 Cal.4th 850, 878.) While that strictly is correct – *Edwards* did not *create* such a federal constitutional right – it overlooks the reasoning therein which does evidence that such federal constitutional right exists and that the basis for the rule would be found in *Massey*, *supra*, 348 U.S. 105. *Massey*'s holding sounds under the Fourteenth Amendment right to a fair trial, and stands for the premise that if a defendant, though competent to

stand trial, is not competent to represent himself and yet is allowed to do so, it violates the due process right to a fair trial. (*Id.* at p. 108 ["The requirement of the Fourteenth Amendment is for a fair trial. . . . No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court." (Citations omitted).]) *Edwards* holds that even given the Court's holding in *Faretta*, the Sixth Amendment of the federal Constitution permits a state to insist on representation by counsel for a defendant who lacks the mental capacity to conduct his defense (viz., carry out the tasks set forth in *McKaskle*) without the assistance of counsel. (*Edwards*, *supra*, 554 U.S. 164, 177-178.) But beyond that, *Edwards* shows that *Massey* survived *Faretta* and that a defendant lacking competence to represent himself has a due process right not to stand trial without an attorney.

Recall that the court in *People v. Burnett* held that *Massey* survived *Faretta*, as suggested by the cases cited in *Faretta* itself and given that no United States Supreme Court case had held that it did not. (*Burnett*, *supra*, 188 Cal.App.3d 1314, 1324-1325.) *Burnett* stated that a defendant's competence to represent himself *is* relevant at a *Faretta* hearing. (*Id.* at p. 1324.) *Welch*, over-reading *Godinez*, held that *Godinez* disproved the *Burnett* court's theory that *Massey* survived *Faretta*. (20 Cal.4th at pp. 741-742.) *Edwards* proves that *Welch* was wrong, by stating that *Godinez* did not so hold (554 U.S. at p. 177) and citing *Massey*, *supra*, 348 U.S. 105 to support the conclusion that the competence inquiry under *Faretta* is separate and apart from the competence to stand trial inquiry under *Dusky*. (*Edwards, supra*, 554 U.S. 164, 177.) Given the pains taken by the United States Supreme Court in *Edwards* to clarify the reach of *Godinez* and its resurrection of *Massey*, this Court's conclusion in *Taylor* that there is no federal constitutional right for a mentally incompetent defendant to be

barred from representing himself (*Taylor*, *supra*, 47 Cal.4th 850, 878) must be revisited.

This Court's affirmation in *Johnson*, *supra*, 53 Cal.4th 519, that trial courts after *Edwards* may restrict *Faretta* rights where a defendant is unable to carry out the tasks like those delineated in *McKaskle*, *supra*, 465 U.S. 168 (*Johnson*, *supra*, 53 Cal.4th 519, 526), is consistent with a conclusion that *Burnett* was correct and *Massey* survived *Faretta* (as indicated in *Edwards*). However, *Johnson's* suggestion that trial courts pre *Edwards* could *not* so restrict *Faretta* rights is mistaken, as an interpretation of federal constitutional law. This is clearly so because *Edwards* itself affirmed a trial court that had restricted such rights in 2005. Nor can this rule from *Johnson* be given weight as a statement of California law, where the decision specifically holds that *Sharp* is good law (*ibid.*) and there is no California constitutional or statutory right to self-representation to begin with. This Court must revisit its ruling in *Johnson* to the extent it suggests trial courts' constitutional authority to deny *Faretta* status, based on a defendant's inability to represent himself due to mental defects, was born with *Edwards*' 2008 publication. Similarly, this Court's statement in *Johnson* that California courts "may deny self-representation *only* where *Edwards* permits it" (*ibid*) has no explicit authority under federal constitutional law.

To the contrary, *Edwards* teaches that trial courts' authority to deny *Faretta* status based on concern that a defendant is unable to represent himself due to mental defects, stems from due process itself and never was checked by the United States Supreme Court's decision in *Faretta*, notwithstanding the numerous courts holding otherwise based on a misreading of *Godinez*. *Edwards* explicitly holds that trial courts may deny *Faretta* rights when the defendant, due to mental impairment, is unable to

carry out the tasks of self-representation as set forth in *McKaskle*, *supra*, 465 U.S. 168. It does not hold that trial court's may *not* deny such rights where a similar, yet lower, benchmark is met.

2. The Trial Court had Authority and Indeed a Duty to Deny Appellant *Faretta* Status

This Court's holding in *Johnson*, *supra*, 53 Cal.4th 519, and the United States Supreme Court holding in *Edwards*, *supra*, 554 U.S. 164 dictate that the trial court in this case had authority – indeed, it had a duty – to deny appellant *Faretta* status if he lacked mental competence to represent himself under the *McKaskle* test.

In this case, Judge Zumwalt in the trial court in 1988 denied appellant *Faretta* status based on his incapacity to represent himself. The precise language of Zumwalt's ruling shows that her ruling in part rested on his inability to represent himself which was consistent with *Burnett*, and which was cited in Russell's brief to Zumwalt.

Zumwalt stated:

> The court finds from this hearing's testimony, especially that of Doctors Kalish and Koshkarian and the testimony at the Pen. Code Sec. 1368 hearing that is part of this record, that defendant has a mental disorder, illness or deficiency which impairs his free will to such a degree that his decision to request to represent himself is not voluntary; he has a *mental disorder, illness or deficiency which has adversely affected his powers of reason, judgment and communication.* He does not realize the probable risks and consequences of his action. His request to waive counsel is, therefore, not an exercise of his informed free will. *While Waldon has the cognitive ability to understand the proceedings, he cannot formulate and present his defense with an appropriate awareness of all ramifications.*
>
> The witnesses called by Defendant Waldon (with the exception of Dr. Koshkarian) were not competent to give an opinion

of his ability to waive counsel and the court finds their testimony deserving of very little weight.

(8CT 1574-1575, emphasis added.)

The italicized language in Judge Zumwalt's order seems to rest on the strand of analysis in *Burnett*, *supra*, 188 Cal.App.3d 1314 – that the defendant's mental capacity to conduct a defense is something a trial court should consider in addressing a *Faretta* motion. This strand of authority correctly interprets federal law, as we now know based on the United States Supreme Court's decision in *Edwards* and its reminder that *Massey* survived *Faretta*, as also noted in *Godinez*.

When Judge Boyle subsequently granted *Faretta* status in November of 1989, *Burnett* still was good law as were *Curry*, *Zatko*, and *Teron*. Boyle's failure to consider evidence about appellant's mental capacity was error, per *Burnett* as regarding a defendant's mental capacity to conduct his defense and per *Edwards* (affirming a state trial court's exercise of discretion to deny *Faretta* status) and *Massey*, which survived *Faretta* (as suggested in *Edwards* and contrary to which there is no California appellate holding). (84ART 64 ["The Court does find that the defendant has made an intelligent and knowing request to represent himself, and I find that he is competent to make that request and that, *under the law, I am required to grant that request* and I do so . . ."]; 84ART 60 [Boyle states that the only issue before him was whether appellant was making "an intelligent and knowing waiver of his right to counsel"].) In reality, Boyle was vested with a duty to consider whether appellant was mentally competent to represent himself. Since Boyle abnegated that duty and decried holding any discretion, his grant of *Faretta* status is not probative to the question of whether the standard for denying self-representation under *Edwards* and *Johnson* was met, and no deference in that regard is required.

This Court in *Johnson, supra*, 53 Cal.4th 519 held that the trial court appropriately denied the defendant *Faretta* status, because the record on review supported a conclusion the defendant was unable to perform the tasks of representation set forth in *McKaskle, supra*, 465 U.S. 168. After the United States Supreme Court's decision in *Edwards, supra*, 554 U.S. 164, the courts of numerous states have addressed cases where, as here, trial courts granted *Faretta* privileges, notwithstanding the defendant's mental deficiency, under the mistaken belief that the federal constitution left them no option. (*People v. Davis* (Colo. Ct. App. 2012) __ P. __, 2012 WL19373 * 9-10; *State v. Wray* (N.C. Ct. App. 2010) 698 S.E. 137, 148); *State v. Jason* (Iowa Ct. App. 2009) 779 N.W. 66, 74-75; *Connor, supra*, A.2d 627, 658-59; *State v. Lane* (N.C. Ct. App. 2008) 669 S.E.2d 321, 322; *U.S. v. Ferguson* (9th Cir. 2009) 560 F.3d 1060, 1070; *U.S. v. Ruston* (5th Cir. 2009) 565 F.3d 892; *contra U.S. v. DeShazer* (10th Cir. 2009) 554 F.3d 1281, 1290.) These reviewing courts wisely have held that the appropriate remedy in such cases is to reverse the judgment and remand for trial courts to carry out the relevant assessment, as outlined in *Edwards, supra*, 554 U.S. 164. (See cases cited immediately above.) This Court should do likewise here. The record creates ample doubt as to appellant's ability to represent himself in light of his mental condition; indeed Judge Zumwalt, the only judge to address the issue, determined that such ability was lacking. A trial court on remand would be in a vastly superior position to make this assessment, as compared to this Court, because it could directly observe appellant and develop further evidence as appropriate.[87]

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[87]In making that assessment, the trial court on remand must take into account the added complexity faced by a mentally impaired defendant presenting his own defense in a *capital* case. The reasons for this particular requirement are set forth below.

X.

THE COURT OF APPEAL ERRED IN FINDING THAT JUDGE BOYLE'S GRANT OF FARETTA STATUS MOOTED THE ISSUES IN THE COMPETENCY WRIT

In obvious reference to the proceedings in front of Judge Boyle, the Court of Appeal dismissed the competency writ because it found that subsequent events, i.e., a finding that appellant was "competent to represent himself," made the competency proceedings "moot." (62CT 13783.) This was error requiring reversal of the competency verdict.

A. Legal Background

"[A]n action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal in such a case would be without practical effect, and the appeal will therefore be dismissed." (9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 749, p. 814.)

B. Factual Background

On May 25, 1988, the Court of Appeal issued the alternative writ in the petition challenging the denial of counsel's motion for a new competency trial, D007429, after having been ordered by this court to do so, S004854. (56CT 12066.) On September 12, 1988, the Court of Appeal ruled on two other writs, D007850 and D007873, the result of which was to vacate Russell's appointment. (72CT 15600-15601.) The appellate court ordered the superior court to "appoint substitute counsel forthwith" and ordered that new lead counsel should have the ". . . opportunity to fully brief and argue all issues relating to the competency hearing including those that may not yet have been raised." (*Id.* at 15600.)

Later, appellant appeared before Judge Boyle for consideration of his renewed motion to represent himself. On November 3, 1988, Boyle ruled that appellant was able to read and write, had made a request to represent

E. It is Questionable Whether Appellant was Competent to Stand Trial, Which is a Prerequisite to a Trial Court Granting *Faretta* Status and Which Made the Error in Boyle's Reconsideration of the *Faretta* Motion While Appellant was Unrepresented Even More Egregious

Godinez makes clear that the defendant's competence to stand trial is a prerequisite to granting him *Faretta* status. In this case, Judge Boyle in granting *Faretta* status stated, without elaborating further, that appellant was "competent to make [the] request" to represent himself. (84ART 64.) The judge made no explicit or implicit determination of the more fundamental question, of whether appellant was competent to stand trial to begin with, nor did he state that he was relying on the section 1368 verdict with respect to that issue. For all of the reasons explained above, the 1368 jury determination was egregiously flawed and it could not, under the circumstances, be taken as a reliable finding that appellant was competent to stand trial. Judge Boyle violated due process and fundamental fairness by granting appellant pro se status where his competence to stand trial remained in doubt and where his attorney had been relieved and no lawyer had been substituted to represent him. This is yet another basis to reverse the judgment and remand to the trial court for further proceedings on the *Faretta* motion.

* * * * *

himself and was "competent to make that request" and granted the motion. (84ART 64.) Appellant then represented himself on the proceedings on the competency writ in the Court of Appeal, D007429. However, appellant never filed any pleadings in that case, although given multiple extensions of time to do so. After appellant's fourth request for an extension of time, the Court of Appeal denied the request and dismissed the writ, stating: "The petitioner's request for extension is denied. The alternative writ is discharged and the petition is dismissed as moot. In issuing this order, we are aware the alternative writ was issued at the direction of the Supreme Court. Since issuance of the writ, however, the petitioner has *been determined competent to represent himself, rendering these proceedings moot.*" (62CT 13783, emphasis added.)

C. Boyle's *Faretta* Finding did not Moot the Issues in the Competency Writ

By finding that appellant's writ challenging the competency proceedings was rendered mooted by the subsequent finding appellant was competent to represent himself, the Court of Appeal essentially held that even if it were to rule in appellant's favor on the writ, Judge Boyle's ruling meant that any such holding would be "without practical effect." (9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 749, p. 814.) In essence, the Court of Appeal held that even if appellant had been denied an adequate competency hearing, and even if it were true that the motion for new trial was incorrectly denied (so that appellant should get a new competency trial), the fact that the superior court found appellant "competent to represent" himself meant that a new competency hearing would be pointless. (*Ibid.*) What the Court of Appeal appears to have meant is that any ruling granting a second competency trial would be moot because a jury finding that appellant was competent to stand trial either had the same effect as, or was

somehow subsumed under, Judge Boyle's finding that appellant was "competent to represent himself." This is wrong for numerous reasons.

First, the standard for determining that one is "competent to represent oneself" is not the same as the standard for determining that one is "competent to stand trial." Under section 1368, a person is mentally incompetent to stand trial if "as a result of a 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, § 1368.) Under *Dusky*, to be competent to stand trial a defendant must have a rational and factual understanding of the proceedings against him, and he must also have the ability to consult with his lawyer with a reasonable degree of rational understanding. (*Dusky v. U.S.* (1960) 362 U.S. 402.) On the other hand, according to the United States Supreme Court, "competence to represent oneself" is something altogether different. A finding that someone is "competent to represent himself" involves a judge taking "realistic account of the particular defendant's mental capacities" and finding the defendant "competent to conduct proceedings on his own." (*Indiana v. Edwards* (2008) 554 U.S. 164, 177-178.) A finding that a defendant is able to conduct proceedings on his own is transparently not the same as a finding under *Dusky* or section 1368 that a defendant can rationally assist counsel.

More importantly, the Court of Appeal was simply wrong that Judge Boyle found that appellant was "competent to represent himself." The most Boyle held was that appellant had the ability to "read and write, listen, be polite, and cooperate if he chooses to do so." (84ART 62.) This is not a finding that appellant was "competent to represent himself." It certainly was not a finding that appellant was in any way or shape competent to represent himself in the sense that he could conduct proceedings within the

meaning of *Edwards*. Nor was it a finding under *Dusky* that appellant could rationally understand the proceedings and or rationally assist counsel in his defense.

Appellant has elsewhere argued that at the time of appellant's trial there was case law articulating a different standard for competence to represent oneself than for competence to waive counsel. (*People v. Burnett* (1987) 188 Cal.App.3d 1314.) As noted in this Court's recent case *People v. Taylor* (2009) 47 Cal.4th 850, 873, the *Burnett* court stated a separate test for the "cognitive and communicative skills" involved in competently representing oneself: "'Such skills are present where the accused: (1) possesses a reasonably accurate awareness of his situation, including not simply an appreciation of the charges against him and the range and nature of possible penalties, but also his own physical or mental infirmities, if any; (2) is able to understand and use relevant information rationally in order to fashion a response to the charges; and (3) can coherently communicate that response to the trier of fact.' (*Burnett*, supra, 188 Cal.App.3d 1314, 1327, fn. omitted.)" It is obvious that Boyle never found that appellant was competent to represent himself within the meaning of *Burnett*.

Furthermore, even if the Court of Appeal was correct that Boyle had found appellant "competent to represent himself," such a finding was not the same as a finding that appellant was competent to stand trial. As noted above, competence to stand trial employs a different standard than competence to represent oneself. Additionally, there are important procedural differences between a proceeding where the issue is competence to stand trial and a proceeding where the issue is competence to represent onself. The question whether a person is competent to stand trial is a jurisdictional question that cannot be waived by the defendant or his counsel. (*People v. Hale* (1988) 44 Cal.3d 531, 541; *People v. Pennington*

(1967) 66 Cal.2d 508, 521.) A defendant cannot go to trial if he is not competent to stand trial. The question of "competence to represent oneself" is not jurisdictional.

A finding that someone is "competent to stand trial" also is not the same as a finding that someone is "competent to represent himself" because at a hearing on trial competence, the assistance of counsel is required; whereas at a hearing regarding self-representation, the defendant usually acts without the assistance of counsel, or even against counsel's advise. Appellant was entitled to counsel at his 1368 hearing. That representation includes pursuing the issue of a defendant's possible incompetency to stand trial whether or not the defendant wants it pursued. (*Shephard v. Superior Court* (1986) 180 Cal.App.3d 23, 29; *People v. Bye* (1981) 116 Cal.App.3d 569, 576.) Appellant has no such rights in a *Faretta* hearing. There is no requirement that an attorney represent a defendant's interests when a judge determines whether a defendant knowingly and intelligently waived his rights. It makes no difference in the *Faretta* context whether a defendant's attorney opposes the self-representation request.

At the hearing before Judge Boyle appellant did not have an attorney to represent him on the issue of competence to knowingly and intelligently waive counsel. Alan Bloom, appointed as advisory counsel for a limited purpose, made it very clear that he was not counsel for all purpose and was there only to abide by appellant's wishes and support him in seeking *pro per* status. Bloom's appointment clearly did not encompass pursuing evidence of whether appellant's mental capacity affected his entry of a knowing, intelligent, and voluntary waiver of counsel – which would have been very much against appellant's wishes.

Appellant also did not have an attorney to represent him on the question of whether he was competent to stand trial while in front of Boyle.

Bloom did not see his role as having anything to do with trial competence, any more than it had to do with whether appellant knowingly, intelligently, and voluntarily waived his right to counsel. In a 1368 hearing, counsel for the defendant is required and such counsel "*shall* offer evidence of appellant's incompetence [to stand trial]." (Pen. Code, § 1369, sub. (b)(1), emphasis added.) If the defense for some reason declines to offer evidence of incompetence the prosecution may do so. (Pen. Code, § 1369, subd. (b)(2).) Although there was plenty of evidence of incompetence to stand trial which counsel, or even the prosecution, could have offered, nothing was presented at the Boyle hearing.

