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 III of III
Arguments XIV - XXII, Conclusion, and Certificate of Counsel
(Pages 533 - 849)

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

HONORABLE DAVID GILL

MICHAEL J. HERSEK
State Public Defender

KAREN HAMILTON (SBN 171794)
Deputy State Public Defender

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

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

Attorneys for Appellant

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XIV.

FACTUAL SUMMARY IN SUPPORT OF REMAINING ARGUMENTS

Appellant summarizes below the proceedings before Gill relevant to the argument that follows in remaining sections of this brief. Even as trial drew near, appellant continued to devote much time to writs challenging the trial court's rulings, rather than preparing for trial.

Over the two years of pretrial proceedings, jury voir dire, presentation of the prosecution and defense cases in the guilt phase, the penalty phase, and post-verdict proceedings Gill received resounding notice that appellant was unable to work with not only Geraldine Russell, but also with any attorney appointed to assist him in any manner. Gill also was shown that appellant's chosen defense and the arguments he made in connection with it created ample question on appellant's mental capacity as related to his ability to proceed.

A. As Trial Approached, Judge Gill Learned More About Appellant's Mental Capacity and his Inability to Work With any Counsel

In a hearing on August 31, 1990, Gill returned to the issue of pretrial motions and appellant stated that the legal research was not completed. (3RT 320.) Gill stated:

> Geraldine Russell in her assistance had done all this for you, Mr. Sequoyah. If you get over the blind spot, it has all been done. That has all been done. It's [*sic*] strikes me as irony, on the one hand apparently you are going to assert that you had ineffective assistance of counsel. Yet, last time you went on at some length about all the boxes of materials that Geraldine Russell had because she had done all this investigation; she had several investigators, some of whom you didn't know who they were, they had been working for her. So, although I'm not saying I am not going to consider whatever you raise by way of ineffective assistance of counsel, I am not going to give you a whole lot of time to

pursue that because I can't imagine there is any merit at all to that motion.

The preliminary hearing, the depth she went into in that prelim, I can't imagine any appellate court in the world is going to find she inadequately represented you. So, I'm just not going to tolerate weeks of delay while you chase after that windmill. This is a windmill, in my view, that has no merit at all. So you can do that at 12:00 o'clock at night or some other time, but we are not going to waste a lot of time while you are chasing after that.

(3RT 320.) In discussing the progress of the motions, appellant turned to the performance of advisory counsel. He stated that he was satisfied with Chambers' work, but that Rosenfeld had not been devoting sufficient attention to the case. (3RT 324.)

Out of the presence of the prosecution, Rosenfeld asked to address the court. (3RT 329.) Appellant objected on the grounds that she did not "represent" him. (*Ibid.*) Gill stated that he thought that she was speaking as his advisory counsel, not his representative and that she was not "required to sacrifice her basic professional and personal responsibility and integrity as an officer of the court." (*Id.* at 329-330.) Rosenfeld detailed some of the work that she had done on the motions. (*Id.* at 330.) Gill responded:

Well, again, Mr. Sequoyah for what it's worth to you, if you really are as deeply invested in representing yourself as you appear to be, as I say, I don't have any – really don't have any investment in doing you out of that right, as foolish as this that may be. I realize that is not the test under the law. But it really doesn't, in my view, enhance your position in the eyes of the court – and although Judge Edwards is the one who is apparently addressing that issue at the moment, that issue is always before me, I think, as the trial judge, whether you can continue to be in pro per status. There may have been some finding at one point that you were competent to represent yourself, but that doesn't mean that's a finding indelibly carved in stone for all time. That is something I think I have a responsibility to monitor as we go along.

> It is not helpful to your position, I think, to have things like this constantly be coming up. You ought to be working together as a team. There should not be this tension that I sense is constantly afoot in your camp, so to speak. I just don't think that it's in your best interest.
>
> There may come a point when I decide, as the trial judge, whether I pull this thing back from Judge Edwards or what happens there, that I decide as the trial judge that you have abused, grossly abused your right and your privilege to represent yourself; and I may be persuaded to terminate your status. So, a word to the wise.

(*Id.* at 330-331.)

Later that afternoon, there was another hearing out of the presence of the prosecution. In that hearing, appellant asked for access to sealed materials generated earlier in the case, including the sealed 987.9 proceedings and orders that were made prior to appellant representing himself. (3-1RT 332-1.) Gill asked appellant to explain the relevance of the materials. (*Id.* at 333-1.) Appellant asserted that one of the reasons he needed the material was because the hearings were "held clandestinely, without my permission, over my objection. I contend that was illegal." (*Id.* at 335-1.) He wished to take up these things in the Court of Appeal. (*Ibid.*) Gill stated that appellant would get the material about Russell as a result of the proceedings before Edwards. Appellant disagreed, asserting that Edwards would do whatever Russell wanted him to do. (*Ibid.*) Gill asked why he thought there was a conspiracy between Russell and Edwards and appellant responded: "I told [*sic*] what you a person told me, that Geraldine Russell was there having illegal ex parte proceedings with him." (*Id.* at 336-1.)

Appellant also complained about alleged "secret" contacts between the court and his advisory counsel, and moved to unseal the preliminary hearing transcript. (3-1RT 337-1-347-1.) Gill said appellant was "fishing,"

relating his views on the trial court's responsibilities vis a vis appellant's competence:

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

(*Id.* at 349-1-350-1.) Appellant asserted in response that the delays were brought about by his "enemies" opposing his right to go pro per, and that under those circumstances it made sense that he thought of the attorneys as "enemies" and not "friends." (*Id.* at 351-1.)

During proceedings on October 17, 1990, Gill noted the remarks from the Court of Appeal that the case had a "long and tortured history." (6RT 409.) Gill noted: "I think the not too subtle message there is that let's get on with this guys, let's – let's get the motions heard, let's get the trial heard, and – and the chips will fall as they may. But let's – let's get moving here. So I – I think that point is well taken." (*Id.* at 409.)

On December 13, 1990, Gill addressed appellant's progress on pretrial motions. Appellant asked Gill to excuse the prosecution to discuss issues relating to advisory counsel. (7RT 441.) Appellant asserted that Chambers was working full-time on the case, but that Rosenfeld was not. (*Id.* at 443-444.) Gill responded that it was up to appellant how he organized the staff. (*Id.* at 446.) Gill commented:

> I do think that, frankly, more attention ought to be paid on motions and getting ready for trial and less attention on all this broadside of writs, which are constantly being visited upon the appellate courts. But again that's, I guess, his decision how he wants to devote his time and effort and he will suffer the consequences if he misdirects his time and efforts on frivolous motions and writs and not on the real business at hand, but he's going to suffer the consequences if that turns out to be the case. He knew that, and he knew that when he's [*sic*] decided to represent himself.

(7RT 446.) Gill declined to make orders changing the status of advisory counsel. (*Ibid.*)

At a hearing before Gill on February 1, 1991, appellant stated that advisory counsel had put in motions behind his back which had brought the defense to a halt. (8RT 474.) Appellant claimed that Chambers' actions had forced appellant to send motions to the prosecutor's office asking the District Attorney to file charges against Chambers for perjury and obstructing justice; he characterized this as an "outrageous" interference with his defense, forcing him to reveal "confidential" information. (*Id.* at

475.) Appellant asserted that Chambers was "permanently terminated" by him, and that he would never permit Chambers to give him advice. (*Id.* at 476.)

Appellant also complained that Rosenfeld had put in a secret motion behind his back in 1990, viz., a section 987 motion signed by Sanchez and Rosenfeld, calling Rosenfeld's actions an attempt to revoke his pro per status and to "take over" as the attorney of record. (8RT 477.) Appellant asked Gill to terminate and replace Chambers and order Rosenfeld not to file motions or speak in court without his permission. (*Id.* at 478.) Gill rebuffed appellant's complaints, noted that appellant was not going to be able to work with advisory counsel and that what appellant seemed to want was not, in fact, advisory counsel, but rather "a slave." (*Ibid.*) Appellant asserted that the filing of motions behind his back was the equivalent of having his pro per status revoked. Gill disagreed, and said that any writ appellant might take on the issue would be "ridiculous." (*Id.* at 483.) Appellant asserted that there were other motions he would be unable to complete for lack of advisory counsel. (*Id.* at 491.) Gill responded that appellant had counsel, but that he chose not to be "reasonable or rational" in working with them. (*Ibid.*)

During five days of hearing before Judge Revak in early February 1990, appellant persuaded the court to remove Chambers and his investigator Atwell, but the court soon reversed itself and reinstated them. First, appellant asked to have Atwell, an investigator working under Chambers, fired. (9-1RT 501.) Appellant asserted that Atwell was working for Chambers and doing what Chambers wanted, which appellant considered a revocation of his pro per status. (*Id.* at 504.) He said that Atwell was spreading lies about him and that Chambers had been deceptive, which forced appellant to take confidential information and provide it to the

district attorney so that charges could be brought against Chambers. (*Id.* at 505.) Appellant also repeated the allegation that Sanchez and Rosenfeld had conspired together to revoke his pro per status. (*Id.* at 509.) Later, appellant said that his defense was "at a complete state of complete withdrawal because of ineffective advisory counsel." (9-1RT 516-517.) Appellant asserted that his advisory counsel were ineffective because they had license to obstruct his defense and submit billings without his permission. (*Id.* at 518.) He said Rosenfeld had broken her promise to work full time on his case, and had taken other cases because they paid more money; he did not want her removed, but did want the court to order her not to make any motions or speak in court without appellant's permission. (*Id.* at 517-518.) As for Chambers, appellant said there had been a complete breakdown of communication between them for three months and he wanted Chambers removed. (*Id.* at 525.) Revak relieved Chambers, but declined to make orders about Rosenfeld because she was not present. (*Id.* at 525-526.) The next day, appellant said that if Chambers were really advisory counsel he would be "devoted in helping the defendant to present a truthful meritorious defense. The only thing Mr. Chambers has done as advisory counsel is attempt time and time again to get my pro per status revoked so that he can take over as lead counsel, buy a new Mercedes Benz by the end of the year." (9-1RT 534.) Revak said it was clear that appellant wanted to be his own lawyer and that he had been cautioned about the dangers of this, but that now appellant should be concentrating on getting ready for trial. (*Id.* at 534-535.) Appellant asserted that the need to get ready for trial made it more important that he get rid of Chambers instead of fighting him. (*Id.* at 535-536.)

The next day, Rosenfeld was present and appellant asked Revak to order her to turn over to him her record of past billing, so he could file a

motion to dismiss ineffective advisory counsel. (9-1RT 543.) Rosenfeld admitted that she had taken on other cases, but she did so because appellant had fired her three times. (*Id.* at 544.) Rosenfeld said she believed appellant's view of "confidentiality" was basically a "gag," because he believed that any time she talked to other advisory counsel or appellant's clerk it was a breach of confidentiality. (*Id.* at 546-547.) In response, appellant reiterated his position that he had ordered Rosenfeld not to communicate with Sanchez and that instead she and Sanchez had filed a motion that proved that she was conspiring to "revoke my pro per status by taking complete control of the law clerk and investigators and take everything away from me. Control that you had given me." (*Id.* at 548.) Then, according to appellant, Rosenfeld and the court had kept the arrangement secret from him. (*Id.* at 548-549.)

Revak reinstated Chambers and Atwell (9-1RT 564) and ordered Rosenfeld not to submit any motions without appellant's permission and to speak in court only when she was responding to the court's questions. (9RT 554.)

At the next hearing before Gill on February 15, 1991, appellant objected to the presence of Chambers and Atwell, and asked that they be excluded from the courtroom as Chambers was not his advisory counsel and Atwell was not his investigator. Appellant asserted that their presence was an "affront to my dignity and autonomy." (9RT 576.) Appellant also complained that Rosenfeld had made a list of what was in the boxes when he told her not to look in them. (*Id.* at 589.) Gill responded:

> Well, you make it awfully tough to give you any assistance, Mr. Sequoyah. I don't know how you expect people to be your advisory counsel. I think you want advisory slaves, not advisory attorneys. If advisory attorneys bring you some advice you don't like, then fine, you don't have to

follow their advice. But I think they're obliged to give you their professional advice. Not simply what you want to hear.