There are additional procedural differences between proceedings relating to trial competency and proceedings relating to competence to represent oneself. Under section 1368 et seq., once there has been a declaration of doubt regarding a defendant's mental competence to stand trial, a psychiatrist *must* be appointed who will evaluate the defendant and determine his ability or inability to "understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental disorder." (Pen. Code, § 1369, sub. (a).)[88] In contrast a defendant who moves to represent himself is not statutorily entitled to a psychiatric evaluation to determine his competence.

Nor under California law does the term "*competent*" have the same meaning in the term "*competent* to represent himself" as it does in the term

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[88]In fact, Bloom specifically rejected suggestions by the trial court that a psychiatrist be appointed in connection with the *Faretta* motion. Prior to the assignment of appellant's motion to Judge Boyle, it had been assigned to Judge Kennedy. When Judge Kennedy suggested that he might order a psychiatric examination of appellant, in anticipation of the motion to be heard, Bloom convinced the judge he should not do so because that would be "premature." (70ART 9.)

"*competent* to stand trial." Under California law a valid waiver of the right to counsel requires "(1) a determination that the accused is *competent* to waive the right, i.e., he or she has the mental capacity to understand the nature and object of the proceedings against him or her."[89] (*People v. Lawley* (2002) 27 Cal.4th 102, 139, emphasis added, citing *Godinez v. Moran* (1993) 509 U.S. 389, 400–401 & fn. 12.) That test, that the defendant have the mental capacity to understand the proceedings, is only the first part of the test for competency to stand trial. To be competent to stand trial a defendant must have not only a rational and factual understanding of the proceedings against him, *but also* the ability to consult with his lawyer with a reasonable degree of rational understanding. (*Dusky, supra*, 362 U.S. 402.) Since, under California law, the standards are different, one cannot imply from a finding that appellant was competent to waive counsel, an additional finding that appellant was competent to stand trial.

Nor is it necessary that a court make a determination that the defendant is *competent* to waive counsel whenever taking a waiver of the right of self-representation. As the High Court held in *Godinez*: "We do not mean to suggest of course that a court is required to make a competency determination in every case in which the defendant seeks to plead guilty or waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence." (*Godinez, supra*, 509 U.S. 389, 401, fn. 13; see *People v. Welch* (1999) 20 Cal.4th 701, 734, fn. 5 [citing *Godinez* at fn. 13]; *People v. Blair* (2005) 36 Cal.4th 686, 719 [declining to adopt a rule that a

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[89]There must also be a finding that the waiver is knowing (*Lawley, supra*, 27 Cal.4th 102, 139), but that is not concerned with the definition of the word "competency."

competency hearing is required every time a defendant elects to represent himself]; see *People v. Johnson* (2012) 53 Cal.4th 519, 530 [A trial court need not routinely inquire into the mental competence of a defendant seeking self-representation. It needs to do so only if it is considering denying self-representation due to doubts about the defendant's mental competence.].)

According to Boyle, the only "issue before [him]" was ". . . whether the defendant's making an intelligent and knowing waiver of his right to counsel." (84ART 60.) Boyle clearly did not indicate that he was required to make a finding about appellant's competence to represent himself. Nor did he do so. When ruling on the *Faretta* motion Boyle found "that the defendant has made an intelligent and knowing request to represent himself, and I find that he is competent to make that request. . ." (*Id.* at 64.) Boyle also stated that his task was to make "a decision to be sure [the defendant] is aware of what he is doing when he requests to be pro per." (81ART 29.) It is clear in this context that Boyle was not considering appellant's competence to waive his *Faretta* rights, which recall under *Lawley* is "the mental capacity to understand the nature and object of the proceedings." (*Lawley*, *supra*, 27 Cal.4th 102, 139.) Rather, it is Judge Boyle's statement that his task was to be sure that appellant knowingly and intelligently waived his rights. Judge Bolye's finding does not constitute a finding per *Lawley* that appellant was competent to waive the right to counsel; so much less does it constitute a finding per *Dusky* that he was competent to stand trial.

D. Reversal is Required

The Court of Appeal's error in dismissing appellant's motion for a new competency trial as moot requires reversal without a showing of prejudice because the error is structural. Because of the Court of Appeal's

erroneous decision to dismiss appellant's competency writ, important issues regarding the validity of appellant's competency trial were never addressed. As such, appellant did not have an adequate hearing on the question of competency as guaranteed by *Pate v. Robinson* (1966) 383 U.S. 375, 385 and *Cooper v. Oklahoma* (1996) 517 U.S. 348, 363. As in *Pate*, and *Cooper*, the denial of such procedures in appellant's case requires reversal without a showing of prejudice.

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XI.

BECAUSE THERE WERE SERIOUS QUESTIONS WHETHER APPELLANT'S COMPETENCY TRIAL WAS FAIR AND MET DUE PROCESS STANDARDS, APPELLANT'S SELF-REPRESENTATION IN THE WRIT PROCEEDINGS RELATED TO THAT TRIAL VIOLATED HIS DUE PROCESS RIGHT NOT TO BE TRIED WHILE INCOMPETENT AND HIS RIGHT TO THE ASSISTANCE OF COUNSEL UNDER THE FEDERAL CONSTITUTION AND STATE LAW

A. Legal Background

The assistance of counsel at a competency proceeding is guaranteed by the Sixth Amendment and by a defendant's Fourteenth Amendment due process right not to be tried while incompetent. (*Appel v. Horn* (3d Cir. 2002) 250 F.3d 203, 215 [competency proceeding is a critical stage of trial proceeding]; *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 503 [right to counsel clearly applies to section 1368 competency proceeding]; *People v. Pokovich* (2006) 39 Cal.4th 1240, 1252 ["A competency examination occurs after the right to counsel has attached, at a critical stage of the proceeding at which counsel's participation is constitutionally mandated."]; cf. *People v. Lightsey* (2012) 54 Cal.4th 668, 692 [the provisions of section 1369 show that the Legislature intended that a defendant be represented "throughout competency proceedings"].) An inquiry into competency is required so long as there is a bona fide doubt as to the defendant's ability to stand trial. (*Pate, supra*, 383 U.S. 375, 385.) Evidence that raises a bona fide doubt about competence is evidence which raises a "reasonable doubt" about competence to stand trial. (*People v. Lewis* (2008) 43 Cal.4th 415, 524; *People v. Rogers* (2006) 39 Cal.4th 826, 847.) A "full competency hearing" is required once there is a reasonable

doubt about trial competence. (*People v. Stankewitz* (1982) 32 Cal.3d 80, 92, citing *Pate, supra*, 383 U.S. 375, 385.)

Additionally, appellant has a procedural due process right to an adequate hearing on the question of competency. (*Pate, supra,* 383 U.S. 375, 385; *Medina v. California* (1997) 505 U.S. 437, 448; *Cooper v. Oklahoma* (1996) 517 U.S. 348, 363; *Hull v. Kyler* (3d Cir.1999) 190 F.3d 88, 110 ["*Pate* . . . required states to provide adequate procedures to ensure that only competent defendants were tried . . ."]; *Reynolds v. Norris* (8th Cir. 1996) 86 F.3d 796, 800 ["To safeguard this due process guarantee [of competence to stand trial], the Supreme Court has established a separate procedural due process right to a competency hearing."].) The "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent . . . deprives him of his due process right to a fair trial." (*Drope v. Missouri* (1975) 420 U.S. 162, 172.)

As appellant has shown, effective representation by counsel is essential to a hearing meeting the demands of due process. (See Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System* (2000) 75 N.Y.U. L. Rev. 676, 714-715 [By maintaining an adversarial balance, counsel helps the court make an accurate determination of the defendant's fitness to stand trial and reduces the risk of an incompetent defendant proceeding to trial pro se.])[90]

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[90]There are many cases holding that active counsel in a competency hearing is necessary to assure the defendant's due process right not to be tried while incompetent is met. So in *Drope, supra*, appellant's right not to be tried while incompetent was violated by *counsel's* failure to ask for a competency hearing. (420 U.S. 162, 176.) It was a denial of a defendant's right not to be tried while incompetent to conduct a hearing where *counsel* was not permitted to interrogate and cross-examine the witnesses maintaining that the defendant was competent. (*U.S. ex rel. McGough v.*

(continued...)

Where a defendant requires the assistance of counsel to make decisions relating to the competency proceedings, counsel is required. (*Pokovich, supra*, 39 Cal.4th 1240, 1252, citing *Estelle v. Smith* (1981) 451 U.S. 454, 470-471 [counsel's assistance required in making the decision whether to submit to a competency examination].) Since the assistance of counsel is required to satisfy due process during competency proceedings, it follows that the assistance of counsel is required so long as there is doubt about the defendant's competency. (See *Medina, supra*, 505 U.S. 437, 450 [once a competency hearing is held, defendant is entitled to the assistance of counsel, citing *Estelle v. Smith, supra*, 451 U.S. 454, 469-471; *U.S. v. Klat* (D.C. Cir. 1998) 156 F.3d 1258, 1262-1263 [district court erred in allowing appellant's appointed counsel to withdraw without appointing new counsel to represent appellant until the issue of her competency to stand trial had been resolved].)

A defendant may not represent himself at his own competency proceedings. As this Court recently reiterated in *Lightsey, supra*, 54 Cal.4th 688, under state law the requirement that counsel be appointed is made explicit by California statute: "The plain language of section 1368,

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[90](...continued)
Hewitt (3d Cir. 1975) 528 F.2d 339, 343; see *U.S. v. Caldwell* (D.C. Cir. 1974) 543 F.2d 1333, 1348 [defense counsel must have the opportunity to examine testifying witnesses at a competency hearing]; see also *Greenfield v. Gunn* (9th Cir. 1977) 556 F.2d 935, 937 [competency hearing was constitutionally adequate where defendant had the protection of an adversary proceeding]; *Appel v. Horn, supra*, 250 F.3d 203, 215 [counsel had the obligation to subject the state's evidence of competency to meaningful adversarial testing].) Additionally this Court has held that counsel is required at a hearing on the *restoration* of competency. (*People v. Fields* (1965) 62 Cal.2d 538, 543 ["The proceeding in which the order was rendered is a part of the administration of the criminal law, and an assignment of counsel will promote effective appellate court administration and minimize the hazards of affirming an erroneous judgment."].)

specifically addressing the procedures in criminal competency proceedings, provides that when the trial court states on the record that a doubt exists concerning the defendant's mental competence, "*[i]f the defendant is not represented by counsel, the court shall appoint counsel.*" (§ 1368, subd. (a), italics added.) Nothing could be clearer." (*Id.* at p. 692, emphasis in original.)

The Court of Appeal has held that counsel is required, and such counsel cannot be waived, so long as there is a doubt about competency, irrespective of when in the proceedings doubt is found. In *People v. Robinson* (2007) 151 Cal.App.4th 606, the defendant asserted that he wanted to go pro per. (*Id.* at p. 610.) The trial court relieved counsel (who had expressed doubts about the defendant's competency) and permitted the defendant to represent himself. Shortly thereafter, the judge declared a doubt about the defendant's competence. Robinson declined the judge's offer of counsel. (*Ibid.*) There were additional 1368 proceedings at which Robinson was *unrepresented* and was again found competent. The Court of Appeal held that "since there was a doubt as to his competency, [Robinson's] exercise of his *Faretta* right could not be considered a knowing and intelligent waiver of his right to counsel." (*Ibid.*)

The holding in *Robinson* was not dependent upon whether the defendant had been determined competent by a jury. The *Robinson* court disagreed with the government's contention that, because there had already been a section 1368 hearing, the defendant had to be presumed competent, so that his *Faretta* right to waive counsel had to prevail. (*Id.* at p. 614.) The appellate court found that where the trial court found enough doubt about the defendant's competence to require additional competency proceedings, the defendant had a right to counsel, and could not represent himself – no matter that the express wishes of the defendant were to the

contrary, and no matter that the defendant had previously been found competent. (*Id.* at pp. 614-616.)

The rule not allowing a defendant to represent himself at a competency hearing – regardless of when in the proceedings there is doubt about competency – is based in federal law. In *U.S. v. Purnett* (2d. Cir.1990) 910 F.2d 51, appointed counsel asked to be relieved, citing personal difficulties with defendant. The defendant then asked to represent himself. (*Id.* at p. 53.) Later, the court raised the question of defendant's competence to stand trial. A psychiatric report concluded defendant was competent to stand trial and to represent himself. The court found him competent to stand trial and allowed him to represent himself. (*Id.* at p. 54.) On appeal, defendant contended his waiver of counsel was ineffective because it was made prior to a valid determination of his competency, even in the face of the report that the defendant was competent. The determination, appellant contended, was invalid because he had not been represented by counsel. (*Ibid.*)

The Second Circuit agreed and reversed the district court's decision to let the defendant represent himself, citing the paramount importance of the right to counsel in a competency proceeding and the law disfavoring the waiver of the constitutional right to counsel. "[The] trial court should not accept a waiver of counsel unless and until it is persuaded that the waiver is knowing and intelligent." (*Purnett, supra,* 910 F.2d 51, 54.) The circuit court held: "[l]ogically, the trial court cannot simultaneously question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel." (*Id.* at p. 55.) The court held that where "a trial court has sufficient cause to doubt the competency of a defendant to make a knowing and intelligent waiver of the right to counsel, it must appoint

counsel—whether defendant has attempted to waive it or not—and counsel *must serve until the resolution of the competency issue*." (*Id.* at p. 54, emphasis added; see also *U.S. v. Zender* (2d Cir. 1999) 193 F.3d 562, 567 [error to have defendant appear pro se at his own competency proceeding]; *Payne v. Walker* (E.D. Cal. 2011) 2011 WL 4345868 *7 [violation of due process for defendant to represent himself in pro per at competency hearing].)

In *Pate, supra*, 383 U.S. 375, the Supreme Court addressed an analogous issue of whether a Sixth Amendment violation occurred when the state court held that an accused had waived his right to a competency hearing by failing to raise the issue before the trial court. (*Id.* at pp. 376-377.) The Supreme Court granted habeas relief, holding that a defendant could not waive his right to a competency hearing because, among other reasons, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." (*Id.* at p. 384.)

Under state law, a defendant is not permitted to dismiss counsel and then represent himself, so long as a doubt about competence remains. The presumption is that the defendant needs counsel throughout the proceedings: "Where a doubt has arisen as to a defendant's sanity, it should be assumed he is not capable of acting in his own best interest [citations], and he should not be permitted to discharge his attorney *until that doubt has been resolved*." (*People v. Tracy* (1970) 12 Cal.App.3d 94, 103, emphasis added; see Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System, supra,* 75 N.Y.U. L. Rev. 676, 711 ["Therefore, when the defendant's competence is in question, the defendant should not be allowed to represent herself until the court resolves that question and receives a valid waiver. The competency hearing

becomes part of the waiver process, and the determination of competency is a condition precedent to an effective waiver of counsel."].)

One critical point during competency proceedings where the requirement of counsel is especially important is during the decision of whether competency should be litigated at all. Generally, it is counsel, not the defendant, who has the authority over tactical decisions during the competency proceedings. (*Shephard v. Superior Court* (1986) 180 Cal.App.3d 23, 29.) Once a doubt about competency is declared, it is counsel, not the defendant, who makes the decision whether to litigate the issue of competency in the first place. "To permit a prima facie incompetent defendant to veto counsel's decision to argue that the client is incompetent would increase the danger that the defendant would be subjected to criminal proceedings when he or she is unable to assist counsel in a rational manner." (*People v. Jernigan* (2003) 110 Cal.App.4th 131, 136.) Indeed, defense counsel in a competency proceeding has a "duty to argue the defendant's best interests," irrespective of the defendant's actual wishes. (*Shepard, supra*, 180 Cal.App.3d 23, 29; *People v. Bye* (1981) 116 Cal.App.3d 569, 576 [even when a defendant resists this protection by opposing the evidence of incompetency, it is unfair to deny him the benefit of treatment for his condition before subjecting him to a potential loss of life or liberty in the criminal proceeding].)

The danger of an incompetent defendant being tried is great where there is no counsel to argue the best interests of a possibly incompetent defendant, who does not want an issue made of his own incompetency. "If counsel were compelled to accede to defendant's desire not to initiate section 1368 proceedings, even though counsel has a bona fide doubt as to the defendant's competence, the court might never be informed that the defendant's competence is in issue, and the result could be that the

defendant's due process rights are violated." (*People v. Harris* (1993) 14 Cal.App.4th 984, 994-995.) There is the same concern when the defendant wishes to stop competency proceedings after they have begun. There is great danger of a trial of an incompetent defendant where a defendant without counsel (whose competency is the subject of a proceeding) procures the dismissal of the very proceeding which would show that he is not competent to stand trial. (See *Mason ex rel Marson v. Vasquez* (9th Cir. 1993) 5 F.3d 1220, 1223 [In some cases a lawyer bears an "ethical obligation, acting in the best interest of his client, to contest [his client's] competency to dismiss his action"].)

Under state law, a defendant must be represented by counsel at a competency proceeding even if he has previously been granted self-representation status. This is the clear holding of *Lightsey*. In *Lightsey, supra,* 54 Cal.4th 668, the respondent argued that the statutory requirement of counsel at a competency proceeding was satisfied by the presence of advisory counsel, who had been appointed after the defendant's grant of his self-representation rights:

> The People's second counterargument fares no better. Although section 1368 requires the trial court to "appoint counsel" if "the defendant is not represented by counsel," the People contend the appointment of Attorney McKnight as advisory counsel for the competency proceedings satisfied the statutory requirement. We disagree: Attorneys serving in an advisory or standby capacity do not "represent" the defendant, which is the clear mandate of the statute. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1164, fn. 14, 259 Cal.Rptr. 701, 774 P.2d 730 ["[I]f the accused decides to represent himself under *Faretta, he* assumes primary control of, and responsibility for, his defense."]; cf. *McKaskle v. Wiggins* (1984) 465 U.S. 168, 179, 104 S.Ct. 944, 79 L.Ed.2d 122 ["*Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if

> disagreements between counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel."].)

(*Id.* at pp. 692-693.)

Thus, defendants are entitled to the effective assistance of counsel during all competency proceedings, so long as there is a doubt about his competency – including proceedings following the jury's verdict. The defendant cannot waive that right to counsel until those doubts are resolved. In particular, when a possibly incompetent defendant does not wish his competency called into question, counsel is required to determine whether and how competency should be litigated. Due process requires the provision of counsel at all points of a competency proceeding where counsel is necessary to litigate competency, even if the defendant does not wish to do so. Full Sixth Amendment counsel, not simply advisory counsel, is required. (*Pate, supra,* 383 U.S. 375, 385.)

B. Factual Background

On January 19, 1988, Geraldine Russell petitioned for a writ of mandate, D007429, to vacate Judge Levitt's December 23, 1987 denial of appellant's motion for a new trial and judgment notwithstanding the verdict, alleging on eighteen grounds that appellant was denied a fair competency trial. (56CT 11918-11996.) The Court of Appeal denied the writ, holding that there was "no error in denying the motions for judgment notwithstanding the verdict and for new trial." (56CT 12062.) On May 4, 1988, Russell filed a petition for review from this denial presenting nine issues for review (55CT 11638-11703), urging that the individual errors required granting a new trial and that the cumulative effect of all the errors would result in a miscarriage of justice if the verdict was upheld. (55CT 11699.) She informed this Court in her petition that appellant's motion to proceed "in *propria persona* is presently in progress." (55CT 11646.) On

May 19, 1988, this Court, in case No. S004854, granted an alternative writ "to be heard before that court when the proceeding is ordered on calendar." (56CT 12064.) On May 25, 1988, the Court of Appeal duly issued the alternative writ and ordered the superior court to show cause as to why the relief prayed for in D007429 should not be granted. (*Id.* at 12066.)

Meanwhile, on September 12, 1988, the Court of Appeal ruled on two other writs, D007850 and D007873: (1) Judge Zumwalt's orders denying appellant's *Faretta* and *Marsden* motions were upheld and (2) Zumwalt's order denying Russell's motion to be relieved as counsel was vacated. (72CT 15600-15601.) The Court of Appeal denied Russell's request that the matters in the competency writ, D007429, be addressed first, asserting that it did not serve the interests of fairness to determine the competency writ and then the issue regarding Russell's continued representation of appellant. (*Id.* at 15600.) Instead, the appellate court ordered the superior court to "appoint substitute counsel forthwith." It held that new lead counsel should have the ". . . opportunity to fully brief and argue all issues relating to the competency hearing including those that may not yet have been raised." (*Id.* at 15600-15601) New lead counsel was given 30 days from appointment to file additional briefing. (*Id.* at 15601.)

Yet, new lead counsel was never appointed. Instead, appellant appeared before Judge Boyle for consideration of appellant's renewed motion to represent himself. At that hearing, appellant was represented by Alan Bloom, who stated numerous times on the record that he was not counsel for all purposes, but counsel only for the purpose of presenting appellant's motion to represent himself. (See, e.g., 62ART 7-9.) Boyle, who granted Bloom's and appellant's request not to review material from the previous hearings on appellant's pro per status (79A3RT 8-9), and stated that he was deliberately keeping himself ignorant of all previous

proceedings (80ART 15-16), ruled that appellant was able to read and write, had made a request to represent himself and was "competent to make that request." (84ART 64.) Therefore, Boyle granted *pro se* status.

Appellant thus was unrepresented during the rest of the competency writ proceedings. Appellant asked for four extensions of time to respond to the writ. He alleged in the first and second requests that he could not file because he did not have the effective assistance of advisory counsel, did not have access to his files, to legal materials, and to paralegal assistance. (12CT 2628-2629; 54ACT 11618-11620.) After the second request, the Court of Appeal stated that it believed appellant should request the dismissal of the writ:

> [I]t is unclear to this court why he would proceed on his previous counsel's challenge of the trial court's determination he is competent to stand trial. Apparently petitioner believes it is necessary for him to "respond" to the petition. Petitioner now having the ability to request dismissal of the petition, no "response" is necessary. Petitioner is given 15 days from the date of this order to either request dismissal of the petition or file additional briefing in support of the petition.

(62CT 13786.) After the third request, the Court of Appeal concluded that appellant's sole motivation for seeking the extensions was delay: "Other than delay, this court can conceive of no reason why petitioner, who has sought and obtained a determination he is competent to represent himself, would continue to challenge the determination he is competent to stand trial." (*Id.* at 13784.) The court warned appellant that "[u]nless [he] presents this court with reasons why he wishes to challenge his competency to stand trial, and necessarily his competency to represent himself, this court intends to discharge the alternative writ and to dismiss the petition as moot." (*Ibid.*)

Appellant failed to respond as directed by the court. Instead, he asked for a fourth extension, again alleging that he had been denied the effective assistance of counsel and that he intended to seek mandate with the Court of Appeal to correct this. (13CT 2830-2834.) The Court of Appeal denied the request for extension of time and dismissed the writ, stating that "petitioner has been determined competent to represent himself, rendering these proceedings moot." (62CT 13783.) Appellant thus represented himself at trial without a ruling on the issues raised in the competency writ.

C. There Were Substantial Reasons to Believe That Appellant's Competency Trial was not Fair and did not Meet the Due Process Threshold

In this case, there were doubts about whether appellant's competency trial was fair and satisfied due process, during the pendency of the competency writ, and it was thus error to allow appellant to represent himself during the writ proceedings, particularly where the consequence of letting appellant represent himself resulted in the dismissal of the writ – so that the serious issues about the constitutionality of the competency proceedings raised in that writ were never considered. There were two sources which, taken together, caused there to be such doubt about appellant's competency that the assistance of counsel was required. These are the manner in which the competency trial itself had been conducted and the procedural posture of the alternate writ.

First, turning to the manner in which appellant's competency trial was conducted: The competency petition alleged nine errors of constitutional magnitude.[91] One significant issue was whether Judge Levitt

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[91]The Reply to the Answer to the Alternative Writ of Mandate delineates the errors in appellant's 1368 trial. They were:

(continued...)

had unconstitutionally raised appellant's burden of proof of showing that he was not competent to stand trial, by misreading CALJIC No. 4.10 and misdefining the definition of the standard of competency. A mis-allocation of burden of proof at a competency trial that heightens defendant's burden on competency violates due process and requires reversal of the verdict. (*Cooper v. Oklahoma* (1996) 517 U.S. 348.) In addition, the court erroneously permitted the prosecutor to present a member of its own office, DDA Michael Ebert, to testify in a misleading manner about the law regarding the relationship between defense counsel and the defendant during a competency inquiry and during a trial. The trial was further contaminated by Judge Levitt permitting the prosecutor to call appellant to

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[91](...continued)

(1) It was error to allow the jury to be informed of the underlying capital charges;

(2) The trial court erred in allowing appellant to be called as a witness;

(3) The trial court erred in failing to admit appellant's hospital records;

(4) The failure to instruct the jury as to the results of the verdict of incompetency was error;

(5) The trial court erred in allowing an instruction adapted from BAJI No. 2.02;

(6) The trial court erred in allowing DDA Ebert's testimony, in restricting cross-examination of Ebert and in restricting summation with respect to Ebert's testimony;

(7) The trial court erred in improperly instructing the jury with CALJIC No. 4.10 without the language "in a rational manner."

(8) The trial court erred in giving CALJIC No. 2.21;

(9) The trial court erred by denying the motion to continue until lead counsel could be available for the 1368 trial. (55CT 11802-11894.)

In addition, in other briefing Russell asked the court to consider the 1368 court's error in denying the motion for judgment notwithstanding the verdict, and the court's errors in limiting the examination and cross-examination of witnesses by appellant's counsel. (62CT 13798-13799.)

the stand, then advising the jury that appellant was competent. Levitt also misinstructed the jury with BAJI No. 2.02, which allowed the prosecution to improperly argue that all of appellant's evidence at trial was untrustworthy.[92] The fact that appellant had been found competent in an unconstitutional trial casts considerable doubt on the verdict, and therefore on appellant's competency. In any event the numerous errors that occurred demonstrate that appellant did not have the procedural protections necessary to assure that he was not being tried while incompetent.

The procedural posture of the competency writ also suggests that the proceedings failed to meet due process standards sufficient to remove doubt that appellant was competent to stand trail. When this Court directs the Court of Appeal to issue an alternative writ, that direction must be "regarded as an implied determination that the petitioners have no other adequate remedy and that extraordinary relief is appropriate." (8 Witkin, Cal. Proc. (5th ed. 2008) Writs, § 121, p. 1012; see *Department of General Services v. Superior Court* (1978) 85 Cal.App.3d 273, 279.) In *Atlantic Richfield Co. v. Superior Court* (1975) 51 Cal.App.3d 168, 170, the court held that when this Court transfers a cause to the Court of Appeal with directions to issue an alternative writ, the order establishes as conclusive all facts necessary to the issuance of the alternative writ, including the fact that "the petition raises a theory which will support the relief sought." (See *Lang v. Superior Court* (1975) 53 Cal.App.3d 852.)

Although the issuance of the alternate writ did not represent this Court's opinion that the petition had merit (9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 946, p. 1000), it did mean that the Court of Appeal was required to consider the petition because it raised colorable claims for relief.

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[92]Appellant has argued that each of these errors independently requires reversal.

As one appellate court has noted: "The Supreme Court's direction that we issue the alternative writ, after our denial, is an expression on the part of the Supreme Court that we examine the contentions raised by the petitioner and write an opinion evaluating those contentions." (*Charlton v. Superior Court* (1979) 93 Cal.App.3d 858, 861.) This Court's actions in issuing the alternative writ shows that Russell's petition had at least preliminary merit, that the claims were factually supported, and were eligible for interlocutory relief. Given that the competency writ challenged the constitutionality of the competency trial, it follows from the issuance of the alternate writ that there were questions as to whether appellant had received the procedural protections to which he was entitled, and whether a criminal trial without a resolution of the petition would create the danger that appellant would be tried while incompetent in violation of his constitutional rights. (See *Smith v. Superior Court* (1968) 68 Cal. 547, 558 [appropriate for this Court to review a pretrial order to rectify error before a "constitutionally defective trial is undertaken"].) Yet the Court of Appeal never heard appellant's writ as it was ordered to do by this Court.

Another detail about the proceedings lending support to a conclusion that appellant's competency remained in doubt is that appellant was never given the counsel he had been ordered when the Court of Appeal ruled in D007850 and D007873. In ordering that new counsel be appointed rather than ruling on the competency writ as raised by Russell, the Court of Appeal clearly anticipated that some counsel – just not Russell, with whom appellant had a conflict – would "fully brief and argue all issues relating to the competency hearing including those that may not yet have been raised." (10CT 1932.) It was not the intent of the Court of Appeal that appellant should represent himself on decisions related to the competency writ.

The Court of Appeal ordered that appellant have non-conflicted counsel on the competency issues, counsel who would sort out what issues should be raised by counsel.[93] The Court of Appeal did not intend that a decision not to pursue competency would be made by someone who was unrepresented on that issue. The Court of Appeal was aware that appellant did not want to be found incompetent. The fact an unrepresented defendant, who vociferously did not want his competency called into question, was permitted to control the proceedings and thereby procure the dismissal of substantial issues regarding his competency trial, throws a deep shadow on the writ proceedings, and suggests that they did not satisfy the due process demands of an adequate hearing on the issue of competency.

The Court of Appeal appears to have been operating with the incorrect belief that appellant had been found *competent* to represent himself and that this was the equivalent of him having been found *competent* to stand trial, so that the issue of competency having been resolved, there was no need for appellant's representation in the writ proceedings. However, as appellant has shown in the argument immediately above, the Court of Appeal was incorrect. Boyle did not consider the question of competency to stand trial or to waive counsel. Even if he had, the two are not equivalent. The Court of Appeal was thus still presented with serious issues of the constitutionality of appellant's

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[93]However, at least one superior court judge thought differently. Judge Revak, who was the judge who appointed Alan Bloom solely for the purpose of presenting appellant's motion to represent himself and who determined that the self-representation motion should be decided before appellant was appointed counsel for all purposes (if any was to be appointed at all), stated on the record that if appellant's *Faretta* motion were granted then appellant would be his own lawyer and could decide himself what action to take regarding the competency writ. (66AART 18-19.) This was error, as appellant has elsewhere argued.

competency trial – issues which should have been presented by counsel with full Sixth Amendment responsibilities to air the issues related to appellant's incompetence, in spite of appellant's wish that they not be aired.

Appellant's limited advisory representation by Alan Bloom during part of the period the competency writ was pending, on the sole issue of appellant's request to proceed in pro per, does not change the result. As appellant has discussed above, this Court held in *Lightsey*, *supra*, that advisory counsel does not "represent" a defendant for the purposes of a competency proceeding because the statute requires that a defendant actually be "represented." (54 Cal.4th 668, 693.) *Lightsey* held that advisory counsel in that case was no substitute because advisory counsel never addressed the trial court about competency. (*Id.* at p. 691.) Here, Alan Bloom never addressed any of the issues in the competency writ, and never expressed his views to the court about the substantive issues raised therein.

Finally, appellant had no right to self-representation on the appeal of his competency determination, irrespective of concerns with respect to his mental capacity. The Fourteenth Amendment requires that where the state confers a criminal appeal of right, a defendant has a constitutional right to an attorney. (*Douglas v. California* (1963) 372 U.S. 353, 356-357.) The only basis for the right of self-representation in California is the federal constitution: a defendant has neither a state statutory right, nor a state constitutional right to such. (*In re Barnett* (2003) 31 Cal.4th 466, 472, citing *People v. Scott* (1998) 64 Cal.App.4th 550, 558, cited in, *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152, 155, 120.) For example, once a defendant has been convicted, "the balance between a criminal defendant's interest in acting as his or her own lawyer and a state's interest in ensuring the fair and efficient administration of

justice 'surely tips in favor of the [s]tate.'" (*Id.* at p. 472, citing *Martinez*, *supra*, 528 U.S. 152, 162.)

Here similarly the balance between a defendant acting as his or her own lawyer and a state's interest in ensuring fair proceedings tips in favor of restricting the self-representation rights of a defendant in writ proceedings relating to a competency verdict. "Section 1367 declares that "[a] person cannot be tried or adjudged to punishment while that person is mentally incompetent" (*Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 486) and due process requires the same. "It is well established that a pretrial order substantially affecting a defendant's right to a fair trial in criminal proceedings may be appropriately reviewed by mandamus." (*Yorn v. Superior Court* (1979) 90 Cal.App.3d 669, 673.) The state's interest in mandamus, as a means of assuring that a mentally incompetent defendant is not tried, heavily weighs in favor of the state limiting a defendant's right to self-representati in writ proceedings from a competency verdict.

Given that appellant had no right to represent himself in the writ proceedings, the Court of Appeal erred in accepting appellant's pro per pleadings before it. Generally, "a represented defendant has no right personally to present supplemental arguments [of counsel]." (*People v. Kelly* (2006) 40 Cal.4th 106, 120, citing *Barnett*, *supra*, 31 Cal.4th 466, 469.) Capital inmates in particular have no right to supplement the briefs of counsel and, thus, ". . . all appellate motions and briefs must be prepared and filed by counsel and may not be submitted pro se." (*Barnett*, *supra*, 31 Cal.4th 466, 473, citing *In re Clark* (1991) 3 Cal.4th 41, 173.) "Any other pro se document offered in an appeal 'will be returned unfiled' [citation], or, if mistakenly filed, will be stricken from the docket [citation]." (*Id.*, at p. 474, fn. omitted.) Thus, in this case, the Court of Appeal erred in accepting appellant's pro per filing, and should have returned them and only

accepted the filings of the attorney appointed to represent appellant pursuant to its order.

In sum, the serious issues presented in the competency writ that were never considered by the reviewing court undermined confidence that appellant's trial comported with due process. The actions of this Court in ordering that the issues in appellant's petition for writ of mandate be considered, followed by the Court of Appeal's issuance of the alternative writ, show that dismissal of the writ when appellant was unrepresented by counsel rendered the constitutionality of appellant's competency proceeding dubious that doubt of his competency to stand trail remained, and that there was substantial risk that he was be tried while incompetent. California law and due process required that appellant have counsel who would pursue the issues presented in the writ.

D. The Error Requires Reversal

The absence of counsel was structural error requiring reversal of the competency judgment. As appellant has previously explained, this Court applied the principles of structural error articulated in *Holloway v. Arkansas* (1978) 435 U.S. 475, *Mickens v. Taylor* (2002) 535 U.S. 162, and *Arizona v. Fulminante* (1991) 499 U.S. 279 to a competency trial and held that the error in Mr. Lightsey's case, the violation of the statute requiring counsel at a competency hearing, was akin to a pervasive Sixth Amendment violation and could not be likened to trial error. This Court stated in *Lightsey* that it could not excise some item of evidence in order to "make an intelligent judgment" (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, emphasis in original.) As such, the error was structural. Here too, this Court cannot make an informed judgment about whether the competency

determination was affected by the absence of counsel. Rather, the deprivation of counsel during pendency of the appeal of the competency writ had a wholesale effect.

Moreover, this Court has held that reversal without a showing of prejudice is appropriate when, as happened in *Lightsey:*

> a criminal defendant whose mental competence is in question is permitted self-representation and to maintain he or she is competent to stand trial, [because] a breakdown occurs in the process of meaningful adversarial testing central to our system of justice. (See *U.S. v. Cronic* (1984) 466 U.S. 648, 655, 104 S.Ct. 2039, 80 L.Ed.2d 657 ["'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'"]; *U.S. v. Purnett, supra,* 910 F.2d at p. 56 [recognizing an appointed attorney's responsibility to ensure an adequate examination of the evidence regarding the defendant's competence].)

(54 Cal.4th 668, 696-697.) Here, as in *Lightsey*, there was no meaningful adversarial testing of the issues in the competency writ. Counsel brought the writ having assessed the strength of the issues therein, but no counsel advocated on appellant's behalf in the Court of Appeal and indeed that court never reached the merits of the issues. Just as in *Lightsey*, appellant, who did not want to be found incompetent to stand trial, procured a dismissal of proceedings where there was a substantial possibility that he was incompetent. Reversal is required without consideration of prejudice.

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XII.