And it sounds to me you want two advisory attorneys. One that you're working on some secret stuff that nobody else knows about, and another one that's working on secret stuff. How can they properly advise you under those circumstances? I think you are creating an impossible situation.

I think you're knowingly and intentionally doing that, Mr. Sequoyah. And at some point I'm going to think that you are manipulating the system, and I am going to have to revoke your pro per. And I can if I know you're manipulating the system.

(*Id.* at 590.)

In a proceeding out of the presence of the prosecution, Rosenfeld stated that she did have a box from Russell, but she denied that she had kept this secret from appellant. She agreed that he had told her not to look at the box. Gill said that Atwell and Chambers had done good work on the case and he did not want to lose that. (9-3RT 616.) Gill stated that if it came down to it Chambers would serve as standby. They would not start over if appellant's pro per status were revoked because he manipulated the system or because he decided that he wanted help. Gill stated: "This case goes to trial with or without Mr. Sequoyah's cooperation and I'm convinced it is going to be without his cooperation and we're going to go ahead." (*Id.* at 617.) Gill observed that appellant was setting down an impossible set of rules for advisory counsel. (*Id.* at 618.) Appellant repeated his assertion that his defense had been completely withdrawn because of the ineffectiveness of advisory counsel, and that his advisory counsel were putting motions in behind his back and obstructing his defense. (*Id.* at 621.)

In a hearing on March 18, 1991, appellant complained that he could not know what experts he would call for his proposed motion to exclude the gas chromatography evidence in the case because Gill had refused to order

advisory counsel to "follow my orders." As a result, appellant had "advisory counsel that are allowed to do everything and anything except what I wanted done." (11RT 646.) Appellant also asserted that he could not have witnesses at court for a hearing on his motion to exclude evidence because he did not have advisory counsel who would do what he wanted done. (*Id.* at 651.) He asserted that no subpoenas had been issued because he did not have the staff. His need for the staff was the reason that he asked Gill for an order enforcing Judge Boyle's order that he have two advisory counsel. (*Id.* at 652.) Gill responded:

> Judge Boyle didn't decree that you had advisory slaves, but two advisory attorneys, which you have. If you don't choose to follow their advice, that's your business. It's not the order of attorneys to go around subpoenaing other witnesses anyway. That's why you have the other two chaps for that sort of thing.

(*Id.* at 653.)

At the end of the hearing Rosenfeld asked to get a copy of the daily transcript. (11RT 666.) Appellant opposed this request. He also stated that: "I further object to Mr. Chambers sitting here at defense table next to me, and if I had advisory counsel that was under orders to do what the attorney needs to have done, I would have no problem whatsoever providing them with transcripts, but unfortunately I have advisory counsel licensed to commit deceipt [*sic*] and fraud over my objection, and I cannot afford to have such people having any access to defense materials." (*Id.* at 667.) Gill characterized the request as a reasonable request from the "team" and granted it. (*Ibid.*) He stated again that they would move forward and the case would go on with or without appellant's cooperation. (*Ibid.*)

On March 18, 1991, Rosenfeld wrote appellant a memo (with a copy to Gill), expressing her concern about appellant's lack of preparation for motions and trial. (38CT 8359-8364.) She recounted his rejection of her

advice, his failure to accomplish "crucial tasks," his failure to share information with her, and his fixation on refiling and organizing old materials, which was not productive in light of the immediate and fast approaching trial and motions dates. She noted that none of the material she had seen in the boxes they reviewed had "been substantially related to presenting a defense." Rosenfeld said: "You've got to deal with that and get prepared, but all I see you doing is avoiding reality, which concerns me." She continued: "You also intentionally keep things from me to keep me unprepared." She added: "If your personal principles and religious convictions don't permit the use of services [requested by advisory counsel] because you didn't request them, why have you not requested such services on your own?" (*Ibid*, emphasis in original.) Rosenfeld noted that she had corrected some misleading comments in court, but her purpose was not to humiliate him. She thought that he could be honestly mistaken or misinformed when he made some of the comments. (*Ibid.*) She explained that she could not give him a sound opinion about the law without knowing all the facts. (*Id.* at 8362.) She noted that they had had some useful discussions (about jury selection and hearsay exceptions, for example) but that they "ha[d] not discussed facts, you haven't confided in me apparently because you don't trust me or anyone else. If I am not giving you the advice you need and you aren't speaking to Chambers I don't know how you are going to get ready." (*Ibid.*) She stated that she could not be on top of the case without the ability to conduct investigation, consult experts and without access to clerks and paralegal help. She also expressed frustration at appellant's limitations: "I understand you to be of the belief that if you do not specifically direct the person who performs the service (psychiatrist, investigator etc. . .) you refuse to take advantage of whatever product or information the person can provide. You have directed advisory counsel

and investigators not to speak to each other. You must by now understand that a 'team' cannot work without communication." (*Id.* at 8363.) She noted that he opposed her getting a transcript from that day, which precluded from her getting prepared, while at the same time he complained that advisory counsel were not preparing. (*Ibid.*)

March 28, 1991, was the date for appellant to argue the previously filed motions. Appellant asked to withdraw the severance and section 995 motions and the demurrer on the grounds that his religious beliefs had been violated. (12RT 700.) He stated:

> The church to which I belong requires me to represent myself and requires me not to utilize anything that was acquired or produced in violation of that right to represent myself.
>
> This 995 motion, the demurrer, the severance motion were produced by attorneys previously recognized by this court or advisory counsels. I was not allowed to produce them myself, because the court was denying me access to my legal materials. Therefore, to – to present these motions that previous counsel did violates my right to represent myself.
>
> I – I – I tried to come into a – a– compromise myself with my conscience and with this religious conflict, and I – I wish to resolve that by supplementing these motions with my own writings and by presenting argument. And by the supplements and the argument I hope to – I hope to fulfill my requirement to represent myself and go forward with these motions that previous counsel had produced. But the court's restrictions have – have denied me access to the court and have denied me access to my law clerks and have denied me access to my legal materials. And the combined effect of the court's action is just basically forcing me to go forward only with the material that was created by previous counsel and advisory counsel, while denying me my – my rights to supplement the motions with my own writings and my own requests and to present my own arguments.

> Since I'm being denied the right to present those supplements and my own arguments, I have no – no choice but to withdraw the motions . . . .

(*Id.* at 700-701.)

Appellant asserted that he could not argue the motion because the material in his legal files had not been organized, which happened because the court had permitted advisory counsel to ignore appellant's orders. Appellant asked Rosenfeld to come work with him the jail "morning, afternoon and evening seven days a week until we get that done" and she had refused to do so. (12RT 706.) Gill stated that the motions were well-done (*id.* at 704) and denied appellant's motion to withdraw them. (*Id.* at 707). He said: "That's just a further manipulative stall on your part. I'm not going to allow you to do that. Legal issue are legal issues. . . . The law is the law, the evidence in this case is the evidence." (*Ibid.*) Gill also denied the request to withdraw the motions and demurrer (*id.* at 715), which he later overruled. (13RT 917.)

At the same hearing, DDA Carpenter stated that he gave the jury questionnaire the prosecution proposed to Chambers. Appellant asserted that he had not seen the prosecution's questionnaire. Appellant continued:

> [Appellant] He's definitely not advisory counsel on my case, he is a prosecution agent. I won't be using anything – anything he produces. That would violate my religious beliefs to use --
>
> The Court: Wait a minute. Your religious beliefs, then, I take it prevent you from even using advisory counsel; is that correct?
>
> The Defendant: If advisory counsel does as I wish I can use anyone. But if it's – if the court's allowing advisory counsel to act as attorney of record that's a different matter, and the court has been allowing that.

(12RT 716.) He said Chambers had put in motions behind his back and that Revak had removed Chambers, but the prosecutor "came running in, attempting to get his agent back into the defense team. And he was successful." (*Id.* at 717.) Gill offered Rosenfeld an opportunity to respond to appellant's assertion that she had refused to follow his orders. Rosenfeld stated: "I am advisory counsel, I give him advice. His priorities may be a little different than what I've advised him his priorities should be. I'm continually working on his case, maybe not exactly to his orders." (*Id.* at 728.)

On April 8, 1991, appellant asked to have Chambers relieved and submitted a written motion alleging Chambers' "deceit and fraud." (16CT 3617.) Appellant accused Atwell and Chambers of intentionally "mixing up" the material in his files and thwarting his efforts to organize them, in order to keep him from bring claims of ineffectiveness of counsel against other attorneys. When appellant said that he had experienced the same problem with all of his advisory counsel, Gill replied: "Interesting, isn't it, that you've had that problem with every single one. Does that suggest to you you might be off base, Mr. Sequoyah, and not them?" (12RT 808.)

Gill asked if appellant would present oral argument on his other motions. Appellant asserted that unless the court granted his request for access to his legal materials he would be unable to proceed with them. (12RT 814.) Gill thought it bordered "on the unconscionable" for appellant to argue that his religion was being violated by Gill requiring him to argue his motions, after the time granted and money for staff expended to prepare them and after appellant had promised the court that he assigned them to advisory counsel and they were almost done. (*Id.* at 816-817.) Appellant said his membership in the "World Humanitarian Religion" forbade him from accepting the work of those who did not recognize his right to

represent himself. As a final matter that day, the court turned to the issue of the jury questionnaire. Appellant said he would need to modify a draft questionnaire given to him by Rosenfeld, because he knew what his defense was and others did not. (*Id.* at 825-826.)

At the next appearance, Rosenfeld asked the court that she not be ordered to spend time in the jail going through boxes with appellant, pointing out other, more important, work to be done (such as responding to the prosecutor's recent request to introduce evidence of uncharged crimes committed in Oklahoma in its case in chief). (12-1RT 851-852.) Appellant argued that Rosenfeld should do only what he ordered, and that if the court disagreed, he would be forced to "stand mute" at the trial. (*Id.* at 852.) Appellant said once the boxes were organized he would bring charges of criminal activity against former counsel Russell, and claimed that Rosenfeld wanted to obstruct that from happening. (*Id.* at 853-854.) Gill said Rosenfeld should do tasks other than going through boxes. Appellant said: "I wish to note on the record that I'll not be using any of the stuff she's produced because doing so violates my religious rights protected by the first amendment." (*Id.* at 856.) Gill rejoined: "Advisory counsel is to give you legal advice not to follow mindless senseless orders from you." (*Id.* at 858.) Regarding appellant's preoccupation with Russell, Gill said: "Geraldine Russell – that's all history, man. Let's get on with this case. She's off of this case. She has nothing more to do with this case. You can't spend the rest of your life in some paranoid crusade against Geraldine Russell." (*Ibid.*) Appellant said Rosenfeld and Gill were interfering with his right to present evidence of Russell's deceit and fraud. (*Ibid.*)

At the next hearing (April 19, 1991) appellant again asked for time and resources to alphabetize his boxes. Appellant suggested that Chambers and Atwell had "mixed up" the boxes, thus obstructing the defense. (12RT

866-877.) Gill reasoned that they had no motive to do as appellant claimed. He stated:

> Let me tell you my reaction when you make statements like that, Mr. Sequoyah. I'm telling you this because I want – I want us to understand each other. . . .
>
> If you honestly believe what you're telling me, if you honestly believe in your heart of hearts, if you will, really believe that, then I think that's a manifestation of some serious mental illness. And that causes me to wonder whether you really are capable of representing yourself, and whether that mental illness isn't going to overwhelm you and consume you and – and prevent you from making any sort of effective representation of yourself. If you honestly believe that.
>
> On the other hand, if you don't honestly believe what you're telling me, and you're just manipulating and just stalling and grasping at any reason you can not face up to reality and get ready for trial, I don't have to tolerate that. . . .

(*Id.* at 877-878.) Appellant insisted that whether or not the boxes were mixed up was not a matter of mental illness and that his clerk's declaration would attest to the problems with the boxes. (*Id.* at 878.) Gill stated that most of what was in that declaration concerned material relating to an ineffectiveness claim against Russell, for which Gill saw no basis. (*Id.* at 878-879.)