THE COURT OF APPEAL ERRED IN REVERSING JUDGE EDWARDS' CONSIDERATION OF APPELLANT'S MENTAL STATE AS RELATED TO HIS SELF-REPRESENTATION AND WAIVER OF COUNSEL

As shown above, Judge Boyle erred in granting appellant *Faretta* status because he neglected the trial court's duty, in cases where the defendant's mental condition is at issue, to consider expert opinion on whether the defendant's impaired capacity precluded the waiver of counsel from being knowing, intelligent, and voluntary. Moreover, Boyle's grant of self-representation was flawed because he erroneously believed he could not consider whether appellant was competent to represent himself, when in fact constitutional due process requires that the right to self representation under the Sixth Amendment be *withheld* when the defendant is unable to carry out the tasks of self-representation set forth in *McKaskle v. Wiggins* (1984) 465 U.S. 168. Judge Zumwalt developed the record on those questions and appropriately denied appellant *Faretta* status in March of 1988, but Judge Boyle subsequently ignored that record and misread constitutional requirements when granting *Faretta* status in November of 1989. In the summer of 1990, the trial court through Judge Edwards took steps to ameliorate Judge Boyle's errors, give weight to the entire record including expert opinion obtained by Judge Zumwalt, and revisit the significance of appellant's mental condition as related to his self-representation status in light of events occurring after Judge Boyle acted. The Court of Appeal granted a writ blocking Judge Edwards' efforts and that erroneous ruling violated appellant's right to due process and representation by counsel under the state and federal constitutions, warranting reversal of the conviction and sentence.

A. Factual Background

As explained above, Judge Zumwalt considered the opinions of Dr. Koshkarian, Dr. Di Francesca, Dr. Kalish (whom Zumwalt had appointed, and who had reviewed appellant's Navy psychiatric records) and her own observations of appellant's statements and writings, and on March 16, 1988, denied appellant's motion for self-representation because his waiver of counsel was not voluntary and he lacked the capacity to make his own defense. (8CT 1572-1575.)

Judge Boyle thereafter entertained a second motion for self-representation by appellant, and agreed not to consider, in connection with the motion, any of the material considered by Judge Zumwalt or anything else in the file.[94] (See 79A-3RT 1-9.) Based on declarations from numerous acquaintances of appellant and from psychiatrist Dr. Giraldi and psychologist Dr. Ricardo Weinstein, Boyle granted appellant's motion on November 3, 1989. The conclusions of both doctors Weinstein and Giraldi

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[94] Thus, Boyle was oblivious to the transcript of appellant's "outburst" at the September 8, 1988, hearing before Judge Malkus (55ART 1-2); another outburst by appellant before Judge Malkus on October 27, 1988, in which he raised his voice and hurled accusations that Russell was a psychopath who wanted him killed and had ordered his murder by an inmate who was Russell's lover (57A RT 1-2, 4); appellant's complaints against advisory counsel Sanchez which started to emerge in late 1988 (57A RT 13-19); Malkus' threat to have appellant gagged on November 17, 1988, due to his continued outbursts (58A RT 2-5); appellant's claims in his December 12, 1988 "Urgent and Emergency" petition for habeas corpus, in which he claimed his religious beliefs required that he represent himself and called Russell a "cold-blooded killer," an "omni-vaginal prostitute," a "Tyrannasaurus Rex(ine)," and a "man trapped in a woman's body" (52CT 11025.265-11025.296); appellant's serial objections to one trial court judge assigned to hear matters in the case after another; or appellant's April 10, 1989, for cause challenge of Judge Kennedy, alleging Kennedy also was sexually involved with Russell and was biased against appellant from having reviewed prior proceedings. (72A RT 2-5; 10CT 2097-2109.)

were based solely on oral interviews of appellant, in which he denied being depressed or experiencing hallucinations. (See 38CT 8237-8243, 8244-8250.) Both doctors, at the behest of appellant, limited their examinations to subjects and events within one year of the examination, and neither reviewed any medical or psychiatric records. (*Ibid.*)

On November 22, 1989, *after* Judge Boyle *granted* appellant's motion to represent himself, appellant filed a petition in the Court of Appeal claiming Boyle should have been disqualified from hearing the motion. (63CT 14084-14102.) When that petition was denied for procedural reasons (*id.* at 4222) appellant petitioned for rehearing, even after Judge Boyle advised him of the irony that prevailing on the disqualification would render void Boyle's actions in granting appellant's every request. (63CT 14223-14244, 14220-14221.) On December 22, 1989, appellant sought this Court's review of his challenge to Judge Boyle. (52ACT 11083-11143.)

In December of 1989 and January and February of 1990, appellant filed four requests for extension of time in the Court of Appeal to file briefing in the competency writ, that is, Russell's petition seeking *reversal* of the verdict that appellant was competent to stand trial. (12CT 2628-2629; 54ACT 11618-11620; 11621-11625; 13CT 2830-2834.) Appellant continued to seek extensions even after the Court of Appeal advised him that no "response" was necessary and that it made no sense for him to proceed on previous counsel's challenge of that verdict. (62CT 13784, 13786.)

Appellant filed further motions to disqualify other judges in the trial court, including a January 22, 1990, challenge for cause against Judge Gill claiming that Russell had given Gill sexual favors in exchange for judicial favors. (13CT 2747-2752.) On February 1, 1990, appellant filed a motion requesting copies of *all* minutes of the presiding criminal department

spanning a two-week period in 1987, reflecting every judge who sat in that department and every case which was heard therein during that period of time. (*Id.* at 2791-2793, 2805.) At about the same time, appellant also moved that two attorneys from the district attorney's office, two defense attorneys, and three superior court judges be ordered to take polygraph tests. (*Id.* at 2835.) When the challenge to Judge Gill was denied by Judicial Council-appointed Judge LeRoy Simmons on March 29, 1990 (*id.* at 2871, 2874), appellant challenged Simmons as well and alleged that Simmons' proceedings did not meet procedural requirements. (45CT 9972-9975, 9979-9992.)

On February 9, 1990, appellant challenged Judge Wagner and Judge Greer, who were on the trial court's 987.9 funding panel, and said he did not recognize "California jurisdiction." (53CT 11315.)

In February of 1990, during section 987.9 funding proceedings, appellant accused advisory counsel Sanchez of interfering with appellant's right to self-representation by keeping court dates secret from him and by submitting briefs to the funding court in a "clandestine" way. (987.9-7BRT 4-5 ; 31CT 6814-6822.) Through the spring of 1990, appellant complained repeatedly about the conduct and funding of "advisory counsel," seeking to have new counsel appointed, and battled the trial court's section 987.9 funding panel for the right to use peremptory challenges against the funding judges (13CT 2888; 987.9-6RT 1; 987.9-7ART 4[95]).

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[95]On February 9, 1990, appellant filed a Petition for Writ of Mandate, D0011623, regarding the funding court's refusal to grant him peremptory challenges for the funding panel judges. (53CT 11307-11322.) This petition was denied on February 14, 1990. (*Id.* at 10300.)

On March 2, 1990, appellant filed a request for relief from default and petition for review in this Court, challenging this Court's jurisdiction. (53CT 11289-11305.) On April 9, 1990, appellant stated in court that he challenged California's jurisdiction. (1RT 24.) On March 30, 1990, and April 27, 1990, appellant filed three pro se petitions in the Court of Appeal, each of which stated "The Petitioner Recognizes Neither the Jurisdiction of the State of California nor that of the Court of Appeal, Fourth District, Division One." (76CT 16202-16205, 16301-16303, 16317-16319.)

In April of 1990, appellant sought to file a 200-page motion in the trial court. (1RT 2-3.) On April 13, 1990, appellant objected to advisory counsel speaking in court without appellant's permission. (1RT 46.) In court on April 27, 1990, appellant complained that Judge Gill talked to advisory counsel without appellant's permission, saying that advisory counsel should seek appellant's permission to speak even before stating their appearance for the record. (1RT 47-48.) Appellant complained about advisory counsel, lack of access to funding and to his legal materials, that he needed more time to prepare motions and yet his speedy trial rights were being violated, and requested that the entire court file be stricken on the grounds of "due process." (1RT 54-96.) On May 2, 1990, appellant filed a motion challenging the "effectiveness" of advisory counsel Rosenfeld and Sanchez, complaining that the lawyers were not adequately compliant to his control and seeking to bar the lawyers from speaking to one another absent appellant's direction. (96ART 5-47.) On May 7, 1990, appellant moved to have all pending motions earlier filed by Russell de-filed, and to have the entire court file stricken. (1RT 68-94.)

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On May 8, 1990, Sanchez appeared before the 987.9 judges (without appellant present) to discuss difficulties re funding and getting paralegals and support staff to work on appellant's case. Judge O'Neill said the court did not have a clear idea of what appellant wanted because appellant was unwilling or unable to comply with procedural rules; that the case was like *Alice in Wonderland*; that the law required the court to grant appellant the right to screw up his own defense; that a couple of hundred thousand dollars already had been spent on the case; and that O'Neill believed appellant was entitled to dig his own grave. (987.9-10RT 5.)

Through April and May of 1990, Judge Gill arranged for appellant to be brought repeatedly to the courthouse and supervised by court staff, for 70 hours total, so that appellant could review the court file. (24CT 5531, 5532, 5534, 5535, 5536, 5538, 5539, 5540, 5541, 5542, 5544, 5545, 5546, 5547, 5548, 5549.) On May 25, 1990, appellant said he wanted to demur to the amended information and complained that he did not have adequate assistance; appellant said he wanted to file a jurisdiction motion but had been unable to finish it, and that he could not discuss it with Judge Gill because it was confidential. (1RT 105-108.) Appellant requested an entire copy of the court file, which he needed to litigate "due process" motions. (1RT 117-118.)

On May 30, 1990, Sanchez wrote appellant a letter, sending a copy to Judge Gill and filing it with the trial court, explaining that Sanchez had served as appellant's advisory counsel for two years but was struggling to continue doing so, because appellant wanted Sanchez's assistance only to file specious and/or frivolous motions, applications and writ petitions. (38CT 8294-8297.) Sanchez said that appellant was avoiding preparing a defense and disrupting the orderly administration of justice, and that appellant's pro per status did not entitle him to use state-provided resources

and attorneys to those ends. (*Id.* at 8295.) Sanchez said he would assist appellant in the future, but only for the purpose of preparing a defense to the criminal charges. (*Ibid.*)

On June 7, 1990, appellant filed a declaration requesting $50,000 in 987.9 funds, complaining that Judge Revak's January 1990 order granting funds had been ignored, that he had been completely unable to investigate the case or prepare for the trial then set for August 6, 1990, and that he had just received four boxes of materials from advisory counsel. (32CT 6968-6985.) In court on June 8, 1990, Judge Gill denied appellant's request to have Rosenfeld replaced on the ground that she had not done enough work; denied Sanchez's request for 987.9 funds on the theory that Sanchez had a constitutional obligation to be ready for a death penalty phase; and told appellant that appellant's interpretation of the Court of Appeal's removal of Russell as having rendered everything previously done by Russell "null and void" was "utter trash." (1RT 124-138.)

On June 21, 1990, appellant filed a demurrer to the information (which resembled a demurrer Russell had filed in the case on April 1, 1987, and which appellant had moved to have de-filed on May 7, 1990). (14CT 2919-2943.)

On June 22, 1990, appellant continued to complain to Judge Gill that he needed more time, money, and resources, while also complaining that it was improper for Judge Gill to have any contact with the 987.9 committee. (1RT 143-147.) The same date, Judge Greer ordered Russell to turn over to appellant's investigator all papers and transcripts in the case, with the exception of work product materials. (53CT 11200; 38CT 8315.) On June 27, 1990, Russell filed a document explaining that she already had turned over all of the materials prescribed by Greer, to Alan Bloom in November of 1989. (See 53CT 11197-11198.)

On July 9, 1990, Judge Gill granted appellant's request to remove Sanchez, as not "satisfactory," and replace him with attorney Chambers. (1RT 170-171.) Gill set a deadline of July 20, 1990, for pretrial motion filing. (1RT 174.) On July 20, the parties appeared before Gill and appellant moved for a continuance to file motions based on Sanchez's failures. (1RT 176-178.) Judge Gill said he would consider the request for a continuance the following week. (1RT 178.)

On July 20, 1990, Rosenfeld wrote appellant a letter, which was copied to Judge Gill, stating that the letter related to items that needed to be memorialized and sealed in the case file in the event that claims of ineffective assistance of counsel should be raised on appeal. (38CT 8305-8307.) Rosenfeld's letter reminded appellant that under *People v. Doane* (1988) 200 Cal.App.3d 852, which he often cited and quoted from in court, a pro per defendant almost never can claim ineffective assistance of counsel. (*Id.* at 3805.) It stated that the pretrial motions, which had not been completed by the July 20, 1990, filing deadline, had not been "assigned" by appellant to Rosenfeld and Sanchez until about six weeks earlier. (*Ibid.*) Because appellant insisted on doing, himself, all work for which the trial court approved funding under section 987.9, Sanchez and Rosenfeld had not been able to assist appellant on the motion because they lacked any funds. (*Ibid.*) Rosenfeld advised appellant to "stand on" Russell's motions filed in April of 1987, which Rosenfeld believed were excellent, and let her update them. (*Ibid.*) Rosenfeld expressed regret that Sanchez had been replaced, and advised appellant to let her communicate directly with Chambers to help appellant avoid a death sentence, reminding appellant that communication between the two advisory counsel would be protected by privilege. (*Id.* at 8306.) She said that no one disputed that appellant was the attorney in the case, and requested that appellant permit

her and Chambers to work together as an effective team and let them "start working on a defense." (*Ibid.*)

On July 25, 1990, Judge Gill ordered Russell to appear on July 31, 1990, to respond to appellant's request that she comply with Judge Greer's June 22, 1990, order to turn over her files to appellant's investigator. (14CT 2977-2978.)

On July 30, 1990, Russell filed a legal memorandum about the release of defense materials, alleging that she complied with the prior order and gave materials to Bloom and Sanchez, and that all the materials still in her possession were protected by work product privilege. (14CT 2981-2987.) Russell described appellant's psychiatric disorders, this Court's grant of review and transfer back of the competency writ, and appellant's subsequent "abandonment" of that case. (*Id.* at 2981-2983.) Russell stated she believed appellant was severely ill and would dig his own grave if given all materials. (*Id.* at 2982.)

On July 31, 1990, appellant's motion for an order requiring Russell to turn over all of her files to him, including work product, was assigned to Judge Edwards for hearing. (25CT 5563.) The parties appeared before Judge Edwards the same day, and Edwards also heard from Russell that day. (2RT 242-250.) Edwards ordered Russell to turn over the disputed documents for his in camera review. (2-1RT 254.)

On August 30, 1990, the parties appeared again before Judge Edwards on the issue of whether Russell would be required to turn over the "work product" materials to appellant. (2RT 256-257.) Appellant refused to enter an appearance under the name of "Waldon," explaining that his religion, viz., "Humanitarianism," required that he appear only under the name of "Sequoyah," which was his Cherokee name. (*Id.* at 256-259.)

Judge Edwards stated that he had "some doubt as to whether or not [appellant was] mentally competent," based on appellant's conduct in the courtroom, Edwards' review of the records submitted for in camera review (which indicated appellant was not of Cherokee heritage), documents from the file, including the reports of Dr. Di Francesca, Dr. Norum, and Dr. Kalish and Judge Zumwalt's order of March 16, 1988, and Edwards' review of appellant's military mental health records. (*Id.* at 261.) Edwards said he also had reviewed the court record of the November 1989 proceedings before Judge Boyle on appellant's motion to represent himself, in an effort to learn what had happened between the time of Judge Zumwalt's finding that appellant was not competent to represent himself, and Judge Boyle's later contrary conclusion. (*Id.* at 261-264.) The prosecutor asserted that the November 1989 hearing was not the only one at which Judge Boyle "considered that particular issue," but Judge Edwards confirmed with the prosecutor that there had been no "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 [appellant] was competent to represent himself." (*Id.* at 265-266.)

Edwards said that he had reviewed the transcript and the affidavits considered by Judge Boyle in concluding that appellant was mentally competent to represent himself. (2RT 268.) Edwards expressed doubt that appellant's personal acquaintances were well-qualified, as compared to expert mental professionals, to opine on whether appellant could "knowingly, intelligently and voluntarily waive [his] right to counsel and represent [himself]." (*Ibid.*) He suggested that courts should determine whether a defendant could "waive his right" and represent himself, by relying on professionals with expertise "as to how the mind works, as to

whether or not a person is able to operate in a free-will situation in making a decision." (*Id.* at 269.) The prosecutor argued otherwise:

> The Supreme Court of the State of California and also the United States have not delineated, have not spelled that out, and I think that it is left to the individual judge acting on his best – his or her best reason and judgment.

(*Ibid.*)

Edwards indicated that he gave greater weight to the opinion of Dr. Di Francesca, an expert and a psychiatrist, than to those of appellant's personal acquaintances. (2RT 269.) Edwards quoted Di Francesca's 1988 report, as follows:

> The question that faces the court is whether Mr. Waldon is competent to waive his right to counsel and proceed in pro per. In my opinion, because of Mr. Waldon's severe borderline personality disorder, no matter if this were a murder case or a case much less serious, Mr. Waldon would not be able to rationally develop his defense if that case in any way involved an assault on his self-esteem. [¶] Further, it is my opinion that Mr. Waldon is not competent to waive his right to counsel – that is, do it with his eyes wide open – because his insight into his psychopathology is nil. Again, it is too threatening for him to have insight because he would have to acknowledge faults, shortcomings and wrongdoings. A borderline personality disorder is a chronic condition that would require years of psychotherapy to ameliorate.

(*Id.* at 269-270, quotation marks ommitted.)

The prosecutor argued that Dr. Di Francesca, though well thought of in the courts, was not infallible. (2RT 270.) He pointed out that Judge Gill had held numerous hearings with appellant. He cited for authority *People v. Crandell* (1988) 46 Cal.3d 833, and stated his own personal observations:

> I've observed Mr. Waldon on numerous occasions. He may have some psychological problems that – that maybe some of us have, maybe some of us don't have. But I don't see – you

know I'm not really giving an opinion. All I'm saying is that he has conducted his defense in rather an exemplary fashion.

(*Id.* at 271.)

Judge Edwards said that he also had reviewed appellant's statement of objection to and disqualification of Judge Kennedy, which included appellant's claims that people were "conspiring against him." (2RT 271; see 72ART 2-5.)[96] He also had reviewed a habeas petition filed by appellant, including its allegations against attorneys Russell and Alex Landon. (2RT 272.)[97] Edwards cited those materials as examples disproving the prosecutor's assertion that appellant was conducting an adequate defense. (*Ibid.*) The prosecutor countered that ability to conduct an adequate defense was not legally required:

> I don't think that's a prerequisite and I don't think that [*Faretta*] and the other cases say that he has to be able to conduct a defense. All he has to be able to do is have the mental capabilities of going into it with his eyes open, knowing that he may be making the biggest mistake of his life.