At the next hearing (April 29, 1991), appellant again complained that advisory counsel was behind the scenes mixing up his legal materials, and refusing to assist him in alphabetizing them. He said that instead of advisory counsel, all he had was "two people acting as attorney of record doing anything they wish to do, in complete violation of my orders as attorney of record." (13RT 912.) Gill took this as further evidence of appellant's paranoia. (*Id.* at 912-913.) Gill also noted that while appellant was busy filing motions asking the prosecution not engage in misconduct thereby wasting his time with "this claptrap out of the ABA canons of

professional conduct," other important motions appellant said that he wanted to file were not getting done.[109] Gill thought this was evidence that appellant was "just incapable of ever producing those matters." (*Id.* at 915.) He thought that appellant had access to the legal materials, but that he did not "want to find what you need to find because that would . . . force you to face up to what needs to be resolved here now." (*Id.* at 916.)

Gill denied appellant's demurrer to the amended information and proceeded to arraign appellant. Appellant objected that he was not representing himself at that hearing because the court through "illegal and dishonest and deceitful acts" deprived him of the ability to represent himself and the proceeding was a "charade." (13RT 920-921.) He asked for an "honest and upright" preliminary hearing where he would represent himself. (*Id.* at 921.) Gill replied: "That assumes a fact that is not in evidence to me. And – and in fact the contrary is becoming more and more evident to me, that representing yourself there could be an honest and upright preliminary examination, because I'm not sure you're capable of effectively representing yourself." (*Ibid.*) Appellant complained that the prosecution was allowed to stand at the podium when he was addressing the court but that he was not allowed to do so. (*Id.* at 951.) Gill stated that appellant was not prejudiced by sitting when he addressed the court and that he was "making a mountain out of a molehill" and that he was diverting attention from what they should be discussing. He noted that appellant was "puting [*sic*] form over substance here and I think, frankly, that's sort of a manifestation of your mental condition, if you . . . get fixated on some little relatively insignificant point and we spend a whole lot of time on that point

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[109]Gill appears to be referring to appellant's motion for discovery of the prosecution's chargedng practices filed on April 29, 1991. (17CT 3659-3760.) Appellant attached parts of the ABA Standards for Criminal Justice. (17CT 3733-3744.)

and we never get to some substance of the real issues that need to be addressed." (*Id.* at 981.) Later at the hearing, appellant said that Rosenfeld still refused to help organize material in his boxes as he asked her to do. (*Ibid.*)

Later, appellant again requested an order that Rosenfeld bring him boxes of his legal material into the jail for four hours everyday until the task was done. (13RT 1026.) He also objected that his defense was "in complete withdrawal because of the deceit and fraud of advisory counsels. . . ." (*Id.* at 1026-1027.) At one point appellant objected to the "prosecution agent Chambers speaking without the permission of the attorney of record" and to Chambers sitting next to him in the courtroom, saying that "his presence makes a nightmarish mockery of my right to represent myself. His presence should be offensive to any court of justice, considering the habitual deceit and fraud and violation of his own contract." (*Id.* at 1027.) He also objected to Gill allowing his courtroom to be used for deceit and fraud. (*Ibid.*) Gill noted that appellant's "pro per status is becoming increasingly questionable in the eyes of the court." (*Id.* at 1029.)

At the next hearing, there was discussion of appellant's motion to discover the prosecution's charging practices. In that motion, appellant requested the charging practices of the San Diego District Attorney's office asserting that he needed them to substantiate his claim that the office had discriminated against him in charging the case. (17CT 3671.) Attached to the motion was appellant's declaration in which he asserted that he had been singled out for prosecution on the grounds that "I am a Cherokee; claim a Cherokee identity; speak the Cherokee language; am active in the American Indian Movement to restore Cherokee independence; and am active in what the U.S. government deems an 'Anti-English movement,' as a member of the Esperanto movement; the Cherokee language movement;

and the Poliespo movement." (17CT 3684.) Gill commented first that he thought that the motion was not timely; second, he noted: "One thing, though, he needs to understand, and I'll reiterate this again to him, but if I rule against him on this motion, that's going to be it as far as the court is concerned. And none of this is going to come in front of the jury. . . . So I want to disabuse him of any idea he's going to get on the soap box in trial to say he's going discriminated . . . against because of all these factors. So if that's what he has in mind, why, I want to disabuse him of that notion at this point." (13RT 1039.)

On May 10, 1991, appellant filed a declaration from "Earl Smith." Smith declared that he signed the declaration under an alias to protect himself and loved ones. He stated that if he were to come to testify for appellant it would be essential that his personal security and legal rights be assured. He said he knew who should be charged with the crimes of which appellant was falsely accused, and so considered his life to be in danger. Smith further claimed to have firsthand knowledge of the deceit and fraud by Rosenfeld and Chambers upon appellant, complaining that the court was letting them act against appellant's wishes in a mockery of his legal and religious right to represent himself. The declaration , signed on May 9, 1990, in Zurich, Switzerland, stated Smith would not testify if Gill presided because he would not be safe. (38CT 8383.)

At a hearing on May 10, 1991, appellant told Gill that several of his witnesses, who would prove his innocence, had been threatened and two others had been murdered. (13RT 1061.) He said witnesses were afraid to come and testify. Appellant said the witnesses could not come and receive legal advice from "Mr. Chambers or Ms. Rosenfeld, because the court has licensed them to engage in any type of activity that they wish, in violation of the attorney of record orders. And the result is that there's such an

atmosphere here of – of – that they find unacceptable." (*Ibid.*) He suggested that Gill's failure to compel Rosenfeld and Chambers to follow appellant's orders created an "atmosphere" which his witnesses could not abide, and moved to disqualify Gill for that reason. (See 17CT 3843-3844.) Appellant said the witnesses also knew Gill had permitted the lawyers appointed by Judge Edwards (Hodge Crabtree and Beverly Barrett) to step in as attorney of record and stripped him of his pro se rights without a hearing. (13RT 1062-1065.) Gill described appellant's allegations as "a flight of fancy." (*Id.* at 1065.)

On May 14, 1991, appellant returned to his request to disqualify Gill, stating that any fair or reasonable person would recognize that Gill had been prejudiced and biased, as shown by Gill's funding of Atwell as investigator over appellant's objection and his allowing advisory counsel to put in motions "behind" appellant's back. (14RT 1174.) Appellant said Chambers was sitting in the courtroom in "mockery and disobedience" of a contract appellant claimed he had with Chambers." (*Ibid.*) Appellant challenged Gill to bring twelve people off the street and let those people hear the history of the case and that if the twelve people agreed with appellant that Gill was prejudiced then Gill would resign. (*Id.* at 1175.) Gill questioned what any such people "off the street" would think:

> I think the doubt that's going to – going to reasonably be aroused in the minds of anybody reviewing these people [*sic*] is to your sanity and how foolish and how what an awful mistake you're making to try and represent yourself in this case. That's going to be the reaction of the man on the street. They're going to wonder, how did the court let somebody like that represent himself, that's outrageous, and he's outrageously foolish to try to do that. That's going to be the reaction of the reasonable man in those proceedings.

(*Id.* at 1176.)

On May 14, 1991, appellant stated that he wished to call witnesses for a dismissal motion on the grounds that his speedy trial rights had been denied, but that he had been unable to get the subpoenas issued because the court had failed to order advisory counsel to work for him and do only what he ordered. The failure of the court to act gave "advisory counsel a complete license to act as attorney of record and do whatever they want to on the case," so that appellant was unable to have witnesses subpoenaed. (14RT 1208.) Appellant stated that he had been stripped of his right to be "captain of the ship." (*Ibid.*) Appellant complained that the court had let Chambers hire Kalish, who appellant called "a doctor who has already taken the stand repeatedly and committed perjury, a doctor who took the stand not only during my pro per hearings and said horribly untruthful and derogatory statements about me, committed outrageous perjury concerning his non interview with me, that was a non interview but he claimed it was an interview, and then he, at my competency trial, he took the stand and he rattled and rattled on some more perjury and a lot of other derogatory things." (*Id.* at 1209.) Appellant said he was drafting pleadings to sue Kalish. Gill noted the incongruity of appellant pursuing a civil suit when he was about to go on trial for his life. (*Ibid.*) Appellant said it was necessary for him to do so because Gill had refused his request for an order that advisory counsel not do anything without his permission, and as a result, he would not be able to argue his speedy trial motion. (*Id.* at 1210-1211, 1213.) Gill retorted:

> But I made it clear to you early on they don't work for, you didn't employ them. They're not your employees, they're appointed by the court to assist you. And when the court appointed them the court did not sign any written contract with them, and the court did not extract from them any promise that they were going to sacrifice [*sic*] their personal and professional integrity to advise you.

(*Id.* at 1216.)

Gill said appellant was trying to defeat the attorneys' diligent efforts to aid him: "That's the last thing you want is for them to give you sound, valid legal advice, because you don't want to hear that. Because they're helping you get ready to go to trial, and that's the last thing you ever want to do is go to trial, despite this claptrap you filed claiming that we're denying your right to a speedy trial." (14RT 1217.) Gill continued:

> You know, your saying so doesn't make any of this so. I'm just hearing the rehash of the same old thing. There's a monstrous conspiracy that's all-consuming, and in every aspect of this case is some aspect of some giant conspiracy against you. And when you're put to the proof there is none.
>
> And I'm convinced that anybody reading this record, anybody sitting in this courtroom this morning would walk out of there saying, how on earth's [*sic*] can the court let that guy represent himself. He's no more capable of representing himself than – than the man on the moon. That would be the reaction of the reasonable man knowing the facts of this case.

(*Id.* at 1217-1218.)

At proceedings on May 15, 1991, Judge Gill took up appellant's request (see 17CT 3845) that "prosecution agents Rosenfeld and Chambers (who bear the misnomer advisory counsel)" be prohibited from speaking in court; discussing or communicating about his case without his permission, from putting in motions without his permission or conducting investigation or other research without his advance permission. (14RT 1217-1218.) Gill denied the requests. (14RT 1252.)

B. As Jury Selection Began, Judge Gill saw More Evidence of Appellant's Inability to Work With any Counsel and Learned More About how Appellant's Mental Condition Affected his Intended Defense and Would Interfere With Presenting a Defense

Jury selection began on May 16, 1991. In introducing advisory counsel to the prospective jurors, Gill noted that appellant had chosen to

represent himself, but that the court had "provided him with advisory counsel for such assistance as he desires and they are present with him at counsel table, San Diego attorney Nancy Rosenfeld and San Diego attorney Mark Chambers." (15RT 1385.) Appellant later objected that Gill had misrepresented the role of Chambers and Rosenfeld to the prospective jurors, because in fact they were "prosecution agents."

At the end of the proceedings that morning, appellant asked that the prospective jurors be dismissed because they had been told something untruthful about the role of Chambers and Rosenfeld. (15RT 1451.) Gill noted he would let appellant make a record of all the legal issues he wanted, but

> I also have the distinct impression that you very much want to play the role of martyr here. And I'm not going to allow you to martyr yourself in the presence of the jury that's why I'm not allowing you to make statements like you have been making in the hearing of the jury. I want you to understand that I'll let you put them on the record, but not – you're not going to become the Cherokee martyr in the eyes of this jury, and you better understand that. Got it?

(*Id.* at 1452.)

At the end of the second day of jury selection, Rosenfeld asked to put something on the record out of the presence of the prosecution. Appellant objected that anything she said would violate attorney-client privilege. (15RT 1596.) Rosenfeld stated that she did not intend to violate any privileges, but that her records would show that she was behaving morally and ethically and that she knew what her responsibilities were. (*Id.* at 1598.) Rosenfeld noted that she got a packet of proposed preinstructions from the prosecution for appellant and left them on the table for him. Gill urged appellant to look at them. (*Id.* at 1599.) Appellant objected that the prosecution had not served him, because he would not accept anything

given to him through advisory counsel because he represented himself. (*Id.* at 1600.) Gill pointed out that the instructions were on the table and appellant stated that they had not left anything on the table for him. Gill responded:

> The Court: Did too, Mr. Sequoyah. That's nonsense and I'm not going to put up with that.
>
> The Defendant: I'm objecting.
>
> The Court: Well, you can object all you want. You read those damn things.
>
> The Defendant: They're not on the table for me.
>
> The Court: They're for you. If you don't want to read them, that's your business but that's your copy, buddy, like it or not.