(*Id.* at 272.)

The prosecutor cited *Crandell*, *supra*, 46 Cal.3d 833, 865 and *People v. Bloom* (1989) 48 Cal.3d 1194, and argued that Judge Zumwalt's March 16, 1988, order had been appealed. (2RT 272-274.) He further argued that "as a result of" the appeals, Russell was removed. (*Ibid.*) Referring to the

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[96]This is appellant's April 10, 1989 "Statement of Objection and Disqualification [CCP § 170 et.seq.], Notice of Motion and Motion (Pro Per)" alleging that Judge Kennedy received sexual favors from Russell in exchange for favors for Russell's client-lover Maier. (10CT 2097-2109.)

[97]It is clear in context that Edwards was referring to the 100-plus page December 12, 1988, "Urgent and Emergency Petition for Writ of Habeas Corpus" appellant filed in the Court of Appeal. (52CT 11025.241-11025.343 as discussed in detail above.)

Court of Appeal's January 13, 1989, order, the prosecutor characterized it as "indicating that nothing [the Court of Appeal] had said would impinge upon Mr. Waldon's right to pursue pro per status." (*Id.* at 274.) This, he said, "persuaded the superior court judge who was hearing it at that time not to appoint a new attorney but to resume the pro per hearings in front of other judges." (*Ibid.*)

Appellant objected to Judge Edwards that Dr. Norum never had examined him, and that Dr. Di Francesca had not examined him during the year previous to when she wrote her report in 1988. (2RT 274-275.) He argued that the mental health professionals' ethics code dictated that "no doctor has any business writing a psychological report on any person whom she has not examined." (*Id.* at 275.) He further argued that none of the 12 jurors who had heard Dr. Kalish's testimony during the competency trial had "believed one single word he said," and that Kalish's report deserved no credence. (*Ibid.*) Appellant argued that he never had been given an opportunity to submit to the court evidence of his Cherokee heritage, and pointed out that Judge Boyle received psychiatric testimony by affidavit. (*Id.* at 276.) He also objected to Judge Edwards' jurisdiction, arguing that the case had been referred to Edwards solely for the purpose of determining whether Russell should turn over material that she claimed was work product. (*Id.* at 277.)

Judge Edwards pointed out that Dr. Giraldi had interviewed appellant under the name of Stephen Midas, had given appellant no tests nor considered any other reports, had relied on appellant's statements that he had not experienced any hallucinations, and had been limited by appellant's refusal to answer any questions relating to events more than one year prior. (2RT 277-278.) Edwards said he therefore weighed Giraldi's

report as nothing more than "fraud," and believed that Dr. Weinstein's examination had similar defects. (*Id.* at 278.)

Edwards noted that appellant's prior filings containing extreme allegations against Russell and individual trial court judges contributed to his doubt about appellant's mental condition as related to self-representation:

> [When I read] 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, perhaps it was some joke. Then when I read the psychological reports that I've referred to here and then the findings 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.

(2RT 278-279.)

Edwards outlined his legal research on the issue:

> I've read the case of *People v. Teron*, a 1978 decision at 23 Cal.3d 103, which makes clear that the court has an affirmative duty to order a proper psychiatric examination if it has a doubt, and I do have such a doubt, sir, and that's why I called this hearing here, to see if there was anything that you could say to persuade the court that there was no need to have you examined. But nothing that I've heard here today has convinced me to the contrary. In fact, I am convinced even further now, sir, that, perhaps, something is amiss.

(2RT 279.)

The prosecutor argued *Teron* was bad law: "I think that *Teron* is old law in light of *Bloom* and *Crandell*. A psychiatric report was not required in either of those cases for those individual defendants to go pro per. I think that – " (2RT 279.) Edwards interjected: "Let me stop you. Is it your view that if the court has a doubt as to the defendant's mental competency, it cannot order him examined? Is that what you're saying?" (*Id.* at 279.)

The prosecutor expressed his view that Judge Boyle believed his decision to be "well-reasoned," and that it should be given "a great deal of validity." (*Id.* at 280.) The prosecutor recounted that appellant was beaten up in the jail by five inmates, including John Maier, and that Russell had advised appellant not to file charges. (*Ibid.*)

The prosecutor claimed appellant was barred from speaking in support of his February 1987 letter seeking to go pro per:

> [N]ever, ever, was Mr. Waldon allowed to tell any judge anywhere what he wanted to do and why he wanted to do it. Every time he came into court, that I'm aware of – I've read the transcripts; I've been personally involved – he was cut off by Miss Russell saying, "you can't listen to him. He is not competent to say anything."

(2RT 280-281.)[98] He suggested that it was reasonable, in context, for appellant to become paranoid of Russell, who opposed him "every step of the way" and secured release of appellant's military records on the promise that they would not be used in court – a promise that Russell broke. (*Id.* at 282.) He urged that Russell's arguments that appellant was incompetent to stand trial, followed by her challenge of the competency verdict on appeal, contributed to an onerous situation that appellant started to challenge in his writings. (*Ibid.*)

Judge Edwards pointed out that the Court of Appeal had never said that appellant was mentally competent. (2RT 283.) Exaggerating the specificity of prior appellate rulings, the prosecutor argued that the Court of Appeal had said: "Nothing that we have done in this case should preclude Mr. Waldon from proceeding with his desire to become pro per." (*Ibid.*)

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[98]This assertion was wrong, when in fact Zumwalt had, during the March 10, 1988, hearing on the *Marsden* motion, given appellant every opportunity to explain his complaints against Russell and what he wanted to see done in the case. This is discussed above.

The prosecutor asked Edwards to give "great weight" to the judges who had ruled on the issue before, and to infer from Judge Gill's inaction on the issue that Gill believed appellant mentally competent to represent himself. (*Id.* at 283-284.)

The prosecutor argued that "there [had] been an evolution" in the law on the issue, and that *Bloom* and *Crandell* represented leading precedent. (2RT 285.) Edwards paused to read those decisions, and then stated his ruling and the reasons for it:

> I've reread those passages of *Bloom*, and I'm – I'm still convinced that in order for the defendant to waive his right and represent himself, as the court says in *Bloom*, if it is asserted voluntarily and if he has a mental disease or defect that prevents that voluntary assertions, that then he cannot 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.

(*Id.* at 286.)

Edwards explained what materials he would have the newly-appointed experts consider, including Dr. Norum's reports of August 7 and September 17, 1987; Dr. Kalish's reports of April 27, 1987, June 2, 1987, and March 9, 1988; a statement of objection and disqualification and notice of motion by appellant repeating and alleging information relating to judges having sex with lawyers; Judge Zumwalt's ruling of March 16, 1988; affidavits submitted to Judge Boyle; nurses' notes from appellant's military files; and the transcripts of the hearing before Judge Boyle on November 3, 1989. (2RT 287-288.) Appellant argued that nothing looking back more

than a year before a court's determination of mental competency was relevant; Judge Edwards disagreed:

> If you have a borderline personality disorder which has not been treated, the medical profession is of the view that, in order to treat it, it requires years of treatment. [¶] So if someone has made the assessment that you have that and that assessment is correct, you have not received any treatment, common sense would dictate that the person making an assessment take that into account because they can disagree. They can say, "I don't think he has that disorder and this is the reason why. And therefore, whoever gave that opinion, I disagree with them respectfully and professionally." But if they agree – and these things are difficult to treat, and there's been no treatment – then I would like to know from them how it is that they're now able to say that you're mentally competent . . . to represent yourself. [¶] . . . [¶] I'm not saying that I'm going to take away your pro per status. All I'm saying is that when someone looks through all the information, there's a hearing conducted so that it's all considered, no matter how it turns out, then I will feel that if the decision is made that you are competent to represent yourself, that it will withstand attack from here to the United States Supreme Court.

(2RT 290-291.)

Appellant asserted that the doctors' reports stating he was mentally incompetent to represent himself were false and perjured:

> It's possible to give to any psychiatrist a bunch of false reports and get a good false opinion from that psychiatrist. And forgive me, but that's what I see that's going to come about. The false report of Di Francesca. The false, erroneous report of Dr. Norum. The false report of Kalish. [¶] It's the same as when the court goes to these perjurers and these people who have told untruths and then takes their reports and now gives them to a fourth psychiatrist and says, "give me an opinion based on those." What are you going to get? You're going to get the same regurgitation of these other opinions. These mental health professionals will almost never contradict one of the fellow brothers. They hang together like a group of thieves.

(2RT 291-292.)

Judge Edwards said that if appellant refused to be examined, the judge would revoke his pro per status. (2RT 292.) Appellant requested leave to call in witnesses to prove up the facts underlying what had been labeled as allegations of "conspiracy"; Judge Edwards denied the request. (*Id.* at 294-295.) Doctors likely to be appointed would be Kalish, Di Francesca, and Norum, but Edwards would consider also appointing Giraldi and a doctor who had not seen appellant before. (*Id.* at 295, 297.) At the request of the prosecutor, Edwards ruled that the orders directing the psychiatric professionals to examine appellant would include this directive, language taken from *Crandell, supra*, 46 Cal.3d 833, 854: "Does this defendant have the mental capacity to waive his constitutional right to representation by an attorney with a realization of the probable risks and consequences?" (*Id.* at 296.) Edwards reserved ruling on the motion for Russell's release of claimed work product material, as he had not completed going through the 15 boxes. (*Id.* at 299.) Further hearing would be on November 12, 1990, after receipt of the reports of the appointed mental health professionals. (*Id.* at 302.)

In an August 31, 1990, hearing before Judge Gill on appellant's motion to set aside the special circumstances and motion to continue briefing deadlines, the prosecutor and appellant both asked Gill to rescind the referral to Judge Edwards, in order to stop Edwards' investigation into appellant's mental condition as related to self-representation status. (3RT 308-315.) Judge Gill declined to do so, stating that any challenge to Judge Edwards' orders should be taken up on writ to the Court of Appeal. (*Id.* at 313, 315.) In addressing appellant's claims that he needed additional time for preparing motions, Judge Gill said he thought appellant was preoccupied with drafting briefs focused on allegations of misconduct by

Russell, which Gill compared to chasing after "windmills," and could best redeem the court's grant of his pro per status by getting on with the case. (*Id.* at 318.) Later, outside the presence of the prosecutor, Gill advised appellant that the question of his competency to represent himself, irrespective of Judge Edwards' anticipated ruling, remained always at issue before the trial court and that Gill himself had "responsibility to monitor" the issue as the case moved along and determine whether pro per status should be revoked. (*Id.* at 331.)

On September 4, 1990, Russell filed a sealed declaration regarding her claim that materials were privileged work product, explaining therein that appellant's intended defense was that evidence seized from his car bore his fingerprints only because he was kidnaped and forced to put his fingerprints on the evidence. (38CT 8348-8351.)

On September 5, 1990, Judge Edwards issued an order appointing Drs. Di Francesca and Koshkarian to examine appellant "to determine if he ha[d] capacity to waive his constitutional right to representation by an attorney with a realization of the probable risks and consequences." (14CT 3030.) On September 7, 1990, Judge Edwards appointed attorneys Hodge Crabtree and Beverly Barrett as standby counsel to serve in the event that appellant's pro se status was in the future revoked, over appellant's objection that it violated his religion to be represented by an attorney. (4RT 388; 14CT 3033.) On September 10, 1990, Edwards ordered that the materials as to which Russell claimed work product privilege be turned over to appellant. (15CT 3164-3170.)

On September 12, 1990, the prosecutor filed petition D012975 in the Court of Appeal, arguing that only the trial judge had authority to look into appellant's mental condition as related to his self-representation, that Boyle's ruling was insulated from re-litigation by collateral estoppel and

law of the case, and that appointment of standby counsel violated appellant's rights under *Faretta*. (72CT 15685-15709.) At the prosecutor's request, the Court of Appeal issued a stay of the mental capacity examinations on September 13, 1990. (15CT 3175.) On September 19, 1990, respondent superior court filed a response to the petition in D012975, attaching thereto a copy of the reporter's transcript of the November 3, 1989, *Faretta* hearing before Judge Boyle, and an affidavit of Judge Gill. (74CT 15982-15997, 15998-16031, 16032.) The response argued, inter alia, that Edwards' order was based in part on appellant's in-court conduct Edwards had observed, after Boyle's ruling. (*Id.* at 15994-15994.) On September 26, 1990, appellant filed a pro se petition for writ of mandate or prohibition, D013055, attacking Edwards' order for a psychiatric exam and seeking a stay of all proceedings in the trial court. (*Id.* at 16050-16075.) On September 28, 1990, the Court of Appeal consolidated the petitions of appellant and the prosecutor, and on October 2, 1990, respondent superior court filed a response in D013055. (15CT 3179; 74CT 15977-15981.)

On October 10, 1990, the Court of Appeal granted the consolidated petitions in D012975 and D013055 and directed the trial court to vacate Judge Edwards' orders ordering mental examinations and appointing standby counsel. (15CT 3182-3190.) It stated that although a trial court had discretion to order a psychiatric examination if it had a valid question regarding the defendant's mental capacity with respect to his in propria persona status (*Id.* at 3187, citing *Teron, supra*, 23 Cal.3d 103, 114), that discretion is "not unlimited." (*Ibid.*) The appellate court disagreed with Edwards' belief that Boyle had made his ruling on "limited documentation" and without awareness of the earlier proceedings before Judge Zumwalt, stating "we reach a different conclusion." (*Ibid.*) It said:

> 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.

(*Id.* at 3188.)

The Court of Appeal continued:

> 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.

(15CT 3188.) It stated that neither the findings of Judge Zumwalt, made "two and one half years" prior, combined with the medical reports underlying them, nor Judge Edwards' current concerns based on recent in-court observations, provided adequate basis to order the examinations. (*Ibid.*) Transcripts of recent proceedings before Judge Edwards bore out that appellant conducted himself in a "reasonable 'lawyer-like' fashion" and did not appear "mentally disturbed." (*Id.* at 3189.) Appellant's questioning of the conclusions in the mental health reports prepared in 1988 did "not demonstrate that he [was] suffering delusions or [was] mentally incompetent." (*Ibid.*)

As for appellant's earlier allegations of conspiracy between Russell and various judges to deny him his rights, the Court of Appeal stated:

> We do not consider Waldon's allegations of conspiracy, with which we are well familiar, to be sufficient grounds to question whether Waldon is mentally competent to waive his right to have an attorney represent him.

(15CT 3190.) The appellate court summed up its determination, thus:

> 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. [¶] An alternative writ or order to show cause would add nothing to the presentation. A peremptory writ is proper.

(15CT 3190.)

On October 17, 1990, in court on whether to extend the motion cutoff and continue the trial date, Judge Gill noted that the "language" of the Court of Appeal's opinion relating to Judge Edwards' orders suggested that the Court of Appeal wanted to see the case get to trial. (6RT 411.)

Thereafter various section 987.9 hearings were held in the trial court regarding appellant's funding requests for investigators, legal assistants, and related needs. In response to a petition for a writ after a funding request was denied, the Court of Appeal on December 14, 1990, issued an order stating:

> That Waldon's tactics and attitude have become vexatious to the superior court is clear as well as understandable. He has taken positions and assumed postures which, we presume, would not be tolerated of a practicing attorney. However, we must recognize that (1) this is a capital case, (2) Waldon has the unconditional right to represent himself, and (3) giving short shrift to his motions and objections will only prolong this disagreeable proceeding and increase the likelihood of reversal in a highly predictable appeal should Waldon be convicted.

(79CT 17008.)

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B. The Court of Appeal's Interference With the Trial Court's Return to the Question of Appellant's Self-Representation in Light of his Mental Condition was Error and Violated Appellant's Due Process Right to a Fair Trial Under the Federal Constitution and his Right to the Assistance of Counsel

1. The Court of Appeal was Wrong on the Merits When it Granted the Writ and Vacated Edwards' Order Appointing Psychiatric Experts

In granting the writ and vacating Judge Edwards' appointment of Di Franscesca and Koshkarian to examine appellant and assess his mental condition as related to his self-representation, taking into consideration the entire record and appellant's Navy psychiatric records, the Court of Appeal erred under *Teron*, *supra*, 23 Cal.3d 103, *Godinez*, *supra*, 509 U.S. 389, and the federal constitution for the reasons explained above. This contributed and led to an unfair trial where appellant represented himself although his mental impairment prevented his waiver of counsel from being knowing, intelligent, and voluntary and where the record demonstrates that he did not have the capacity to carry out the tasks of self-representation delineated in *McKaskle*, supra, 465 U.S. 168.

As explained above, references by the trial court from 1988 through 1990 as to whether appellant was "competent" to waive counsel (e.g. 2RT 261, 2RT 265-266, 2RT 268) signify doubt as to whether appellant's mental impairments were considered when waiver of counsel was knowing, intelligent, and voluntary. *Godinez*, *supra*, 509 U.S. 389, as further articulated in *Edwards*, *supra*, 554 U.S. 164, teaches that any defendant who is "competent to stand trial" also is "competent" to request self-representation under *Faretta* and to waive counsel, but that does not preclude imposition of a "heightened" standard in assessing whether a mentally impaired defendant enters a waiver of counsel that is knowing,

intelligent, and voluntary. (*Godinez*, *supra*, 509 U.S. 389, 401-402, citing *Johnson v. Zerbst* (1938) 304 U.S. 458, and *Westbrook v. Arizona* (1966) 384 U.S. 150.)

Recall, Judge Boyle believed he had no discretion to consider appellant's mental condition as related to whether the waiver of counsel was knowing, intelligent, and voluntary. Instead of considering pertinent parts of the record, including Judge Zumwalt's March 1988 ruling and the experts she appointed who reviewed appellant's psychiatric history, and appellant's written attacks on Russell and Judge Kennedy filed on December 1988 and April of 1990, respectively, alleging a rampant conspiracy against appellant, Boyle blindfolded himself in abnegation of his duties under *People v. Lopez* (1977) 71 Cal.App.3d 568, *People v. Burgener* (2009) 46 Cal.4th 231, *People v. Koontz* (2002) 27 Cal.4th 1041, *Teron*, *supra*, 23 Cal.3d 103, and *People v. Johnson* (2012) 53 Cal.4th 519, 533 ("[w]hether to deny self-representation due to mental incompetence is for the court . . . to determine based on *all of the information available to the court*"). Judge Edwards sought to fulfill the trial court's duties in that regard but the Court of Appeal deemed it an abuse of discretion, ruling as a matter of law that the trial court erred in considering all of the substantial information before it regarding appellant's significant mental impairments. That Judge Boyle's ruling was "not made lightly" (15CT 3188) is irrelevant where the record makes clear that Judge Boyle believed he had no discretion or authority to obtain and consider objective psychiatric opinion on appellant's mental condition as related to his entry of a knowing, intelligent, and voluntary waiver.

The Court of Appeal seemed to believe that appellant's "conduct of his defense" in the months after Boyle granted *Faretta* status had proven his aptitude. (15CT 3188.) It said that for nearly 10 months "no one had

questioned his mental or legal capacity to represent himself based upon his conduct of his defense." (*Ibid.*) To the extent that this conclusion implies there *was no evidence providing a basis to question* his capacity, it is ill-reasoned and unfounded, given that during that 10-month period of self-representation appellant, acting pro se, had

(1) vociferously continued to seek disqualification of judges, even those who ruled in his favor (63CT 14084-14102, 14223-14238; 52ACT 11083-11143; 13CT 2742-02753);

(2) ardently sought repeated extensions to file briefing in support of an appellate challenge to the verdict that he was competent to stand trial (12CT 2628-2629; 13CT 2830-02834; 54ACT 11618-11620, 11621-11625; 62CT 13786);

(3) claimed that the state of California, the Court of Appeal, and this Court had no jurisdiction over him (53CT 11311, 11289-11305; 1RT 24);

(4) sought to disqualify Judicial Council-appointed Judge LeRoy Simmons and to overturn his ruling on the grounds that the proceedings were not in appellant's presence (45CT 9972-9975, 9979-9992);

(5) requested the trial court to provide him with copies of *all* minutes of every case heard within the presiding criminal department during a two-week period in 1987 (13CT 2791-02793);

(6) given Sanchez grounds to admonish appellant in writing, with a copy to the court, that Sanchez was growing weary of appellant's penchant for filing specious and/or frivolous motions, his avoidance of preparing a defense, and his efforts to disrupt the orderly administration of justice (38CT 8294-8297);

(7) given Rosenfeld grounds to send appellant, with a copy to the court, similar written admonitions (38CT 3805-3807);

(8) moved for the removal of Sanchez as advisory/second-chair counsel and complained continually that advisory counsel were providing ineffective assistance (1RT 150-171; 96ART 5-47);

(9) asserted that his rights to freedom of religion were violated by the judge's use of the name "Billy Ray Waldon" rather than "N.I. Sequoyah" (2RT 256-259); and

(10) gotten into a protracted dispute with Sanchez about which requests the trial court should fund in addition to a dispute with the funding panel about who would be the trustee for the 987.9 funds (76CT 16412).

Through the pleadings before it in the many writs filed by appellant the Court of Appeal knew about many of these events, but ignored them. Judge Edwards *was* privy to the records Boyle refused to review and took pains to familiarize himself with much that had happened afterwards. The Court of Appeals' conclusion that there was no evidence of problems with appellant's mental capacity to represent himself was as wrong as Judge Edwards' was well-founded.

That the prosecutor praised appellant's "lawyer-like" behavior deserved no weight, as the Court of Appeal well should have known. An enormous body of case-law stands for the premise that legal outcomes are worse for the defense (that is, better for the prosecutor), when the defendant represents himself rather than proceeding with counsel. (See, e.g., *People v. Phillips* (2006) 135 Cal.App.4th 422, 428, citing *Lopez*, *supra* 71 Cal.App.3d 568, 572 [a defendant who wishes to self-represent must be warned "the prosecution will be represented by experienced, professional counsel who will have a significant advantage over him in terms of skill, training, education, experience, and ability"]; *McKaskle*, *supra*, 465 U.S. 168, 177, fn.8 ("[S]elf-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant

. . . ."].) Common sense dictates that it was neither prudent nor fair for the Court of Appeal to let itself be swayed by the argument and subjective opinion of the prosecutor, whose role in the situation was akin to that of the fox in the henhouse.

Nor were the prosecutor's other arguments well-taken. He insisted that "never, ever" was appellant allowed to tell "any judge anywhere what he wanted to do and why he wanted to do it" – but the facts belie this. Appellant had every opportunity to tell Judge Zumwalt in the spring of 1988 all these details when Zumwalt heard him in camera regarding his *Marsden* motion as well as his motion to represent himself. Regarding his dissatisfaction with Russell, appellant refused to discuss its basis and even withdrew his *Marsden* motion to avoid that conversation taking place. As for *Faretta* status, he had an opportunity to be heard by Judge Zumwalt in March of 1988, by the Court of Appeal thereafter (although he let the filing deadline pass), and by Judge Boyle in the fall of 1989. Indeed, the prosecutor himself put appellant on the stand during the competency proceeding and asked him to express his views. As for the pending competency writ as an alleged "trigger" of appellant's irascibility, although Russell initiated the writ, appellant himself kept it in litigation in the spring of 1990 once he was representing himself. By the time Judge Edwards ruled on July 31, 1990, the prosecutor's contention that red flags concerning appellant's mental state were all grounded in his battles with Russell made little sense – Russell had been off the case since January of 1989 and yet appellant continued to flail out toward judges and advisory counsel appointed to help him, even after granted pro se status.

C. The Court of Appeal's Ruling Cast a Shadow Over the Trial Court's Handling of Appellant's Pro Se Status During Trial

As Judge Gill's comments of October 19, 1990, show (6RT 411), the take-home message for the trial court from the Court of Appeal's ruling was that it was time for the case to go to trial – irrespective of judicial concerns about appellant's mental condition as related to his waiver of counsel and self-representation. The Court of Appeal sent a similar message on December 14, 1990, when it went out of its way to tell the trial court that appellant had an "unconditional right to represent himself" in the "disagreeable" case that had been unduly prolonged. (79CT 17008-17011.) Combined with the Court of Appeal's dismissal of the competency writ in disregard of this Court's order for further hearing, the appellate orders in the fall of 1990 sent a resounding message to the trial court. In essence, the Court of Appeal told the trial court that appellant's *Faretta* status was sacrosanct and could not be breached regardless of anything appellant said or did, and regardless of whether any judge on the bench came to entertain any degree of doubt or concern related to appellant's mental capacity as related to his self-representation, or even as related to his competency to stand trial.

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XIII.

CALIFORNIA'S DEATH-QUALIFICATION PROCEDURE VIOLATES DUE PROCESS, EQUAL PROTECTION, FAIR TRIAL, AND RELIABLE PENALTY GUARANTEES UNDER THE STATE AND FEDERAL CONSTITUTIONS AND STATE AND FEDERAL EQUAL PROTECTION PRINCIPLES

A. Introduction

Over appellant's objection, 14 prospective jurors were excused on the grounds that because they would not select the death penalty their ability to sit on appellant's jury was "substantially impaired" within the meaning of *Wainwright v. Witt* (1985) 469 U.S. 412: L.A. (17RT 2004); R.M. (21RT 2647-2648); R.R. (21RT 2739); C.S. (22RT 2828); J.S. (22RT 2841); D.T. (22RT 2912); M.T. (22RT 2925); A.T. (22RT 2933); J.W. (23RT 3159); M.D. (23RT 3183); C.L. (24RT 3293); D.H. (24RT 3373); D.He. (27RT 4062); and P.H. (28RT 4269). Appellant objected to the removal of Janet Warford on the grounds that her removal denied him a fair trial. He also objected on the grounds that if he were charged with a non-capital crime he would get a more "humane jury." (23RT 3157-3158.)[99] The trial court denied appellant's request that jurors who were opposed to the death penalty sit only on the guilt jury, and then be replaced with alternates (not so opposed) for the penalty phase. (22RT 2924, 2931; 23RT 3157.)

These rulings were error requiring the reversal of appellant's conviction and sentence. Empirical evidence now has overwhelmingly established that with respect to California death-qualified juries, a death-qualified jury, made up of jurors whose views on the death penalty will not

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[99]Appellant also objected that removal of the prospective jurors violated the individuals' freedom of religion and that the removal eliminated people from the jury who were willing to do what was morally right. (17RT 2004; 21RT 2645-2646; 21RT 2737-2738; 22 RT 2828-2829, 2841, 2910, 2924.)

"prevent or impair" the performance of their sentencing duties under governing legal standards, differs markedly from a typical jury and tends to favor the prosecution at the guilt phase. Therefore, this Court must return to the question, raised in *Witherspoon v. Illinois* (1967) 391 U.S. 510 and *Hovey v. Superior Court* (1980) 28 Cal.3d 1, of whether the state's interest in submitting the penalty issue to a jury capable of imposing capital punishment justifies compromising capital defendants' interests in a completely fair determination of guilt and innocence, given the possibility of easily accommodating both interests by means of a bifurcated trial. (*Witherspoon, supra*, 391 U.S. 510, 520, fn. 18; *Hovey, supra*, 28 Cal.3d 1,14 & fn. 28.)

Appellant recognizes that this Court has rejected recent arguments that it should revisit the issue on this basis (see, e.g., *People v. Mills* (2010) 48 Cal.4th 158, 171-173; *People v. Howard* (2010) 51 Cal.4th 15, 26-27), but urges that it reconsider the issue. Contrary to this Court's conclusions in *Mills* and *Howard*, *Lockhart v. McCree* (1986) 476 U.S. 162 does not answer this question because the United States Supreme Court therein (1) disclaimed that such evidence existed, (2) focused primarily on the fair cross-section requirements of *Taylor v. Louisiana* (1975) 419 U.S. 522 and *Duren v. Missouri* (1979) 439 U.S. 357, rather than the jury neutrality requirements of *Witherspoon* or the jury function requirements of *Ballew v. Georgia* (1978) 435 U.S. 223, and (3) did not anticipate developments in constitutional jurisprudence that would alter the calculus in play. As such, this Court should return to the inquiry it began in *Hovey*, afford *Lockhart* no more weight than it deserves, and hold that California's death-qualification violates due process, fair trial, and reliable penalty determination guarantees under the federal and state Constitutions. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Raven v. Deukmejian* (1990)

52 Cal.3d 336, 352-354 [federal law does not govern questions raised under the California Constitution].) This Court also should recognize that California death-qualification violates state and federal equal protection principles.

B. Legal Background

In *Witherspoon*, the United States Supreme Court addressed a claim that death-qualification led to the seating of a *guilt* jury that was non-neutral, in favor of the prosecution. (*Witherspoon*, *supra*, 391 U.S. 510, 520, fn. 18.) The Court found the evidence undeveloped, stating:

> A defendant convicted by . . . a [unitary] jury in some further case might still attempt to establish that the jury was less than neutral with respect to guilt. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence – given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishments. That problem is not presented here, however, and we intimate no view as to its proper resolution.

(*Ibid.*)

In *Hovey*, this Court considered evidence of how the death-qualification process affected the seating of guilt juries. It considered favorably the petitioner's arguments that seating juries from a death-qualified pool would violate due process and fair trial rights under the Fourteenth and Sixth Amendments, and under "neutrality" precepts set forth in *Ballew*, *supra*, 435 U.S. 223, and *Witherspoon, supra*, 391 U.S. 510. This Court explained that a "pure cross section approach" under *Taylor, supra*, 419 U.S. 522, and *Duren*, *supra*, 439 U.S. 357, was a distinct line of

analysis and was not dispositive.[100] This Court suggested that if a defendant raised a "substantial doubt" whether a California death-qualified jury is neutral with respect to guilt, the state then would have the burden of showing an interest counterbalancing the infringement of defendants' interest in a fair capital trial, so as to justify its actions given the availability of other methods of empaneling death juries. (*Hovey, supra*, 28 Cal.3d 1, 14 & fn. 28.)

This Court found the empirical evidence on the "neutrality" theory persuasive in proving that death-qualified jury pools (that is, those from which had been excluded potential jurors who never would consider a death sentence but could still vote for guilt[101]) were non-neutral with respect to guilt, to the detriment of the accused. (*Hovey, supra*, 28 Cal.3d 1, 26.) Nevertheless, the Court rejected the petitioner's claims because the empirical studies he offered on the question of neutrality failed to take into account that California death-qualification excludes for cause *both* those who would never consider a *death* sentence, and those who never would consider a *life* sentence. (*Id.* at p. 68.) The failure of the empirical evidence to address this potential effect was called the "*Hovey* problem."

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[100]Under the *Taylor-Duren* doctrine, once a petitioner shows exclusion of a "cognizable class," viz. a group of "traditional minorities," a reviewing court must effectively *presume* the exclusion resulted in a nonneutral jury. (*Hovey, supra*, 28 Cal.3d 1, 20, fn. 45.) Under the doctrine derived from *Witherspoon* and *Ballew*, in contrast, the petitioner admits that no cognizable class is involved and thus takes on the "burden of demonstrating – by empirical proof or otherwise – that the resulting jury is probably not neutral and that this nonneutrality operates to his detriment." (*Ibid.*)

[101]The Court in *Hovey* designated this group as "guilt phase includables," a term used again in the subsequent opinion of this Court in *People v. Fields* (1985) 35 Cal.3d 329.

In *Fields*, *supra*, 35 Cal.3d 329, 343, this Court held that the non-neutrality of the guilt jury had not been shown due to the *Hovey* problem. It also held that those who automatically would vote against the death penalty are not a cognizable class under the "fair-cross section" test of in *Taylor* and *Duren*, and the state's interest in maintaining a unitary capital jury death-qualified before guilt has "moderate weight and significance," sufficient to justify the exclusion of the non-cognizable group. (*Id.* at p. 349.) Two justices dissented, holding the opinion that the exclusion of "guilt phase includables," a cognizable class, violated the fair cross-section requirement of the state and federal Constitutions. (*Id.* at pp. 377, 387 (dis. opn. Bird, C.J., dis. opn. Reynoso, J.).)

In *Lockhart*, *supra*, 476 U.S. 162, 165, the majority of a divided United States Supreme Court opined that the empirical evidence presented by the habeas petitioner was unpersuasive, but even if it were persuasive, the death-qualification process did not violate a defendant's constitutional right to be tried by an impartial jury selected from a representative cross-section of the community under *Taylor* and *Duren*. The Court noted "serious flaws" it perceived in the empirical evidence (*id.* at p. 168), but then also addressed petitioner's arguments assuming arguendo that death-qualified juries are more "conviction-prone" than non-death-qualified juries. (*Id.* at p. 173.) Regarding the fair cross-section claim under the Sixth Amendment and the *Taylor* and *Duren* precedents, the majority held that *Witherspoon*-excludables are not a cognizable class or distinctive group in the community. (*Id.* at p. 174.) The Court also rejected the petitioner's claim that death qualification violated his right to an "impartial jury" under *Witherspoon*. (*Id.* at p. 183.) It found that the state's interest in a unitary capital jury is "entirely proper" (*id.* at p. 180), and a jury selected from a fair cross-section of the community is "constitutionally impartial" so long as

jurors "can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." (*Id.* at pp. 183-184.)

Five justices joined the majority in *Lockhart*, while one justice concurred and three dissented. The dissent found the petitioner's evidence that death-qualified juries are likely to be skewed in favor of the prosecution was "overwhelming." (*Lockhart, supra*, 476 U.S. 162, 184 (dis. opn. of Marshal, J.).) It further posited that in any event, the petitioner would win the day under the analysis set forth in *Ballew, supra*, 435 U.S. 223, that impairment of jury function resulting from death-qualification violates due process. (*Id.* at pp. 198-204.)[102]

C. This Court Should Revisit Questions First Taken up in *Hovey*, Acknowledge the Skewing Effect of California Death Qualification on Guilt Juries, and Re-examine Whether the Result Comports With State and Federal Constitutional Requirements

Much has changed since this Court addressed the constitutional effect of California death-qualification on guilt juries in *Hovey* in 1980. The *Hovey* problem has been resolved and empirical evidence that death-qualified guilt juries have a tendency to favor the prosecutor has been reinforced. The United States Supreme Court in *Lockhart* has denied relief under the fair cross-section cognizable group doctrine, and has defined

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[102]The Court in *Ballew* held that using five-person juries in misdemeanor trials was unconstitutional, because the smaller juries were likely to be deficient in the quality of their deliberations, the accuracy of their results, the degree to which they would tend to favor the prosecution, and the extent to which they adequately represent minority groups in the community. (*Lockhart, supra* 476 U.S. 162,198 (dis. opn. Marshal, J.).) The dissent in *Lockhart* opined that death-qualified juries in capital cases, which place defense interests at even more risk in cases where the stakes are strikingly higher, had been shown by the empirical evidence to be deficient in all of the same respects. (*Id.* at p. 199.)

"constitutionally impartial" under *Witherspoon* to mean jurors able to "conscientiously and properly" carry out their sworn duty to apply the law to the facts of the case. However, later federal case law raises doubt whether the present Court would hew to that definition of "constitutionally impartial." United States Supreme Court precedent does not govern the question of whether death-qualification is constitutional under state law. This Court should return to the questions raised in *Hovey* and consider whether California's death-qualification of guilt juries comports with due process under the federal and state Constitutions.

1. Empirical Evidence Resolves the *Hovey* Problem and Establishes That Death Qualification Skews Capital Guilt Juries in Favor of the Prosecution

In *Hovey*, this Court found the data showing the effect of the death-qualification process on the pool of eligible jurors deficient to justify relief, because the evidence failed to consider that capital jury selection in California yields a potential juror pool that is both death-qualified and life-qualified (viz., both automatic life and automatic death jurors are excluded). (*Hovey, supra*, 28 Cal.3d 1, 18-19.) This Court should now acknowledge that new data takes this factor into account and reinforces the showing that death-qualification compromises capital defendants' interest in a completely fair guilt trial.

After *Hovey* was decided, a study was conducted specifically addressing the "*Hovey* problem." (Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure* (1984) 78 J. American Statistical Assn. 544 (hereafter "Kadane, *Juries Hearing Death Penalty Cases*").) The article reviewed studies presented in *Hovey* and concluded that excluding the automatic death and automatic life jurors resulted in a "distinct and substantial anti-defense bias" at the guilt phase. (*Id.* at pp. 545-551.) Professor Kadane conducted additional research using data

unavailable when *Hovey* was decided. (See Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors* (1984) 8 Law & Hum. Behav. 115 (hereafter "Kadane, *After Hovey*").) This study proved that "death qualification biases the jury pool against the defense." (*Id.* at p. 119.) More recent studies have reached the same result. (See, e.g., Seltzer et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example* (1986) 29 How. L.J. 571, 604 (hereafter "Seltzer et al.").)