(*Ibid.*)

On the afternoon of May 20, 1991, Gill heard argument on appellant's "*Murgia* motion" to discover the prosecution's charging policies. Appellant asked to amend his declaration to add the information that he had been singled our for prosecution on the basis of activity "in international organizations striving for the autonomy of all peoples who desire it; and No. 2, and active in international organizations striving to establish a world government; and 3, active in international organizations striving to strengthen endangered languages and attempting to enforce the right of all people to be educated in their ethnic language." (16RT 1684.) Appellant then responded to the prosecution's assertion that appellant was not Native American.[110] Appellant asserted that it was a well known kind

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[110]The prosecution's response to appellant's request to discover information about San Diego District Attorney charging practices was filed on May 6, 1991. (17CT 3789-3806.) Appellant was referring to the following allegations by the prosecution in that document: "At this point, all tangible evidence of identification clearly establish the defendant to be a

(continued...)

of discrimination against Indian people or people who claim Indian identities to accuse these people of not being Indian. (*Id.* at 1686.) He also asserted that he was deprived of advisory counsel because Chambers and Rosenfeld "only wished to be prosecution agents and to deprive me of what I needed to come in here to day and present a defense to show that the prosecution's statements here are completely false." (*Id.* at 1690.) The prosecutor said he was unaware of appellant's organizational affiliations and appellant said the court had blocked him from disproving the prosecutor:

> All I can do here today is say this and that when I should have the right to present this defense and I'm objecting to being without access to my legal materials. I'm objecting to having advisory counsel whose only devotion is to prevent me from presenting this defense today and this is just absurd . . .

(*Id.* at 1691.) Appellant also said he could not prove his point because his boxes were disorganized and advisory counsel had not gotten discovery for him. (*Id.* at 1697.)

Gill asked why advisory counsel possibly would be motivated to obstruct appellant. (16RT 1697.) Appellant responded:

> The Defendant: What is their motivation, your honor? That's a really good question, you know. Why do the blacks of – why do the whites of South Africa want to keep the black from voting, for example? Why did Hitler hate the Jews? Jews were such good citizens. They were among his best citizens. Why did he hate them so badly? Who knows why? The fact is that they simply don't and that's unacceptable.
>
> The Court: What have they done or not done to defeat you in pursuing this motion?
>
> The Defendant: The court's well aware they don't do anything I want done. And as a result, nothing that defense

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[110](...continued)
white male adult with the real name Billy Ray Waldon." (*Id.* at 3795.)

> needs to present a defense with can be obtained, can be created and can be argued and be presented.

(*Id.* at 1697-1698.) Appellant asserted that advisory counsel had spent hours and money doing things that undermined his defense. Appellant asserted that Incomindias, a Swiss organization sympathetic to American Indian issues, was investigating the facts for him, supporting him as it had Leonard Peltier. (*Id.* at 1699.) Gill denied the motion, stating that the prosecution believed appellant was not Cherokee, which disproved it having charged him because of his affiliations. (*Id.* at 1708.) DDA Carpenter reiterated that they had talked to appellant's family and that the family members denied Indian heritage. (*Id.* at 1710.) Appellant stated that this showed that the FBI was part of a discriminatory scam:

> That's one of the most often techniques they use is to deny someone's Indian heritage and they do it by interviews. They interview someone and they say he is part Indian. The person says yes. They write down no. Then they will send these to the prosecution agents. This is part of their scam. And that doesn't make it right.

(*Id.* at 1710-1711.)

Gill then turned to appellant's section 1538.5 motion to exclude evidence from an illegal police search. Appellant stated that he was forced to sit mute because the court failed to grant him his orders pertaining to the cooperation of advisory counsel and to give him access to his legal materials. (16RT 1711.) Gill said he suspected that one of the reasons appellant wanted to be pro per was to have the benefits in jail that he thought came from this status. (*Id.* at 1712.)

The next day (May 21, 1991) Gill turned to the prosecution's motion to use the evidence of the Oklahoma crimes in its case in chief. Appellant said he could present nothing in opposition because he had been stripped of an investigator and of advisory counsel. (16RT at 1773-1774.) Gill noted

that Rosenfeld previously had stated that she gave appellant a memo on this issue, admonishing appellant that "the fact that you have not presented anything in writing and have just made the very brief oral presentation you've made, I think, is entirely a matter of your choice in the way in which you have prioritized matters and have directed your information. That's fine. That's your choice and your decision." (*Id.* at 1774-1775.) Appellant responded that Rosenfeld knew that no competent attorney could use the memo unless he had access to materials (44 boxes) which had been alphabetized and organized, and thus she had refused to help with those boxes: "Now she's here and reaps the reward of that treachery and I respectfully and humbly object to it." (*Id.* at 1776.)

At the beginning of the fourth day of jury selection, on May 22, 1991, appellant complained that Rosenfeld had not brought appellant a proper set of clothing for dressing out in front of the jury. He thought this was "a pretty easy task – only task apparently she's been assigned." (16RT 1787.)

At the beginning of the next day of jury selection, May 23, 1991, appellant requested that his law clerks Beleke and Agha be permitted to sit at counsel table with him, and that Rosenfeld and Chambers be ordered away from counsel table because they were "prosecution agents" and would not do as he ordered. He believed that he could not put items on his desk in front of them. (17RT 1898.) Gill responded:

> You don't know what the defense needs to have done. That is your problem. You haven't the faintest clue what needs to be done at this point. That's what makes it outrageous that you're representing yourself and the law allows you that decision but that's a colossal mistake on your part. You don't have the slightest clue what needs to be done. They do and they could help if you'd let them. Those clowns that are your law clerks don't have the slightest clue either. They're not going to be any help to you.

(*Ibid.*) Appellant stated that he would never seek advice from Chambers and Rosenfeld, asking the court to order Rosenfeld not to whisper to him in court because she was distracting him. (*Id.* at 1899.) Appellant said he had ceased communication with Rosenfeld two days previously, because he finally realized that the court would never order her to cooperate with him; thus, he was being forced to go without advisory counsel. (*Id.* at 1900.) Gill stated that advisory counsel could sit in the audience but would remain present throughout the trial as potential standby counsel in case Gill terminated appellant's pro per status or appellant changed his mind about representing himself. (*Id.* at 1903.) Appellant stated that Gill's threatening to take away his pro per status would be an issue on appeal, and that basically he was being gagged by the court funding advisory counsel and not him and by threatening to take his pro per status whenever he wanted to litigate something. (*Id.* at 1904.)

Judge Gill replied to appellant's statement that his advisory counsel conspired against him:

> Your continued evidences of what to me are paranoia is troublesome to me and it continues to cause me to wonder whether you really truly are competent to represent yourself or whether your paranoia is not going to defeat your efforts in that regard and make that impossible, if not difficult, if not impossible for you to do so.
>
> I haven't taken any steps yet but I'm constantly considering that, reviewing that. I'm convinced in my own mind, frankly, that if I ask you to talk to a psychiatrist or psychologist you'd refuse to do so and any professional opinion I might have to get would be based entirely on the record reading the transcripts and I just wonder what some mental health professional might think reading some of these transcripts about the state of your mental health . . .

(17RT 1905-1906.)

Judge Gill explicitly stated that he thought appellant's problems would get in they way of him presenting a defense:

> And I haven't done that up to this point but I must admit I've thought that because I just – I'm convinced that some of these what I'll refer to as paranoid delusions are just going to get very much in the way of your presenting any sort of effective defense and there are different standards, the Faretta standard is different than the standard under 1368 but some point I may feel that we need to have some help from some mental health professionals, if you truly believe and you truly genuinely believe some of the things you tell me and I'm not so sure whether you do or not.

(17RT 1906.) Appellant objected to the reference to paranoid delusions, stating that it was not a paranoid delusion to request advisory counsel to organize and alphabetize his files, to be silent in court, and to tell the truth. (*Id.* at 1907-1909.) Gill noted that appellant kept referring to advisory counsel as "agents of the prosecution," and accused them of mixing up his boxed materials when no reasonable person would have a motivation to do this. (*Id.* at 1908.) Gill also noted that appellant continually put him in the situation where he had to judge between appellant's credibility and the credibility of Chambers, who would have no motivation to lie. (*Id.* at 1910-1911.) During a recess, Rosenfeld attempted to talk with appellant about the impact on the jury of seeing counsel sitting away from him rather than at the table with him. After the recess Rosenfeld reported that appellant would not talk with her. (*Id.* at 1918.) Gill ultimately decided that it would be up to advisory counsel to determine where they would sit. (*Id.* at 1920.)

In court the next day, May 28, 1991, Rosenfeld noted that Gill had asked her to be responsible for providing appellant's court clothing, but it would better to assign the task to appellant's law clerks, whom he trusted. (17RT 2065-2066.) During voir dire for the purposes of death qualification, appellant repeatedly asked questions about whether the

prospective juror would be more likely to give someone the death penalty because that person was a Cherokee Indian. (See, e.g., 19RT 2375, 20RT 2510, 2608.) On May 31, 1991, Gill commented on this, expressing doubt that the jury would hear any evidence that appellant was, in fact, Cherokee. Gill said: "I don't think for a minute that you're a Cherokee Indian. [I'll call you by an Indian name or] whatever name you want to be called to get this on with, get this trial on with." (*Id.* at 2635.)

On June 4, 1991, appellant complained that Rosenfeld had brought him a shirt that was too small after she refused to come to the jail to measure him. (22RT 2820.) He had not asked her for bigger shirts because he had stopped communicating with her "because she doesn't do anything." (*Id.* at 2821.) Gill said providing clothes was not a responsibility for advisory counsel. (*Ibid.*)

Jury selection continued for the next weeks, during which the parties used the questionnaires for questioning prospective jurors. On June 7, 1991, appellant complained that back when he was communicating with Rosenfeld, he had told Rosenfeld to make a copies of the questionnaire both for him and for his clerks, but she had failed to do so. (24RT 3477.) Later, Rosenfeld asserted that she had made the questionnaires for the clerks and that these were available. (24-1RT 3480 .) Appellant then asserted that Rosenfeld had helped the prosecution by giving them advice on a matter that was detrimental to the defense. (*Id.* at 3480-3481.) Rosenfeld stated that she had given the prosecution a code section relevant to the proceedings, and had done so in front of appellant to make sure that he would not be paranoid about what was said. (*Ibid.*) She stated that appellant wanted to put it on the record that she and Chambers were prosecution agents, when appellant knew or should have known that they were not. (*Id.* at 3481.) Appellant also objected to Rosenfeld being

provided a desk, objecting that she was seated near his desk where she could hear defense conversations. Gill stated that appellant did not really believe this and that it was a sham. (*Id.* at 3482.)

On June 19, 1991, Gill returned to the issue of the admissibility at guilt phase of the Oklahoma crimes evidence. Appellant stated that he had not had time to research the issue because he did not have access to his legal materials and because his clerks had not been given enough time. (29RT 4430.) Gill reminded appellant that he previously had said that advisory counsel had given him a memo on the subject far earlier, but that if appellant did not want to use the memo due to his "foolishness" that Rosenfeld was an agent of the prosecution, that was his business. (*Id.* at 4431.) Appellant said he was unable to use the memo because he lacked access to his legal material. (*Id.* at 4438.)

On that same day, the parties began discussion of jury instructions. DDA Carpenter stated that he was giving appellant a set of instructions based on the 1991 law, and that he had previously given advisory counsel instructions based on the 1984 law. (29RT 4519.) Appellant stated that he would not accept things from the prosecution if it had first given them to advisory counsel, because "advisory counsel takes things and they remove them," just like Russell did with discovery materials. (*Id.* at 4521.) Gill characterized this complaint as "complete and utter nonsense." (*Ibid.*) Rosenfeld stated that she had picked up the instructions from the table where the prosecution had left them and had not changed them. (*Id.* at 4522.) Gill stated that he would not waste more time on appellant's "childish" behavior. Appellant accused the prosecutor of sharp tactics, saying: "because of my religion and the necessity to represent myself, he knows he can deprive me of anything by giving it to someone else. And he should not be allowed to commit this fraud on the court by using that

technique." (*Ibid.*) Gill characterized the religious argument as "utter nonsense." (*Id.* at 4523.)