Social scientists also studied the attitudes about the death penalty of jurors called to serve in capital trials. (Luginbuhl & Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials* (1988) 12 Law & Hum. Behav. 263 (hereafter "Luginbuhl & Middendorf").) The study's findings took account of the automatic death jurors as required by *Hovey*. Its findings were critical of death qualification and reinforced many of the studies that the *Hovey* decision had discussed. (*Id.* at pp. 276-278.)

A more recent study updated the past research to account for changes in society and the law, including the increase in support for the death penalty and the United States Supreme Court's decision in *Morgan v. Illinois*, *supra*, 504 U.S. 719, which requires the removal of the automatic death jurors. (See Haney et al., *"Modern" Death Qualification: New Data on Its Biasing Effects* (1994) 18 Law & Hum. Behav. 619, 619-622 (hereafter "Haney").)[103] The Haney study was "likely the most detailed

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[103]The majority in *Lockhart* noted that a previous study by Haney had been submitted by the petitioner as part of the proceedings. (*Lockhart*, *supra*, 476 U.S. 162, 170, fn. 6, citing Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death Qualification Process* (1984) 8 Law & Hum. Behav. 121.) Obviously, the *Lockhart* majority could not

(continued...)

statewide survey on Californians' death penalty attitudes ever done." (*Id.* at pp. 623, 625.) It found that: "Death-qualified juries remain significantly different from those that sit in any other kind of criminal case." (*Id.* at p. 631.) These differences favor the prosecution. (*Ibid.*)

In 1990, a group of researchers, under the leadership of Professor William J. Bowers, funded by the Law and Social Sciences Program of the National Science Foundation, formed the Capital Jury Project (hereafter "CJP"). One of its purposes was to generate a comprehensive and detailed understanding of how capital jurors actually make their life or death decisions. (See *Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings* (1995) 70 Ind. L.J. 1043.) The CJP's work addressed many of the problems referenced by the majority decision in *Lockhart*. It studied actual jurors; that is, 1201 sitting jurors from 354 cases, and how their decisions were influenced by their peers during jury deliberations. (Bowers & Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing* (2003) 39 Crim. L. Bull. 51.) By studying actual jurors, the CJP obtained research data uncontaminated by the influence of automatic life jurors, because those potential jurors were excused during the death-qualification process at voir dire. (See Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation* (Fall 2006) 38 Ariz. St. L.J. 769, 784 (hereafter "Rozelle").) The CJP study confirmed that the death-qualification process results in juries more prone to choose the death penalty and *more prone to convict at the guilt phase*. (*Id.* at p. 785, emphasis added.) The research showed that the death-qualification process skews juries because (1) automatic death penalty jurors are over-

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[103](...continued)
have considered Professor Haney's follow-up study.

represented; (2) seated jurors tend to decide prematurely to convict. (*Id.* at pp. 787-793.)

2. The Majority Opinion In Lockhart has Been Soundly Criticized and Would no Longer Hold up

The majority opinion in *Lockhart* has been criticized for its analysis of both the data and the law related to death qualification. (See, e.g., Smith, *Due Process Education for the Jury: Overcoming the Bias of Death Qualified Juries* (1989) 18 Sw. U. L. Rev. 493, 528 (hereafter "Smith") [the Court's analysis in *Lockhart* was "characterized by unstated premises, fallacious argumentation and assumptions that are unexplained or undefended"]; Thompson, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree* (1989) 13 Law. & Hum. Behav. 185, 202 (hereafter "Thompson") [the *Lockhart* opinion is "poorly reasoned and unconvincing both in its analysis of the social science evidence and its analysis of the legal issue of jury impartiality"]; Byrne, *Lockhart v. McCree: Conviction-Proneness and the Constitutionality of Death-Qualified Juries* (1986) 36 Cath. U. L. Rev. 287, 318 (hereafter "Byrne") [*Lockhart* opinion is a "fragmented judicial analysis," representing an "uncommon situation where the Court allows financial considerations to outweigh an individual's fundamental constitutional right to an impartial and representative jury"].)

Scholars have criticized the handling of the social science data by the *Lockhart* majority. (See generally Moar, *Death Qualification Juries in Capital Cases: The Supreme Court's Decision in Lockhart v. McCree* (1988) 19 Colum. Hum. Rts. L. Rev. 369, 374 (hereafter "Moar") [detailing criticism of the *Lockhart* majority opinion's analysis of the scientific data]; see also Bersoff & Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research* (1995) 2 U. Chi. L. Sch.

Roundtable 279; Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology* (1990) 66 Ind. L.J. 137.) The studies categorically dismissed by the majority in *Lockhart* were carried out in a "manner appropriate and acceptable to social or behavioral scientists." (Smith, *supra*, 18 Sw. U. L. Rev. at p. 537.) The Court neglected to evaluate the studies as a whole body of data, thus ignoring their powerful cumulative effect. (*Ibid.*) When the Court found a "flaw" in a study, or a group of studies, it "dismissed it from further consideration, never considering that alternative hypotheses left open by shortcomings in studies of one type might be ruled out by studies of another type." (Thompson, *supra*, 13 Law & Hum. Behav. at p. 195.) The Court dismissed any study it deemed less than definitive. (*Ibid.*) "The Court's adamant refusal to acknowledge the strength of the evidence before it cast [. . .] grave doubts upon its ultimate holding in *Lockhart*." (*Ibid.*)

As another researcher concluded:

> The fact that the Supreme Court can misrepresent and grossly misinterpret the findings in [these studies] renders the Court's interpretation of all the empirical evidence before it in [*Lockhart v.*] *McCree* suspect. Social science research cannot provide answers with *absolute* certainty. We will never know precisely how many convicted defendants in death penalty cases would have been acquitted if death qualification did not take place prior to the guilt-innocence stage.

(Seltzer et al., *supra,* 29 How. L.J. at p. 590.)

The Supreme Court "erred in its rejection of the empirical evidence." (Moar, *supra,* 19 Colum. Hum. Rts. L. Rev. at p. 396.) "Although there are valid criticisms of some of the *Witherspoon* studies and the potential effects studies, none of their independent weaknesses appear to justify the Court's rejection of the studies' significance for McCree's claim that the death-qualification procedure tends to produce guilt-prone juries." (*Id.* at p. 382.)

The Court in *Lockhart* was presented with over fifteen years of scholarly research on death-qualification procedures, based upon a "wide variety of stimuli, subjects, methodologies, and statistical analyses." (*Id.* at pp. 386-387.) From both a scientific and a legal perspective, "[g]iven the seriousness of the constitutional issues involved [. . .] and the extent and unanimity of the empirical evidence, it is hard to justify [the Court's] superficial analysis and rejection of the social science research." (*Id.* at p. 387.) The majority decision in *Lockhart* "ignored the evidence which indicates that a death-qualified jury, composed of individuals with pro-prosecution attitudes, is more likely to decide against criminal defendants [at guilt] than a typical jury which sits in all noncapital cases." (Byrne, *supra*, 36 Cath. U. L. Rev. at p. 315.)[104]

The majority in *Lockhart* also rejected the relevance of empirical evidence of a jury more prone to convict. It held that a diversity of viewpoints on a guilt jury was constitutionally superfluous so long as no one individual on the jury was so biased as to be ineligible to serve. (*Lockhart, supra*, 476 U.S. 162, 178.) Subsequent legal developments suggest that our high court of today would reject such a cramped view of

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[104]This Court mistakenly asserts that it need not reexamine the new empirical evidence because the evidence was rejected by the majority in *Lockhart*. In *Mills, supra*, 48 Cal.th 158, 172, fn. 1, this Court asserted that the majority in *Lockhart* must have rejected the Kahane study described above (see p. ???, *supra*) because the material had been cited by the dissenters (*Lockhart, supra*, 476 U.S. 162, 187, fn. 2 (dis. opn. of Marshall, J.).) As such, this Court reasoned, the *Lockhart* majority must have considered the evidence and found it unpersuasive. There is no evidence that this is so. The majority in *Lockhart* delineated the empirical evidence it listed and found unpersuasive in three footnotes. (*Id.* at p. 169-170 fns. 4, 5, 6.) The Kahane study is not listed in these footnotes. Moreover, there have been many studies since the *Lockhart* opinion confirming the skewing effect of death qualification on the guilt determination.

the constitutional guarantee of jury impartiality. For example, the United States Supreme Court subsequently stated that an *impartial* jury, in its ideal sense, includes representatives of all the "economic, social, religious, racial, political and geographical groups of the community," and although such representation is impossible, court officials shall not engage in the "systematic and intentional exclusion of any of these groups" as potential jurors. (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 146, fn. 19, quoting *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217, 220.[105])

Further, the Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477-478, transformed jurisprudence concerning the jury trial right under the federal Constitution, holding that the right of "trial by jury" is of the highest constitutional order. (*Ibid.*) It seems unlikely that the jury fact-finding the *Apprendi* court deemed to be of paramount import could be carried out by a California death-qualified jury likely to be skewed in favor of the prosecution. The United States Supreme Court's holding in *Apprendi* and related cases suggests that it might define juror "impartiality" more broadly than did the Court in *Lockhart*. The Court in *Apprendi* relied heavily on *U.S. v. Gaudin* (1995) 515 U.S. 506, 510. (*Id.* at p. 477.) In *Gaudin*, the Court quoted ancient authority establishing that the Sixth Amendment guarantees trial by an "impartial jury," meaning one of twelve of the defendant's "equals and neighbors" who have been *"impartially selected."* (*Gaudin, supra*, 515 U.S. 506, 510, emphasis added.) In *Sullivan v.*

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[105]The Court in *J.E.B.* continued, quoting *Thiel*: "Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 146, fn. 19, quoting *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217, 220.)

Louisianna (1993) 508 U.S. 275, 277, the Court held that the right to trial by jury in serious criminal cases is "fundamental to the American scheme of justice" and its most important element is the right to have the jury reach the finding of "guilty," and thus error in jury instructions on the "beyond a reasonable doubt" standard employed by the guilt jury is structural error beyond the touch of harmless-error review.

In addition, the Court recently acknowledged with respect to another Sixth Amendment guarantee, the right to counsel, that the Sixth Amendment commands *not only* that a trial be fair, but also that "a particular guarantee of fairness be provided." (*U.S. v. Gonzales-Lopez* (2006) 548 U.S. 140.) Analogizing to *Gonzales-Lopez*, the Sixth Amendment provision of a "particular guarantee of fairness" should likewise apply to the impartial jury right in capital cases; so, capital defendants are entitled to not only an "impartial" guilt jury (within the narrow definition given in *Lockhart*) but also one that has been "impartially selected."

3. California Death Qualification Before Selection of the Guilt Jury Violates Due Process Under the Federal and State Constitutions

Appellant contends that the government's systematic exclusion of "guilt phase includables" from capital guilt juries, which results in juries with a tendency to favor the prosecution, violates due process and renders appellant's conviction invalid. In *Hovey*, this Court explained that if petitioners' evidence had resolved the *Hovey* problem, and established a "substantial doubt" that California death-qualified juries are not neutral on guilt, it would need to assess whether the state's interest in a unitary jury death-qualified before the guilt stage outweighs defendants' interest in a fair trial, given the alternatives to the unified jury procedure. (*Hovey, supra,* 28 Cal.3d 1, 14 & fn. 28.) It stated that a constitutional challenge in

this context could be approached from three different lines of analysis. (*Id.* at pp. 17-18 & fns. 37 & 38.) Purely cross-sectional cases such as *Taylor* and *Duren* represent one theory of relief, which was not then before the Court. (*Ibid.*) A second theory, bottomed on *Witherspoon*, involved significant cross-section concerns but was more closely grounded on Fourteenth Amendment due process principles and Sixth Amendment concerns.[106] (*Ibid.*) The third theory relied on the "purpose and functioning" analysis developed in *Ballew* and the related line of cases. (*Ibid.*)

The Court in *Hovey* held that the latter two lines of analysis "deal fundamentally with the same basic topic – the scope of the constitutional right to a trial by an impartial jury" under the guarantee of due process. (*Hovey, supra*, 28 Cal.3d 1, 17-18 & fns. 37 & 38.) A habeas petitioner's burden of proof would be to establish a "substantial doubt" as to whether a California death-qualified jury is neutral with respect to guilt, because long-standing federal constitutional jurisprudence holds that due process is violated by circumstances that create the "risk" or "likelihood" of bias or unfairness. (*Ibid.*, citing *Peters v. Kiff* (1972) 407 U.S. 493, 502-503; *Tumey v. Ohio* (1927) 273 U.S. 510.)

Because *Hovey* so defined this as the defendant's "burden of proof," it is fair to assume that once it is met, the burden shifts to the state to establish that its interest in a unitary jury death-qualified before the guilt phase is sufficient to justify the infringement of defendants' right to a fair

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[106]The United States Supreme Court embraced this type of "blending" of Fifth Amendment due process protections and Sixth Amendment jury verdict rights in *Sullivan v. Louisiana*, which held that reasonable doubt protections and jury trial rights were interrelated and infringement of the former would lead to a violation of the latter under the Sixth Amendment. (*Sullivan, supra*, 508 U.S. 275, 281.)

guilt trial, given that alternative procedures could be used. As this Court has recognized that the state interest in a unitary jury death-qualified before guilt as "moderate" (*Fields*, *supra*, 35 Cal.3d 329, 352; *Lockhart*, *supra*, 476 U.S. 162, 180 [state's interest was "entirely proper"]), something akin to "mid-level constitutional scrutiny" would apply.

The United States Supreme Court explained "mid-level" scrutiny in *Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980) 447 U.S. 557, 566, a case addressing constitutional protections for commercial speech. The test asks: (1) is the asserted government interest substantial? (2) if so, does the state action directly advance the governmental interest asserted, viz., is there a "direct link" between them? (3) if so, can the state's interest be served through more limited means, viz., is the state's measure more extensive or burdensome than necessary to serve its interest? (*Ibid.*) That Court also has noted that under the mid-level scrutiny test articulated in *Craig v. Boren* (1976) 429 U.S. 190 (test used for equal protection challenges based on gender), the state cannot raise cost and administrative inconvenience as an adequate constitutional justification. (*Rostker v. Goldberg* (1981) 453 U.S. 57, 95, citing *Frontiero v. Richardson* (1973) 411 U.S. 677, 690-691.) In considering the present claim under federal law, this test would apply; it also informs a similar analysis under state constitutional law.

a. There is a Substantial Doubt Death-Qualified Juries are Neutral on Guilt

As explained in section C.1, above , the scientific community has come forth with copious evidence that California death-qualified juries are skewed in favor of the prosecution at guilt. Moreover, the magnitude of the skewing against capital defendants keeps increasing due to changes in the law. Under the *Witherspoon v. Witt* test, trial courts now disqualify not only

potential jurors who would "automatically" vote against the death penalty, but also potential jurors deemed by the court to hold views on the death penalty that could "substantially impair" the performance of their duties as jurors. (*Witt, supra*, 469 U.S. 412, 424.)

Conviction of a capital crime and special circumstance open the door to the possibility of a death sentence in the penalty phase – imperiling the weightiest constitutionally-protected interest of all, the defendants' life. Exclusion of "guilt phase includables" significantly increases the likelihood of a capital conviction and special circumstance finding. In *Hovey*, this Court found that the "guilt phase includables" tend to differ from the rest of the jury pool in many matters in addition to their unwillingness to vote for a death sentence. (*Hovey, supra*, 28 Cal.3d 1, 26-69.) They tend to differ from other jurors in (1) the votes they cast on guilt or innocence and on lesser included offenses (*id.* at pp. 26-42); (2) their attitudes toward the criminal justice system, toward basic principles of criminal law, and toward the litigants (*id.* at pp. 43-54); and (3) their evaluation of the evidence and their assessment of the reasonable doubt standard. (*Id.* at pp. 57-60.) In each of these respects, the "guilt phase includables" have been found to be less prosecution-oriented than the remaining jurors.

Defendants' interest in this regard is constitutionally protected. Under federal law, it is protected under the right to an "impartial jury"; although *Lockhart* holds otherwise, more recent United States Supreme Court jurisprudence suggests a different outcome, as explained above. More importantly, the interest is constitutionally protected under state due process principles. As stated in *Hovey*:

> Clearly, the constitutional principle of achieving jury neutrality through diversity is relevant to a determination of guilt as well as penalty. Every juror brings to the guilt phase a number of personal characteristics which will "play an

> inevitable role" in assessing the accused's guilt or degree of guilt. [Citation.] As members of this court have recently observed, each juror brings to the deliberations (on guilt or innocence) his personal store of experience, knowledge, and judgment; these are the tools by which he tests the credibility, the probability of the testimony of witnesses, or of the inferences to be drawn from circumstances. . . . [Citation.] In addition, the juror must determine whether the evidence thus evaluated amounts to proof "beyond a reasonable doubt" of the truth of the charges. . . . Each of us, in effect, has his own subjective sense of when a chance of innocence can be disregarded as de miminis, but our respective senses are surely different.

(*Hovey, supra,* 28 Cal.3d 1, 21-22, footnotes and quotations omitted.) Thus, relying on both *Witherspoon* and state law, this Court in *Hovey* held, "[m]anifestly, fair and impartial jurors will bring to the determination of guilt a diversity of experience, knowledge, judgment and viewpoints, as well as differences in the 'thresholds of reasonable doubt.'" (*Id.* at p. 22.)[107]

b. The State Interest at Stake is Substantial

Case law has held that the state's interest in conducting unitary capital trials with death-qualification taking place before the guilt phase is "moderate" (*Fields, supra*, 35 Cal.3d 329, 352) and "entirely proper" (*Lockhart, supra*, 476 U.S. 162, 180). (See also *People v. Ayala* (2000) 23 Cal.4th 225, 304 [identifying state interest in death qualification at the guilt phase as "the legislative preference to us[ing] a single jury to determine guilt and penalty"].) Appellant assumes for the purpose of argument that

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[107]The Court in *Hovey* also heralded the need for diversity of viewpoint on guilt juries under *Ballew v. Georgia*, here again relying on state law to bolster the analysis. (*Hovey, supra*, 28 Cal.3d 1, 23-24.) It noted that diversity "aids the accuracy of jury decision-making" by counter-balancing jury members' various biases, and also that diversity helps make deliberation more productive. (*Ibid.*)

respondent will establish a "substantial" state interest at the first step of the mid-level scrutiny analysis.

c. California's Death Qualification is Significantly More Burdensome Than Necessary to Serve the State's Interest

California's action in death-qualifying capital juries before guilt directly serves its interest in conducting unitary capital trials with jurors capable of imposing the death penalty. However, it is not narrowly drawn to serve that interest, it is significantly more extensive than necessary, it imposes numerous drawbacks, and it cannot be justified given the availability of alternatives.