During general voir dire on June 20, 1991, appellant tried to ask a group of prospective jurors whether movements to establish Indian autonomy were a good or bad thing. (29RT 4611.) Following a prosecution relevance objection, Gill said that voir dire for bias would be allowed, but "beyond that I don's see any defense that is going to be based on whether you are or are not an Indian or whether you are or are not part of the movement." (*Ibid.*) The prosecution objected to voir dire focused on character. Appellant asserted that these witnesses would be testifying to matters that were critical to his defense, but he declined to state what they would say. (*Id.* at 4613.) As appellant continued to ask the panel questions about Indian autonomy, Gill sustained relevance objections. Out of the presence of the jury, appellant asserted: "I have spent most of my entire life, indeed, ever since I was born – actually my entire life involved in the movement, the Cherokee National movement and movement to restore Cherokee independence and nothing could possibly be more relevant." (*Id.* at 4621.) Gill asked him to state what the defense was and appellant stated that it was character, i.e., that witnesses had an opinion about his good character because of his association with Cherokee independence. (*Id.* at 4622-4623.)

Toward the end of the day, Gill commented that he had permitted appellant to question potential jurors on this issue because there was a possible question of bias against appellant because of his involvement in movements. Gill noted that appellant had referred to a "defense" involving this movement but Gill would not let appellant use the courtroom to espouse the cause of his movements because there was "zero relevancy to any issues which will be before this jury." (*Id.* at 4633.)

Appellant asked to make an offer of proof for the relevancy of the question, outside of the presence of the prosecution. Appellant then stated that he was innocent and he was going to try to prove the identity of the person who committed the crimes, and to do so he had to explain what movements that person and appellant had been involved in. These were the movements for Poliespo, for Cherokee language autonomy, and for American Indian autonomy. (29-1RT 4637-4638.) Appellant said he wanted to ask questions about homosexuality because he had been involved in AIDS research before he was accused of crimes. (*Id.* at 4639.) He also wanted to ask questions about the World Humanitarian Church and the United Nations of Autonomous Peoples. (*Id.* at 4640.) The evidence that he was in the organizations would relate both to his character and to his attempt to identify the person who had done the crimes. (*Id.* at 4641.) Over the objection of appellant, Chambers asserted that appellant might want to ask about the CIA because Chambers had determined that appellant had mailed out statements that he had founded a church and other organizations and the CIA planted the evidence of the crime in his car because it did not want him to spread Esperanto and Poliespo throughout the world. (*Ibid.*) Appellant asserted that Chambers was a prosecution agent who had revealed his confidential defense which would now be spread all over. (*Id.* at 4642.) Appellant asked prospective jurors many questions relating to possible bias related to his involvement in Esperanto, the United Nations of Autonomous Peoples and the World Humanitarian Church.

The next day, June 25, 1991, appellant asked a group of prospective jurors whether they were biased against the goals of Esperanto. (31RT 4874.) Gill stated that it was acceptable for appellant to ask the jurors whether they would be biased against him because he was an Esperantist, but it was not relevant to know whether the prospective juror was biased

against the goals of Esperanto; rather, appellant was indoctrinating the jury. Appellant stated that he did not wish to get up on a soap box, but that "the goals are what cause me to be accused of crimes." Gill stated: "I don't think there's one shred of evidence to that. That's a fantasy on your part." (*Ibid.*) Appellant assured him that there would be evidence of this, and Gill stated that he would be "amazed" if this were true. (*Id.* at 4875.)

On June 26, 1991, at the beginning of continued jury selection proceedings, appellant complained that he had seen Rosenfeld and Chambers talking together and asked that Gill order that they not do so. Gill characterized the complaint as "nonsense." (31RT 4984.) Appellant complained that he could not do a good job because he had been kept from going outside by the jail staff. Gill stated that he thought that appellant looked fine and that he was doing a competent and presentable job. (*Id.* at 4988-4989.)

Appellant asked a group of prospective jurors, among whom was Larry Berggen, whether he thought that the goal of American Indian Autonomy was a good one. Berggen expressed negative views on the subject, and on any movement to establish or support Native American languages. (31RT 4974, 4978.) When appellant asked whether the panel members had a negative view of small religions (like the World Humanitarian Church), Berggen said small religions were bad because they were like cults. (*Id.* at 4980.) Later, appellant challenged Berggen for cause, arguing that Bergen was biased against the idea of Indian autonomy, which was an integral part of himself and his defense. (*Id.* at 5058-5059.) Gill and appellant had the following exchange:

> The Court: Maybe an integral part of you. I don't think it's an integral part of your defense. *I don't think it has anything to do with your defense, Mr. Sequoyah.*
>
> The Defendant: Your honor, it – I speak for --

The Court: I understood what you told me out of the presence of the prosecution. I understand that. But I don't think that is an integral part of your defense. There may be certain witnesses who are called who are sympathetic to those causes but beyond that it is not at all clear to me that the jury is going to hear anything at all about Indian autonomy other than perhaps that's the basis for some relationship between you and the witnesses or their knowledge of you or that you may share those interests. *But beyond that, the substance of the Indian autonomy movement, I think, has little, if any, relevance to this case or any issues in the case.*

The Defendant: Your honor, surely the court is aware that is part of my defense and I object to the court assuming that is not part of my defense.

The Court: You've made your defense – to the limited extent that you've chosen to do so, you've told me about your defense and I'm basing my decision on what you told me in that regard.

(*Id.* at 5059-5060, emphasis added.)

C. During Presentation of the Prosecution's Case, it Became More Clear That Appellant Could not Work With any Counsel

The presentation of the prosecution's case began on July 1, 1991. During a discussion of the prosecution's proposed instructions, appellant said he was not well-prepared because the court had deprived him of advisory counsel. (32RT 5181.) Gill said that appellant had counsel, but had chosen to "fritter" it away, characterizing appellant's complaint as "nonsense." (*Id.* at 5181-5182.) Later, Gill upbraided appellant for not having a copy of the information with him, noting that he thought appellant would have it since his life was on the line. He noted that appellant carried two folders with him which probably only contained junk, including a copy

of a book on Poliespo he wanted to sell. (*Id.* at 5189-5190.)[111] Shortly thereafter, Gill commented on appellant's refusal to pick up and read a copy of the jury instructions they were discussing, which had been laid on the table before appellant: "If you want to engage in that foolish business, those weren't served on you and those somehow passed through the hand of the wicked witch of the west, Miss Rosenfeld, so you can't have anything to do with them. But I think you're perpetrating a bit of a fraud on the court when you tell me I don't know where my set of instructions are, they're somewhere else. The record can reflect that they are in arm's length, where they have been all morning." Appellant expressed regret that Gill was choosing not to respect his religious beliefs. (*Id.* at 5192.) Gill countered that appellant had never shown that there was any religious basis for the "nonsense" he was trying to perpetrate. (*Id.* at 5192-5193.)

Gill held an in camera hearing at appellant's request, and appellant asked Gill to exclude Chambers and Rosenfeld from the hearing because they were agents of the prosecution and not advisory counsel. (32-1RT 5211.) Rosenfeld, speaking over appellant's objection, stated she had tried to give appellant advice over recent weeks, but appellant typically turned his back to her and tried to block out what she was saying. That day, she had tried to hand him a note but he refused to take it, and when she passed it to him through the bailiff, appellant took the paper and threw it on the

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[111]Appellant later complained that Gill could only have learned about his book from Judge Milliken, who was a 987.9 judge. (32-1RT 5218.) Gill stated that he learned about it from Glen Neimy, the court research attorney. Appellant complained that the proceedings before Milliken were sealed but Neimy was present. (*Id.* at 5219.) Appellant noted that prosecution agent Chambers got the document and brought it in to undermine the confidentiality of his defense. Appellant objected that Gill had revealed confidential matters to the prosecution by mentioning the book in open court. (*Id.* at 5220.)

ground. She was ready to give advice, but knew of nothing that had happened to change appellant's attitude toward her. (*Id.* at 5212-5213.) Appellant objected to the bailiffs acting as conduits between him and Rosenfeld, claiming that it placed him in conflict with the bailiffs and filled him with so much disgust and outrage he was unable to concentrate on court proceedings. (*Id.* at 5213.) Appellant asked for an order that Rosenfeld and Chambers not approach him at the table or attempt to communicate with him either directly or through the bailiffs. (*Id.* at 5214.)

Appellant also complained that Rosenfeld and Chambers had conferred with the prosecutor and given him information detrimental to appellant's defense. (32-1RT 5216.) He noted that in the military the penalty for consorting with the enemy was death. (*Ibid.*) Gill denied appellant's request for an order that Chambers and Rosenfeld not talk with the prosecution. (*Id.* at 5217.)

Later that day, appellant complained that he could not get experts ready because the court had deprived him of advisory counsel. Gill reiterated that appellant had advisory counsel available but "you just apparently have not chosen to seek their advice on the subject." (32RT 5225.) After the testimony of prosecution witness Thomas Collimore, appellant asserted that he was forced to decline the opportunity to cross-examine Collimore because he had been stripped of advisory counsel, who should have helped him prepare questions. (*Id.* at 5336.) Gill stated that he had not been "forced," and that if appellant stated this in front of the jury, Gill would tell the jury to disregard the statement. (*Id.* at 5336-5337.)

The next day Chambers put on the record that a fire investigator ("Mr. Sottile") was present and offered appellant to opportunity to speak with him. (33RT 5384.) Appellant said Sottile was not his investigator; indeed, he was planning to sue Sotille. (*Id.* at 5385.) He also objected to

"Mr. prosecution agent Chambers' statements on the record. They're an outrageous lie and an untruth and a court of justice should be a place of honesty and integrity. . . ." (*Ibid.*)

Later that day, Rosenfeld put on the record that she was at counsel table at the request of appellant. (33RT 5423.) Appellant objected to her speaking.

The following day, July 3, 1991, Rosenfeld was absent and appellant asked for a continuance, stating that he was counting on Rosenfeld's assistance. (33RT 5543.) Gill asked why he could not use Chambers and appellant responded: ". . . I will never be utilizing Mr. Chambers." Gill noted that this was appellant's problem not the court's. (*Ibid.*) Gill noted that Rosenfeld had been "presenting quite a bit of assistance to Mr. Sequoyah yesterday during his examination of the witnesses." (*Id.* at 5544.) Gill continued the case. (*Id.* at 5546.) Carpenter observed that appellant took questions out of Rosenfeld's hand and did cross-examination of the prosecution firefighter witnesses. Appellant asserted that the prosecution was not correct and that 95 percent of the questions were his own. (*Id.* at 5555.)

On July 17, 1991, another trial date, Gill reported that Rosenfeld was home with a headache. (37RT 6409.) Appellant asked for a one day continuance due to her unavailability. (*Id.* at 6410.) Gill stated that it was clear that appellant was just using the preliminary examination line by line to cross-examine the witness and that Rosenfeld was not necessary for this. (*Id.* at 6413.) Gill also stated that appellant had other counsel present (i.e. Chambers) and it was appellant's decision if he did not want to use him. (*Id.* at 6414.) Appellant asserted that Chambers had been fired by Judge Revak and that the prosecution asked him to be rehired: "So, Mr. Carpenter hired that man. I didn't. He's Mr. Carpenter's prosecution agent." (*Ibid.*)

Gill noted that Chambers was prepared to offer advice and that appellant's position concerning him was "utter foolishness," an idiosyncracy which Gill would not indulge. (*Id.* at 6414-6415.) Gill denied the motion for continuance. (*Id.* at 6419.)

During the cross examination of prosecution witness Melvin Edward Medhurst, appellant discovered that he was missing one of his reports. At the close of proceedings, Gill noted that when it was determined what report was missing, Chambers produced the form and provided it to appellant. (37RT 6554.) Gill stated that his reason for putting this on the record was to show that Chambers was qualified and willing to assist. Appellant asserted that he did not know that the document came from Chambers and if he had known he would not have accepted it. He objected to the court surreptitiously "behind my back giving me documents from him." (*Ibid.*) Appellant continued:

> If – if your honor was a defendant and – and your advisory counsel looked at your judge and said – advisory counsel said, your honor, look at the defendant David M. Gill, look at him, he thinks he's a white person with a white name. Why, he's not white, and his white name is a delusion. Which the whole idea of racial enthicity [*sic*] is a delusion and a psychiatric sickness. [¶] Do you think you would accept things from that individual? I don't believe that you would.

(*Id.* at 6554-6555.)

On July 18, 1991, after the testimony of prosecution witness Javier Francisco Mainar, appellant asked for a continuance because Rosenfeld was not there and because she had been sick for the previous two days so that he could not prepare. (38RT 6685-6686.) Gill denied the request. (*Ibid.*)

Later that day, appellant asserted that Chambers and Atwell had taken some videotapes from discovery to prevent him from seeing them, thus obstructing his defense. (38RT 6692.) Chambers said appellant had

refused to look at the tapes when he brought them to the jail, and offered to bring them to court and arrange for a private viewing. (*Id.* at 6701.) Appellant said the tapes were his personal property and asked Gill to charge Chambers with theft. Gill characterized this as "nonsense" and that be believed Chambers over appellant. (*Id.* at 6702, 6704-6705.) Appellant complained that Chambers still had his legal material after he told appellant that he had turned over everything, which was an example of him being obstructive to the defense. (*Id.* 6706.) Appellant asked Gill to inquire of Chambers what else he had of his legal material. When Gill asked why he could not do this himself, appellant asserted that he would never communicate with "that dishonest creature." (*Id.* at 6707.) Gill said that he would not be a moderator and he would not referee a dispute between appellant and Chambers. (*Id.* at 6709.) At the end of the hearing, appellant asked the court to order Chambers to turn over the material which he had "stolen" from him. (*Id.* at 6714.) Gill declined. (*Id.* at 6715.)

During the proceedings of July 19, 1991, Gill put on the record that Chambers brought the videos to court. (38RT 6753.) Gill allowed Chambers to put on the record what happened, over the objection of appellant that Gill not allow "advisory counsel to sneak [*sic*] in court on any matter of importance." (*Id.* at 6755.) Appellant repeated his request that Gill charge Chambers for theft. (*Id.* at 6755-6756.) Gill denied appellant's request that Atwell and Chambers turn over everything pertaining to him. (*Ibid.*)

Earlier DDA Carpenter mentioned that they had the biological evidence from the Erin Lab rape case analyzed for DNA, and appellant could not be excluded from the donor of the suspect sample. (38RT 6745.) Appellant asked Rosenfeld to be heard on the DNA issue. (*Id.* 6752.) Later, Rosenfeld addressed the issue of how long it would take for the

defense to respond to the DNA issue. (*Id.* at 6761-6763.) On July 31, 1991, DDA Carpenter put on the record that appellant and Rosenfeld consulted in front of the jury during cross examination causing long pauses and breaks in the questioning. (42RT 7707.)

At some point during the examination of prosecution witness Stephen Midas on August 1, 1991, appellant asked to have an answer repeated because neither he nor Rosenfeld could remember the answer. (43RT 7806.)

On August 12, 1991, appellant asked the court to order the prosecution to supply the whereabouts of witnesses who had testified for the prosecution (Thomas and Katherine Collimore) so appellant could subpoena them. He was unable to locate them. (44RT 8031.) Chambers interjected that this was not true, and that he had given appellant the address. (*Id.* at 8032) Later he said that he gave Rosenfeld the address and asked her to pass it on to appellant. (*Ibid* .) Rosenfeld stated that she had not given it to appellant yet. (*Ibid.*) Appellant stated that he would not accept anything from Rosenfeld that had come from Chambers. He also objected to Chambers' presence in the courtroom. (*Ibid.*)

On August 14, 1991, appellant asked for permission to stand while examining witnesses. Gill observed that in the past appellant had stayed at counsel table and that he consulted with Rosenfeld "on an ongoing continuing basis, so that it's appropriate that you be in a position to do so." (45RT 8222.)

On August 15, 1991, appellant filed a "Request of Sealed Hearing Re Zeroxing [*sic*] for the Defense." In his declaration in support of the request appellant asserted that there were numerous documents in the material the prosecutor had placed in court which were his personal property and were needed by the defense:

> . . . to allow reading and viewing by expert witnesses (including two psychiatrists who are fluent Esperantists and will testify concerning the effect of Esperanto, and my past activities in the Esperanto Movement upon my mind and mental state) . . . Many of my Esperanto writings are needed for review of these expert witnesses and for presentation as evidence. This material contains the names and addresses of a few thousand Esperantists who will either be witnesses at my trial or are people who must be contacted by the defense by letter to locates witnesses k.a. [*sic*] Many of these items document my whereabouts during periods of time in which I'm accused of crimes which I didn't commit.

(38CT 8392.) Gill later alluded to the copying in a proceeding. He stated that he had read appellant's declaration, but that he was still not "very much convinced that there's any real need to do all this copying in terms of this trial. I think you have some other agendas working or some personal interest . . ." (46-1RT 8572.) Gill later alluded to the copying pertaining to some "entirely separate agenda" appellant was working on. (47RT 8862.)

On August 21, 1991, appellant filed a Confidential Request to Prepare a Truthful and Meritorious Defense. He stated that the material contained thousands of addresses which needed to be copied so that the defense could send a letter to each one. (18CT 3972.) At a hearing on this motion on August 21, 1991, Gill stated that appellant had not shown enough in his request to continue copying material. Gill stated that he was disinclined to take up court time for "what I think is largely irrelevant copying that is – I'm convinced is to serve some other purpose, has no relationship to this trial. You're out doing something with your Esperanto cause or selling your book or something else, I'm convinced." (47-1RT 8931.)

Also on August 22, 1991, appellant complained to the court that Rosenfeld had copied some of his personal property after she had promised that she would not do so. (48RT 4933.) Appellant stated that he had told

her that she could keep the property in her office only if she promised that she would not look at it, copy it, or give it to anyone else. (*Ibid.*) Appellant confronted her about some material he saw her with and asked her if she had copied it from his materials and she admitted that she had. Appellant offered this incident as an example of her habitual dishonesty. (*Ibid.*) Rosenfeld replied that she had told appellant that he could not force her to be unprepared. She admitted that she copied materials from his file so that she could have them as part of the discovery. (*Id.* at 8934.)
Gill stated that he thought that Rosenfeld had behaved reasonably. (*Ibid.*) Appellant clarified that he was not just complaining about Rosenfeld copying his materials but about her lying to him about this and about keeping material from him so that he could not prepare his defense. (*Id.* at 8936.) This action denied his right to represent himself and his Fourth Amendment right to be free from illegal seizures. (*Ibid.*) He noted that Rosenfeld had put in a motion behind his back to take over the case and get funding for herself. (*Ibid.*) Rosenfeld stated that she had never put in a funding motion and that appellant's investigator had picked up all the material in her office, so that appellant had it all. (*Id.* at 8937.) Later, appellant objected to Rosenfeld speaking without his permission on the grounds that if she was speaking she was trying to represent him. (*Id.* at 9116.) Appellant also objected that Rosenfeld was "habitually untruthful." (*Ibid.*)

On August 23, 1991, appellant filed another confidential motion to "present a meritorious defense." In that motion he asked for additional time to copy the material held at the court. The motion was supported by the declarations of appellant and investigator Keith Faulder. (18CT 3975-3979.)

On August 28, 1991, Gill held a hearing on the motion. Gill noted that appellant had said that he was innocent, so that he did not understand the relevance of evidence that was pertaining to his mental state, including information that would be developed by psychiatrists. (50-1RT 9498.) Appellant declined to state more about what the relevance was because he believed that Gill would disclose the information to the prosecution. (*Ibid.*) Appellant also declined to tell Gill more about his psychiatrists because Chambers and Neimy were there. (*Id.* at 9502.) Appellant said that the material showed his Esperanto activities and worldwide Esperanto events. (*Id.* at 9503.)

When Gill asked whether his proposed psychiatrists would testify about a mental disease or defect, appellant refused to say. (50-1RT 9504.) Appellant said some of the material he wished to copy was essential background material. (*Id.* at 9507.) Gill replied that appellant's statement was "baloney." Gill stated that if appellant wanted this for a psychiatric evaluation, he would have to have something from the psychiatrists in writing about why they needed it – appellant stated that he would refuse to provide that on the grounds that this would prostitute his defense. Appellant asserted that Gill would love to have this and show it to the prosecution and put a hole in his defense. Gill said he thought there was no such defense. (*Id.* at 9509-9510.) Appellant also stated that there were documents in the files which would show where he was at the time of the crimes, but that he would not show them to Gill because Gill would tell the prosecution about them. (*Id.* at 9515.) There were other declarations which had been leaked and as a result there had been the attempted murder of the declarants and they were refusing to come and testify. (*Id.* at 9516.) Gill pointed out that appellant said in his declaration that there were documents that would yield potential alibi witnesses. Appellant responded that he

needed to write letters to all of them and see who knew when they were together. He knew the people were important because he did not commit the crimes. Gill noted that the people appellant wanted to contact were Esperantists and that the issue of mental state and Esperatists was "hogwash," adding that no responsible psychiatrist would say that speaking Esperanto or being an Esperantist had anything to do with mental state. (*Id.* at 9521.) Appellant urged that the psychiatrist could comment on his character and could say that he created Poliespo and that this was a good thing. Appellant refused to tell Gill what the documents would show or why appellant wanted them translated to Cherokee, saying that telling Gill would be revealing confidential defense information. (*Id.* at 9525-9526.)

Appellant said he needed Rosenfeld to do a funding motion for out of state witnesses and had asked her about this a year prior, but she had refused to do this. Rosenfeld stated that this was not true and that it was not her place to run around figuring out how much it cost to bring in witnesses from out of state because she was an attorney not an investigator. Gill agreed. (50-1RT 9528-9529.) Gill said appellant was on a "fishing expedition," and he had no idea what he was looking for. (*Id.* at 9530.) Gill alluded to a declaration filed by a "Jane Smith," in which the person said she could not use her own name because she was the target of an assassination plot. Gill said the allegations in the declaration were "laughable" and "ludicrous" and "hogwash."[112]

During testimony on August 28, 1991, prosecution witness John Simms testified about the hair found at the scene of the Erin lab rape. After the prosecution's direct, appellant complained that Rosenfeld had just

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[112]There is no declaration from a Jane Smith in the record. However, there is one from "Earl Smith," described, *supra*. It is likely that Gill is referring to the declaration from Earl Smith.

shown him the Simms' report, and asked to put off cross-examination. He also complained that Rosenfeld had not found him a hair specialist as he requested. Rosenfeld stated that if appellant would waive the privilege she would be happy to tell the court what advice she had given him. (50RT 9606.) In camera, Rosenfeld explained that she had given the names of hair experts three weeks prior. Appellant objected to Rosenfeld's habitual untruthfulness stating that she only gave him the name of an expert when appellant learned that Simms would testify. Appellant also complained that Rosenfeld had never finished a *Pitchess* motion in spite of appellant's repeated requests that she do so. She had finally given him the xeroxed work of another person, which was unacceptable. (50-1RT 9609-9610.) Appellant asserted that he told Rosenfeld to call hair experts; Rosenfeld asserted that his investigator was assigned to this and she did not believe the issue was critical. Gill thought it was typical for appellant to seize on something peripheral, that this was delay and there was no reason to delay cross-examination. (*Id.* at 9614-9615.)

On August 29, 1991, appellant asked for an order that Rosenfeld and Chambers be ordered not to talk to the prosecution because he had just observed that Rosenfeld had leaned over and whispered something to the prosecutor's investigator. (50RT 9672.) Rosenfeld responded that she had said something to the investigator about who Carpenter was going to call and that she was trying to help appellant by letting him know who the witness was going to be. Appellant stated that the whispering was too low for him to hear and Rosenfeld was habitually untruthful, so could not be believed. (*Id.* at 9673-9674.)

Towards the end of testimony on August 29, Gill discussed when appellant would be ready to proceed and whether his character witnesses were ready. Appellant stated that he would have been ready with these a

long time ago, but that Gill had stripped him of advisory counsel and as result he had two prosecution agents that had done nothing that he wanted done and had "engaged in numerous deceitful actions that have undermined the defense." He argued that Chambers was appointed at Carpenter's request after appellant got him fired for corruption and deceit. Carpenter found out what happened in sealed proceedings and as a result appellant had no ability to subpoena people. (50RT 9721.) Gill surmised that this meant that appellant did not have character witnesses. Appellant responded that this meant that Rosenfeld and Chambers "did not want" him to have character witnesses, and Gill was getting in the way of him having character witnesses. (*Id.* at 9722-9724.) Appellant claimed that Gill was interfering by not ordering Rosenfeld to do the work for the out of state witnesses. Later appellant said Rosenfeld had refused to provide him help with this because she did not want him to have the witnesses. (*Id.* at 9742.)