The state previously has pointed to California's "long established legislative preference" for a single jury qualified to try both phases of the trial, and has argued that it is justified on the grounds of expense and convenience. (See *Fields*, *supra*, 35 Cal.3d 329, 351). For example, the state may argue that if a bifurcated jury were used, the entire case would have to be retried at penalty, because the "circumstances of the capital crime" and the existence of special circumstances found to be true are aggravators in the penalty phase under Pen. Code section 190.3, subdivision (a). (*Ibid.*) However, cost and inconvenience to the state are not, in themselves, sufficient constitutional justification for the challenged state action. (*Rostker, supra,* 453 U.S. 57, 95; *In re Oliver* (1948) 333 U.S. 257, 280-281 ["restrictions upon authority for securing personal liberty, as well as fairness in trial to deprive one of it, are always inconvenient – to the authority so restricted"].)

There is a far preferable alternative that could be employed to serve the state's core interest, which is seating a jury capable of imposing the death penalty. A guilt jury could be seated along with a substantial number of alternates, perhaps six or eight, following an abbreviated voir dire asking

only whether potential jurors have views on the death penalty such that they would vote against guilt regardless of the evidence. (See Pen. Code, § 1089 [permitting trial courts to appoint alternates if it determines the trial is "likely to be a protracted one"].) At the penalty phase, full death-qualification voir dire could be carried out and jurors who could not enforce the death penalty could be replaced by alternates. As explained by Justice Reynoso in his dissent in *Fields*, through a system such as this, "one jury is preserved." (*Fields, supra*, 35 Cal.3d 329, 387 (dis. opn. Reyonoso, J.).)

This alternative would avoid the inconvenience and cost of double juries sitting through both phases, or having to retry guilt (to establish "circumstances of the crime") at penalty. The cost of selecting a few extra alternates would be minimal. Moreover, in cases where the guilt-phase outcome is acquittal, conviction of a lesser offense, or a hung jury as to the capital crime the time and expense of death-qualification voir dire would be avoided because there would be no penalty phase. The alternates would hear all the evidence at trial, and would sit in on deliberations and be fully aware of discussions therein concerning the weight of the evidence and inferences to be drawn from it. Indeed, this Court noted that such approach might be "the most practical" one (*Fields*, *supra,* 35 Cal.3d 329, 351), while rejecting the proposal of petitioner therein that alternates join the jury *after* it returned a guilt-phase verdict. As Justice Reynoso explained,

> The availability of such a procedure [of using alternates to replace guilt-phase includables after a verdict] would render particularly insubstantial the state's interests in completely excluding such a group from capital juries. Administrative convenience and fiscal conservation, advanced by the state to justify the exclusion, would not be significantly impinged by impaneling one jury with sufficient alternates able to fully participate in the penalty phase. At the same time capital defendants would be assured that their guilt or innocence would be determined by a representative jury.

(*Id.* at p. 357 (dis. opn., Reynoso, J.).)

Moreover, the present system, death-qualification before selection of the guilt jury, has numerous drawbacks *aside from* the skewing the jury in favor of the prosecution. For example, it is well established that the procedure results in significantly fewer women and African Americans being seated on the jury. Numerous studies have shown that "proportionately more blacks than whites and more women than men are against the death penalty." (Moar, *supra*, 19 Colum. Hum. Rts. L. Rev. at pp. 374, 386.) Therefore, death qualification "tends to eliminate proportionately more blacks than whites and more women than men from capital juries," adversely affecting two distinctive groups under a fair cross-section analysis (*id.* at p. 388), thus having a "detrimental effect on the representation of blacks and women on capital juries." (*Id.* at p. 396.) Professor Seltzer similarly found that "the process of death qualification results in juries which under-represent blacks." (Seltzer et al., *supra*, 29 How. L.J. at p. 604.) Professors Luginbuhl and Middendorf found a significant correlation between attitudes about the death penalty and the gender and race of jurors. (Luginbuhl & Middendorf, *supra*, 12 Law & Hum. Behav. at p. 269.)

This Court has acknowledged these disparities related to race and gender exist and are significant. In *Hovey*, the Court cited polls showing that women were more likely than men to be opposed to the death penalty by an average of 11 percent, and similar evidence showing that African Americans were at least 20 percent more likely than whites to oppose the death penalty. (*Hovey, supra*, 28 Cal.3d 1, 55-57.) It stated that the correlations between opposition to capital punishment and racial and sexual characteristics "have tended to appear with boring regularity ever since these topics have been researched" and that "[n]o one who has ever done

[such] a survey . . . has failed to find these differences." (*Id.* at p. 57, quotations omitted.)

Another drawback is that the present system is subject to misuse by prosecutors. Research shows a substantial risk that prosecutors will misuse their charging discretion to take advantage of the fact that death qualification leads to pro-prosecution guilt juries. A study in 1984 concluded that a "prosecutor can increase the chances of getting a conviction by putting the defendant's life at issue." (Thompson, *supra*, 13 Law & Hum. Behav. at p. 199, citing Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data* (1984) 8 Law & Hum. Behav. 7, 13.) Some prosecutors have acknowledged that death qualification skews the jury and that they used the practice of charging the death penalty to gain an advantage in obtaining conviction-prone juries. (See Garvey, *The Overproduction of Death* (2000) 100 Colum. L. Rev. 2030, 2097 & fns. 163 & 164 (hereafter "Garvey"), quoting Rosenberg, *Deadliest D.A.*, N.Y. Times Magazine (July 16, 1995) p. 42.) Through ensuring that the voir dire process includes death-qualification, prosecutors are able to eliminate the segment of the jury pool most likely to be critical of police and forensic testimony and most likely to under-value the "beyond a reasonable doubt" standard. (*Ibid.*)

In *Lockhart*, the United States Supreme Court declined to consider the prosecutorial motives underlying death qualification, because the petitioner had not argued death qualification was instituted as a means "for the State to arbitrarily skew the composition of capital-case juries." (*Lockhart*, *supra,* 476 U.S. 162, 176.) The dissent in *Lockhart* predicted that "[t]he State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under

today's decision, give the prosecution license to empanel a jury especially likely to return that very verdict." (*Id.* at p. 185 (dis. opn. of Marshall, J.).)

Yet another drawback is that the death qualification process itself undermines the presumption of innocence. This Court explained in *Hovey* that in a typical death-qualifying voir dire, potential jurors are examined in detail about their attitudes toward capital punishments and are asked to assume that the accused has been found guilty of first degree murder and that the special circumstance allegations have been found true. (*Hovey, supra*, 28 Cal.3d 1, 70.) They then are asked whether they could fulfill their legal responsibility to choose the appropriate penalty based on the evidence presented. (*Ibid.*) By focusing attention on the death penalty and potential jurors' ability to impose it before any evidence has been presented, some jurors likely will infer that the lawyers and the judge, the authority figures most knowledgeable about the evidence and the proceedings, *assume* the penalty trial will occur because they *believe* the defendant is guilty. (*Id.* at p. 71.) Once seated, jurors who have been predisposed by death-qualification voir dire to believe the accused is guilty tend to be effected in the way they "selectively perceive" the evidence, evaluate the evidence (i.e., the credibility of witnesses), weigh the evidence and draw inferences from it. (*Id.* at p. 72.) The attitudes, beliefs, and expectations of the jurors as shaped by death-qualification voir dire persist, regardless of the evidence actually presented during trial, because they shape the lens through which the jurors perceived that evidence, especially in close cases. (*Ibid.*)

d. Death-Qualification Before the Guilt Trial Results in a Guilt Jury Impaired in Properly Carrying out its Most Essential Functions

In *Ballew*, *supra*, 435 U.S. 223, 237-238, the United States Supreme Court stated, "[w]hen the case is close, and the guilt or innocence of the defendant is not readily apparent, a properly functioning jury system will

ensure evaluation by the sense of the community and will also tend to ensure accurate factfinding."

The dissent in *Lockhart* set forth some of the reasons death-qualified jurors tend to be skewed in favor of the prosecutor. (*Lockhart, supra*, 476 U.S. 162, 188 (dis. opn. Marshal, J.).)

> Death-qualified jurors are . . . more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense; more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions. [Citations.] This pro-prosecution bias is reflected in the greater readiness of death-qualified jurors to convict or to convict on more serious charges. [Citations.] And, finally, the very process of death qualification – which focuses attention on the death penalty before the trial has even begun – has been found to predispose the jurors that survive it to believe that the defendant is guilty. [Citations.]

(*Ibid.*) These very reasons establish that California's system of selecting guilt juries from a subset of the community which has been death-qualified impairs jury function along the lines that were found to violate due process in *Ballew*.

Death-qualification has even greater implications for the defendant's right to a fair trial by jury than it did for the issue under consideration in *Ballew*. Death qualification creates a pool of eligible guilt jurors "likely to be deficient in the quality of their deliberations, the accuracy of their results, the degree to which they are prone to favor the prosecution, and the extent to which they adequately represent minority groups in the community." (*Lockhart, supra*, 476 U.S. 162, 199 (dis. opn. Marshall, J.).) In the situation addressed by the Court in *Ballew*, the stakes were considerably lower (misdemeanor trials) and the flaws were found to be the random product of the practice of seating juries with too few members. Here, in contrast, the defendant's ultimate interest in his or her very life is at

stake, and the flaws are created by trial courts' deliberate, intentional process of conducting death qualification before the guilt trial.

In *Taylor, supra*, 419 U.S. 522, 530-531, the United States Supreme Court identified three purposes underlying the Sixth Amendment right to a jury trial, and death qualification before the guilt trial thwarts all three. First, "the purpose of a jury is to guard against the exercise of arbitrary power" as a "hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (*Ibid.*) Elimination of guilt-includables from capital guilt juries lowers that prophylactic hedge. Death qualification fails to guard against "the exercise of arbitrary power" by an overzealous or mistaken prosecutor. Potential jurors who tend to question the prosecution, and would thus keep prosecutors' power in check, are the very people excluded from the pool of eligible jurors via death qualification. Indeed, evidence shows that prosecutors intentionally use death-qualification in this manner to remove life-leaning potential jurors and lower the "hedge" against the chance they will be overzealous or mistaken. (See, e.g., Garvey, *supra*, 100 Colum. L. Rev at p. 2097 & fn. 163.)

A second purpose of a jury trial is to make the "common sense judgment of the community" available. (*Taylor, supra,* 419 U.S. 522, 530.) As the evidence now shows, the pool of those eligible to serve on a death-qualified jury fails to reflect the common-sense judgment of the community, because the segment most likely to reflect a viewpoint giving the "presumption of innocence" its highest meaning has been removed. This second important function of the jury trial therefore is thwarted by the death-qualification process.

A third purpose of the jury trial is to preserve public confidence. (*Taylor, supra,* 419 U.S. 522, 530-531.) "Community participation in the

administration of the criminal law, moreover, not only is consistent with our democratic heritage but also is critical to public confidence in the fairness of the criminal justice system." (Garvey, *supra*, at p. 2097 & fn. 163.) Excluding guilt-includables from capital guilt trials fails to preserve confidence in the system and discourages community participation. (See, e.g, Moller, *Death-Qualified Juries Are the 'Conscience of the Community'?* L.A. Daily Journal (May 31, 1988) p. 4, col. 3 (noting the "Orwellian doublespeak" of referring to a death-qualified jury as the "conscience of the community")]; Smith, *supra,* 18 Sw. U. L. Rev. at p. 499.)

The relevant case law has recognized other purposes, beyond these three, that would be furthered by acknowledging that death qualification has an unconstitutional effect on the seating of guilt juries in capital cases – for example, the belief that "sharing in the administration of justice is a phase of civic responsibility." (*Taylor, supra,* 419 U.S. 522, 532.) The exclusion of a segment of the community from jury duty sends a message that the administration of justice is not a responsibility shared equally by all citizens. This is especially problematic where capital trials, from the beginning of death qualification through completion of the sentencing phase, are lengthy and jury service therein is quite burdensome. The very important civic responsibility of carrying out a juror's duties in such cases should be shared, to the greatest extent possible, by those opposing the death penalty.

4. California's Death-Qualification Before Selection of the Guilt Jury Also Violates Equal Protection

In addition to violating due process and other protections under the federal and state Constitutions, as discussed above, California death-

qualification is unconstitutional because it violates equal protection principles. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, § 7.)

Death qualification in California results in capital defendants having their guilt or innocence determined by juries that are materially different from juries deciding the same issues in non-capital trials. As explained above, death-qualified juries have a tendency to be skewed in favor of the prosecutor as compared with non-capital juries. (See Haney et al., 18 Law & Hum. Behav. 619, 631 ["Death-qualified juries remain significantly different from those that sit in any other kind of criminal cases."].) By providing different schemes for selecting juries in capital and non-capital cases, California discriminates between two classes of defendants, capital and non-capital.

To survive an equal protection challenge where fundamental rights are involved, California must demonstrate that death qualification is "necessary to promote a compelling governmental interest." (*Dunn v. Blumstein* (1972) 405 U.S. 330, 342.) Strict scrutiny places "a heavy burden of justification [. . .] on the state." (*Id.* at p. 343.) Here, the state cannot meet this burden in justifying death qualification at either the guilt or penalty phase.

In *Fields, supra*, 35 Cal.3d 329, 352, this Court held that although California's interest in death-qualification before the guilt phase was of "moderate weight and significance," it was "certain" that it would not "justify a suspect classification excluding persons on grounds of race or gender." (See also *Lockhart, supra*, 476 U.S. 162, 180.) The test for suspect classifications (viz., by race) is the same strict scrutiny test that should be applied where, as here, defendants' fundamental right to life and to a fair determination of guilt with the presumption of innocence are involved. (See *San Antonio Independent Sch. Dist. v. Rodriguez* (1973) 411

U.S. 1, 17.) A legitimate State interest can satisfy the lesser standard of rational basis review only, not strict scrutiny. (*Id.* at p. 40.)

California's only articulated interest in death qualification at the guilt phase is "the legislative preference to use a single jury to determine guilt and penalty." (*Ayala, supra*, 23 Cal.4th 225, 304.) A mere preference to conserve state resources through the use of one jury is not a sufficient interest under a strict scrutiny analysis; it is not a "compelling" state interest. (See *Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250, 263.)

Further, California allows the impanelment of a new penalty phase jury for "good cause" shown. Penal Code section 190.4, subdivision (c), "does not [. . .] require a single jury for both guilt and penalty phases when the parties agree that in their particular situation use of separate juries would be to their mutual advantage, and the trial court finds good cause to so order." (*People v. Beardslee* (1990) 53 Cal.3d 68, 102.) The fact that the state's interest in a single jury can be trumped by "good cause," stipulation, or the trial court's discretion, suggests that it should not be treated as a "compelling" interest under a constitutional equal protection analysis.

Death qualification also fails the second prong of the strict scrutiny analysis. A law infringing on a fundamental right must be "necessary," that is, it must be narrowly tailored and drawn with precision; it must use the least drastic means of serving the state interest. (See *Dunn, supra*, 405 U.S. 330, 343; *Wygant v. Jackson Bd. of Education* (1986) 476 U.S. 267, 280, fn. 6.) Whatever state interest California has for death-qualifying a *penalty* jury, it cannot be said that death qualification is "necessary" at the guilt phase. California instead can follow the reasonable alternative of impaneling a capital guilt jury with extra alternates, then if guilt and a

special circumstance are found, death-qualifying a jury prior to the penalty phase.

D. Conclusion

The empirical evidence has resolved the *Hovey* problem and that evidence establishes a "substantial doubt" as to whether California's death-qualification process produces guilt juries with a tendency to be non-neutral, in favor of the prosecution. The state's interest served by this procedure must be counter-balanced against defendants' right to a fair determination of guilt. The infringement cannot be justified when a superior alternative procedure is readily available. Trial courts can use a limited voir dire prior to the guilt phase (to exclude "nullifiers," [see Pen. Code, § 229]), swear enough alternates to replace jurors who may be discharged after death-qualification before the penalty phase, and permit the alternates to be present during guilt deliberation although not actively participating in it.

The United States Supreme Court decision in *Lockhart* is not dispositive. The majority in *Lockhart* focused on rejecting the petitioner's fair cross-section claim, and although it also rejected due process arguments under *Witherspoon*, its reasoning on that score has been called into doubt by recent constitutional jurisprudence in *Apprendi* and other United States Supreme Court decisions. Moreover, *Lockhart* does not control the issues raised under the California Constitution. (*Raven, supra*, 52 Cal.3d 336, 352-354.)

This Court should continue along the path it began to trace in *Hovey* and find California's death-qualification process unconstitutional.[108] Since

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[108]In *People v. Taylor* (2010) 48 Cal.4th 574, 602, this Court stated that it had previously considered the empirical studies showing that death-

(continued...)

that process was employed in appellant's trial, his conviction, special circumstance finding and sentence must be reversed.

* * * * *

[108](...continued)
qualified jurors are more likely to convict as part of a claim that death qualification violates due process. This is not so. In *Taylor*, the Court cited *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199, for the notion that it had already considered appellant's empirical evidence. *Jackson*, in turn, cited *Fields*, *supra*, 35 Cal.3d 329, 353. However, in *Fields* at the page cited in *Jackson* this Court explicitly stated that the defendant was *not* raising the issue rejected in *Hovey*, i.e., that the exclusion of "automatic vote groups results in a prosecution prone jury." (*Fields*, *supra*, 35 Cal.3d 329, 353, citing *Hovey*, *supra*, 28 Cal.3d 1.) This Court has not explicitly dealt with the extensive evidence showing that death qualifying a jury makes it more prone to convict, thus denying due process. It should do so now.