D. Appellant's Presentation of his Case Gave Judge Gill Full Reason to Question Appellant's Competence to Stand Trial and Reconsider Whether Pro Se Status Should Continue

On September 12, 1991, appellant made his opening statement. Prior to beginning, Gill asked appellant to show the prosecution some charts he wanted to use. One of them had the word cointelpro on it, which appellant explained stood for "counter intelligence program." (54RT 10295-10296.) The other was a map, which the prosecutor pointed out was a map of the shrinking of the Cherokee nation. (*Id.* at 10303.) Appellant said the map would help the jury understand why he was accused of crimes he did not commit. Appellant then stated: "My defense is cointelpro defense, that's my entire defense." He said that "cointelpros" arise out of "historical confrontations between nations." This showed the history of the Cherokee nation and demonstrated the historical confrontation between nations. (*Id.*

at 10304.) When asked to name the witnesses who would state that there was a "cointelpro afoot," appellant stated that this was confidential. (*Id.* at 10305.) Gill stated that appellant would not be permitted to use the map because he was not convinced that there would be evidence of cointelpro. (*Id.* at 10309.)

In his opening statement, appellant stated that he would show why he was accused of crimes he did not commit, showing the jury the word cointelpro on a bulletin board. (54RT 10336.) He stated that he would show that he was targeted by a cointelpro because he founded the Exiled Government of the Cherokee Nation as part of the United Nation of Autonomous Peoples. He was also targeted because of his launching of Poliespo, a mixture of Esperanto and Cherokee, something which outraged the FBI and CIA. (*Id.* 10338-10339.)

Out of the presence of the jury, Gill asked to know who would testify about this, stating that he doubted that appellant would put on anything about this. (54RT 10339.) Appellant stated that Russell Means would testify that Means was a victim of cointelpro and that he had contact with appellant. (*Id.* at 10340.) Appellant asserted that this would show why he was charged with crimes he did not commit. (*Ibid.*) Appellant stated that he had other witnesses who had "everything" to do with what happened. In reply to Gill's question about how other victims of cointelpro related to appellant's defense, appellant said that it was "everything" and that "they" had put evidence of unsolved crimes into his car. Appellant asserted that he would testify about this, but would not give details because his testimony was confidential. (*Id.* 10342.) Gill stated that this was a ploy and manipulation and that appellant was trying to convince the jurors that he was crazy, but that Gill thought it was a scam and had no question that

appellant was competent. (*Id.* at 10343.) DDA Carpenter commented that the trial was a circus. (*Id.* at 10344.)

Back in front of the jury Gill sustained his own relevance objection when appellant stated that he would put on evidence of the history of cointelpro. (54 RT 10349.) Appellant said he would put on evidence of the history of cointelpros because the jury could not determine whether a cointelpro existed unless they know the history. Gill sustained his own relevance objection. (*Ibid.*) Appellant stated that there would be witnesses about why a cointelpro was launched, one of which reasons was appellant's attempts to try and get a unique bike manufactured for the benefit of the Cherokee Nation. (*Id.* at 10355.) Appellant stated that he would show that a cointelpro is as described in the book, *The Cointelpro Papers.*[113] Gill stated that this was irrelevant. (*Id.* at 10356.) Out of the presence of the jury, Gill stated that he would not let appellant talk more about this because he doubted that appellant had witnesses from the Cointelpro Papers who would testify for him. (*Id.* at 10357.) Later, Gill repeated that he would not allow a long lecture on cointelpro because it was irrelevant. (*Id.* at 10361.) Appellant later returned to cointelpro and stated that he would try to have Ward Churchill and Jim Vander Wall, the authors of the book *Cointelpro Papers,* testify. Gill asked him not to discuss this since the court had not ruled on it. (*Id.* at 10375.)

On September 12, 1991, appellant stated that Rosenfeld had defense witness John Simms lined up. (54 RT 10367.) After the prosecutor objected to Simms' testimony on foundational grounds because appellant had not brought the proper items into court and had not had the officer who

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[113]Appellant's reference is to the book by Ward Churchill and JimVander Wall: *The COINTELPRO Papers Documents From the FBI's Secret Wars Against Dissent in the United States.* (1st Ed. 1988.)

seized the items there to testify, appellant stated that he was having Rosenfeld take care of this. Gill stated that he would not intrude into what appellant had Rosenfeld do, but that this was not the job of an attorney and that the court was paying her to be a "flunky." (*Id.* at 10385.)

On September 13, 1991, appellant stated that he was not ready with witnesses, though he thought there would be someone there at 1:30 that afternoon. (54 RT 10426.) During a discussion of appellant's failure to have witnesses ready, Gill observed that when he tried to pin appellant down he shuffled around and shifted his feet, and his hand went to his mouth and he ran to Rosenfeld and asked her what to do. (*Id.* at 10433.) During a discussion Edwin Spruth's testimony, appellant stated that Rosenfeld would help him find an attorney if Spruth had Fifth Amendment questions. (*Id.* at 10460.)

On September 16, 1991, Gill stated that appellant told him that he did not have his witnesses ready and refused to reveal the names of potential witnesses. (55RT 10559.) At the request of appellant, Rosenfeld addressed the court about the question of the scope of cross-examination of defense witness Edwin Spruth. She argued that Spruth had four felony convictions and that the jury already knew that Spruth was in jail and that information about any more convictions would be prejudicial. (*Id.* at 10624.)

Edwin Spruth testified that he had met appellant in 1985 and that appellant was riding a unique bike, whose seat went up and down. Gill, however, would not permit appellant to demonstrate the bike. Out of the presence of the jury, appellant explained that demonstrating the bike was crucial to his defense because the bike and the way it functioned was part of the reason why he was framed for crimes he did not commit. The bike was one of the motives for the CIA and the FBI to launch a cointelpro against

him. (55RT at 10636.) Gill stated that the bike could not be demonstrated because he did not think appellant would offer cointelpro evidence. (*Id.* at 10637.)

During a break in Spruth's testimony, appellant stated that Brian Burg was there, who was an Esperanto interpreter appellant wanted to use. (55RT 10660.) Gill stated that they would not use him because appellant's witness spoke Danish and they had an interpreter of Danish ready to go.[114] (*Id.* at 10661.) Appellant stated that he wanted the interpretation in Esperanto to show that Esperanto is a beautiful language and this was part of his cointelpro defense. Gill said he did not want to hear about this again, and that appellant's story about cointelpro was a "fiction" and a "fantasy." Appellant asserted that Esperanto was the motive for the FBI and CIA to use cointelpro. (*Id.* at 10662.) He also asserted that his intended witness was a character witness. Appellant refused to state what her testimony would be before she testified. (*Id.* at 10663.)

Back with direct examination of Spruth, appellant asked two questions about cointelpro: did Spruth think appellant was the victim of cointelpro and did Spruth think that he was the victim of the same cointelpro as appellant? Gill sustained relevance objections to both questions. (55RT 10673-10674.) Out of the presence of the jury appellant urged that the more people who said that there was a cointelpro and that appellant was the victim of cointelpro, the more believable it would be. Gill ruled that this was an inadmissible opinion. (*Id.* at 10674.) Appellant ask Spruth more questions about cointelpro: Did Spruth see symptoms of cointelpro in the accusations of which Spruth was innocent; what were the symptoms; was Spruth the victim of cointelpro because he agreed to help appellant; Did Spruth learn something about his and appellant's cases from

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[114]The witness referred to here is Eliza Kehlet. (See 55RT 10698.)

reading the book *Agents of Represssion*?[115] All of the prosecution's relevance objections were sustained. (*Id.* at 10675-10676.)

On September 17, 1991, appellant called Eliza Kehlet as a witness. Gill stated that if appellant asked questions of her like he had asked of Sputh, Gill would sustain relevance objections. (55RT 10693.) When the prosecution objected to questions about Esperanto, appellant stated that Esperanto was one of the reasons he was accused and this was his entire defense. (*Id.* at 10708.) Gill agreed to let him ask a few questions about Esperanto to establish Kehlet's connection with him, but sustained a relevance question as to whether Kehlet could communicate as well in Esperanto as in German or Danish. Appellant argued out of the presence of the jury that Americans think that Esperanto is a language for robots which impression he had to correct or the jurors would not believe that Esperanto was a motive for the FBI and CIA to target him. (*Id.* at 10712.) Appellant asked Kehlet what his reputation was in the Esperanto community. DDA Carpenter objected and appellant argued out of the presence of the jury that he had a right to put on his reputation in that community because he is an "Esperantist." Carpenter stated that the trial had become a circus for appellant's person agenda. Gill stated that he would sustain this objection until appellant showed that he was accused of crimes because he was an Esperantist. (*Id.* at 10727.) Gill also sustained relevance objections to appellant's questions about Kehlet's opinion of the goals of the organizations he founded and about the qualities of Poliespo. (*Id.* at 10729-10730.)

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[115] *Agents of Repression* is a reference to the book *Agents of Repression: The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement,* by Ward Churchill and Jim Vander Wall, published in 1988.

Also on September 16, 1991, Rosenfeld related to Gill that appellant asked for funding for Ward Churchill, whom appellant wanted to call, and that Milliken wanted to know if Gill was going to allow the testimony. Appellant stated that cointelpro was his whole defense. (55RT-1 10796.) Gill asked him what testimony he was going to present and appellant stated that there would be his testimony and the testimony of others. (*Id.* at 10797.) Gill refused to let Churchill testify until appellant could present competent evidence of cointelpro. (*Ibid.*)

On September 17, 1991, Gill asked about appellant testifying. Gill noted that he had the transcript of a sidebar conference where appellant said that he would tell the jury about cointelpro. Appellant asserted that this did not mean that he would testify. Gill characterized appellant's opening statement as a fantasy. (56RT 1091.) Gill also stated that if appellant did not testify there would be no evidence of cointelpro; that would not come 100 yards of the court. (*Id.* at 10918.)

On that same day, there was a discussion about how much time appellant would need to question witness Lisa Gaskell. (56RT 10947.) Appellant stated that he could not say how much time, because Gaskill had not consented to an interview. Gill noted that Atwell had interviewed her, and appellant countered that Atwell did not "work for" him. (*Id.* at 10948.) Gill said appellant was playing a foolish game and that not using a subpoena to get Gaskill there was a tactic for delay. Appellant stated that Gill was distorting the record and that he had taken away appellant's counsel without notice because he did not want appellant to have witnesses there. Appellant stated that Gill had ordered that motions be put in through Crabtree and Hodges. Gill characterized appellant's complaints as ancient history. (*Id.* at 10949-10950.)

Also on September 17, appellant called Bernice Garrett as a witness. Appellant said that Garrett would testify as a character witness. (56RT 10910.) She testified about her acquaintance with him in Esperanto activities. (*Id.* at 11027-11032.) Appellant asked her about *The Fundamentals of Poliespo* and Carpenter's relevance objection was sustained. Appellant argued that what Garrett thought about his character was related to this book and Gill stated that he would not let him ask questions about the nature of Poliespo because this was irrelevant and invited speculation. (*Id.* at 11041-11042.)

Garrett testified that she knew about the goals of the United Nations of Autonomous Peoples. Gill sustained a relevance objection to appellant's question about whether its goal was to provide autonomy to every people on earth who wished to have it. Out of the presence of the jury, appellant argued that the goals of his organization were relevant because this showed why he was charged with crimes he did not commit. (56RT 11050.) Gill asserted that the goals of the organization had nothing to do with this and he had to present evidence first. (*Id.* at 11051.) Appellant asserted that they were exactly why he was charged. Gill continued: "You may believe that. I don't believe you do. But even if you honestly believe that, your belief is completely irrelevant. Even assuming you honestly believe that, your belief is completely irrelevant, because you're not the guy that did these things." (*Id.* at 11052.)

On September 24 and 26, 1991, Gill prevented appellant's witnesses John C. Wells and Sidney Culbert from testifying about the good qualities of Poliespo, sustaining the prosecutor's relevance objection. (57RT 11119-11120; 58RT 11377.) Appellant asserted that he was being prevented from presenting a meritorious defense and that once he presented cointelpro evidence he would call these witnesses back. (57RT 11120.)

On September 26, 1991, Rosenfeld filed a motion for the disclosure of personnel and training records for Officers Eiben and Gaskill, both of whom had previously testified. (18CT 4030-4050.) During a discussion of this motion, DDA Carpenter noted that the bailiff handed appellant two books and he wanted to know what they were. Over appellant's objection that the books were confidential, Gill stated that the two books were *The Agents of Repression* and the *Cointelpro Papers*. There was also material in a manila envelope which a defense witness had given to the bailiff to give to appellant. Carpenter complained that he had seen defense witnesses Garrett and the Culbert reading this material amongst the jurors and that some of the material was the material Gill ruled was inadmissible in appellant's opening. (58 RT 11397.) Carpenter thought appellant was trying to influence jurors with the material. (*Ibid.*) Appellant admitted that this material was from him. Gill stated that he wanted the material to stay in the courtroom or stay in appellant's folders along with the "rest of the junk" he had. Gill stated he thought that this was a ploy because it had nothing to do with the case. Appellant responded: "Could I ask you a question. If you were victim of cointelpro, how would you like to be setting [*sic*] here with a judge staring down at your face telling you books on cointelpro had absolutely nothing to do with his case? How would you feel? Your honor, have you ever read the verse in the Bible, do unto others as you would wish them to do?" (*Id.* at 11398.) Gill stated that he would not tolerate much more and that appellant was trying his patience. (*Id.* at 11399.)

Also on September 26, Gill turned to the issue of appellant's testimony, stating that appellant would not be allowed to testify that he believed he was the victim of cointelpro because appellant's state of mind about this was not relevant. (58RT 11405-11406.) Appellant stated that he

needed to prove that he was framed and he would need an expert for that. The expert would explain what "cointelpros" are, how they work and who are the usual victims. He thought the jury should be able to decide if they sensed symptoms of cointelpro. He wanted to call Ward Churchill and Jim Vander Wall. Gill stated that he wanted a detailed offer of proof and noted that previously appellant was not willing to say what they would testify to. (*Id.* at 11406.)

On September 27 and 30, 1991, Birgitta Sequoyah, appellant's wife, testified about her relationship with appellant and the events in which she had been involved with him. She was with him on December 20, 1985. (58RT 11464.) Appellant went to meet Mark Williams. (*Id.* at 11468.) She saw appellant there with Mark Williams and another man. (*Id.* at 11473.) Several men with the words "Federal Agent" on their sweatshirts and ski masks on were there. (*Id.* at 11474-11475.) One of the men kicked appellant and said that it was for his Cherokee autonomy and Poliespo horseshit. (*Id.* at 11476.) On another occasion, she and appellant talked about the organizations appellant founded: the United Nations of Autonomous People, the World Esperanto and the World Poliespo Organization. There was also the World Humanitarian Church and the Cherokee Bicycle Company. (*Id.* at 11495.) When appellant asked Birgitta Sequoyah about his reputation as the creator of Poliespo, the answer was stricken; a relevance objection about the Native American opinion of Poliespo was sustained. (59RT 11551.) Out of the presence of the jury appellant argued that he should have the right to present his cointelpro defense because he put on evidence that a federal agent cursed over his unconscious body because of Poliespo and he wanted to argue that Poliespo was the motivation for the FBI and CIA to frame him. He wanted to put on evidence of Poliespo and his reputation. (*Id.* at 11552.) Gill did not buy

this. (*Id.* at 11553.) DDA Carpenter's objection to the goals of the organizations appellant founded was also sustained, as was his objections to appellant's questions about whether Birgitta had assisted Indians and tribes who were the victims of cointelpro and whether she was a victim of cointelpro. (*Id.* at 11559.) Her answer to the question about appellant being a victim of cointelpro was stricken. Gill told appellant to stop asking questions about cointelpro. (*Id.* at 11561.)

Later appellant asked questions about whether Birgitta Sequoyah knew that the CIA recruited an army of Native Americans and sent them to Nicaragua. Her answer to appellant's question about whether Russell Means was the head of the army that went to Nicaragua was stricken. (58RT 11620.) Appellant argued that this was important to his defense because Russell Means led an army down to Nicaragua under the auspices of the CIA and the CIA orchestrated a campaign to get the Indians to fight against the Sandinistas as a false charade to get autonomy. (*Ibid.*) This was false because the CIA just wanted the Indians to shoot the Sandinistas and then when the Sandinistas were defeated the CIA would make certain that the Contras would not give the Indians autonomy. This was relevant to the cointelpro defense because it was the history from which the false accusations sprang. Gill did not change his ruling. (*Id.* at 11620-11621.) Objections to other questions about Means and the CIA were sustained. (*Id.* at 11621.) Appellant asked questions about protests by international groups supporting Native American rights. Appellant argued that this was relevant because protests by international groups of humanitarians showed the credibility of his defense. People throughout the world would not be supporting him if there were no merit to his claims. It showed he was framed. There were massive protests for him and Leonard Peltier, who was another Indian who was the victim of cointelpro. (*Id.* at 11624-11625.)

Later Gill stated that it was obvious that appellant was trying to make this into a soapbox by introducing all these political issues. (*Id.* at 11628.)

During a break in Birgitta Sequoyah's testimony, Rosenfeld asked for the opportunity to argue appellant's motion for disclosure of police records. (58 RT 11531; see 18CT 4030-4050.) At the end of his direct examination of Birgitta Sequoyah, appellant said he had to ask Rosenfeld if there were any more questions he should ask. (59RT 11629.)

On October 1, 1991, appellant complaint again about advisory counsel Chambers. According to appellant, Chambers whispered to Atwell or Neimy and it was obvious that he was anti-defense. He was happy when something bad happened for the defense. He was a master of outrageous deceit and fraud and appellant asked that he and Atwell (his "cohort in crime") be excluded from the courtroom. He also objected to Chambers' daily conversations with Neimy. This made a mockery out of the Code of Judicial conduct. (59RT 11713.)

Later appellant asked Birgitta Sequoyah about another witness, Dietrich Wiedmann, and whether that witness was planning to publish a book: *NI Sequoyah versus the CIA*. (59RT 11736.) A relevance objection was sustained. Gill told appellant to stop asking questions about this or he would hold him in contempt. (*Id.* at 11736-11737)

Appellant called Sharon Colligan to the stand on October 1, 1991, as a witness to his activities with Esperanto groups in Europe. (59RT 11750-11754.) Gill sustained the prosecutor's relevance objections about the United Nations of Autonomous Peoples and the World Poliespo Organization. (*Id.* at 11765-11766, 11771.) After Colligan testified, Rosenfeld (at appellant's request) argued the issue of the admissibility of an expert on eyewitness identification, who would testify about the

identifications made of appellant by Katherine Collimore and Karen Eiben. (*Id.* at 11789-11808.)

On October 2, 1991, appellant asked Gill to reconsider his decision not to let him call an expert. Appellant asked to call Ward Churchill, Jim Vander Wall and Wesley Swearingen. (60-1RT 11814.) Swearingen, appellant asserted, was a former FBI agent who targeted Indian activists in "cointelpros." (*Id.* at 11815.) Appellant wanted the witnesses to explain that cointelpros are real. Appellant asserted that both he and Rosenfeld had talked with him. (*Id.* at 11816.) Gill asked why the jury would think that appellant was the target of a cointelpro. (*Id.* at 11818.) He asserted that Birgitta Sequoyah's testimony about being attacked by federal agents was sufficient and that he would also testify in support of what she said. (*Id.* at 11819-11821.) Appellant asserted that his expert, Ward Churchill, would testify that as part of cointelpros ". . . whatever federal agency involved murdered people, robbed people, committed crimes." (*Id.* at 11821.) His experts would testify about the symptoms of cointelpros. These symptoms were: is the "complaining victim" an Indian activist? Does he have a history of activism? Was he a leader? Was he trying to revive dying Indian languages? Did he have a following? Did people enjoy hearing him speak? Was he accused of things he did not commit? Does he have a history as a moral being? (*Id.* at 11823.) Appellant would not elicit an opinion about whether he was the victim of cointelpro. (*Id.* at 11824.) Gill stated that he wanted to look at *Agents of Repression* and *The Cointelpro Papers*. Appellant stated that there was another book which Rosenfeld obtained from Swearingen. (*Id.* at 11827.) When Gill asked for reports, Rosenfeld related that there had not been a discussion of the specific facts of the case. (*Id.* at 11831.) Rosenfeld stated that she would do the direct of Scott Fraser, an eyewitness expert. (*Id.* at 11832.) Gill determined that appellant

had made a sufficient showing of at least a possibility that the testimony of a cointelpro expert would be admissible; however, this did not necessarily mean that an expert would testify and the scope would have to be determined at a section 402 hearing. (*Id.* at 11882-11884.)

Also on October 2, Keiko Sequoyah, appellant's former wife, testified on appellant's behalf. Gill sustained all of Carpenter's relevance objections to appellant's questions about whether Keiko Sequoyah helped distribute *The Fundamentals of Poliespo* to Esperantists in Japan, whether he was the creator of Poliespo, and whether he was the founder of four organizations in Switzerland in 1984. (60RT 11920.)

On October 3, 1991, appellant's sister Vivian Reimer testified. Gill sustained the prosecutor's relevancy objections to her testimony about the autonomous Cherokee nation, whether she believed appellant was a religious person, and the significance of appellant's Cherokee name. (60RT 11966, 11976-11977, 11982-11984.)

On October 3, 1991, appellant complaint that Rosenfeld had given the prosecutor a copy of certain notes without first showing them to him and getting his permission. Rosenfeld stated that the notes were the measurements they discussed previously and some investigator's notes, and that she thought appellant was present when they previously were discussed. (60RT 11947-11948.) Appellant responded that it was typical of Rosenfeld to "feed" information to the prosecution while denying the "attorney of record" access to the information. Gill said Rosenfeld did not have to respond, and appellant retorted that if Rosenfeld responded, she would have to "tell some lies, that she is a wonder woman at telling." (*Id.* at 11948.) After appellant got a copy of the notes, he stated that he did not authorize the investigation and that the notes were made without permission of the attorney of record and he was thinking of taking a writ on the issue.

Appellant said excuses offered by Rosenfeld showed her "devotion and insistence on obtaining an illegal conviction against her client." (*Id.* at 11949-11950.) He also wondered what happened to the days when a lawyer tried to help his client not go to the gas chamber. (*Id.* at 11950.)

Rosenfeld stated that she wanted to call the city engineer whose notes and measurements they were discussing that afternoon. Appellant objected to Rosenfeld speaking without the permission of the attorney of record. Carpenter then asked the record to reflect that whenever Gill asked appellant who he was going to call the first thing appellant did ded was look to Rosenfeld for advice. (60RT 11953.) Gill agreed that he did not seem able to ask a question without talking to her: "You can't hardly state your name without checking with her, Mr. Sequoyah. Every – that's one of the reasons for the constant delays, you constantly got to ask her. I can hear part of what you're saying. You don't even remember." (*Id.* at 11954.) When Rosenfeld started to respond to Carpenter's objections about calling the city officer, appellant objected to her speaking. (*Id.* at 11955.) Appellant stated that he would not call this witness at all because he is "offended and disgusted you're discussing the matter with Miss Rosenfeld." (*Id.* at 11956.) He wanted the witness excused. Gill stated that appellant did not have to call the witness because he was the "captain of the ship." Appellant objected to the court making a complete mockery out of his right to represent himself and objected to the court forcing him not to call a witness just to maintain his dignity and autonomy. Appellant noted that he had talked with Rosenfeld and told her that if she kept talking he would be forced not to call the witnesses and she laughed and said that this was a good way for her to deny him witnesses. Gill stated that he would not dignify this statement by asking Rosenfeld to respond. (*Id.* at 11957.)

Later appellant stated he would call the city engineer as a witness. Gill stated that he thought appellant did not want the witness. Appellant responded that he had had a change of heart. (60RT 12046-12047.) That afternoon, Philip Leon Sanford, a custodian of records for the engineering department for the city of San Diego testified about the placement of stop signs along the route Officer Eiben testified about. (*Id.* at 12054-12055.) At appellant's request, Rosenfeld did the examination. (*Id.* at 12054.)

On that day there was also a discussion about the investigator, Elizabeth Cotton. Appellant stated that he understood that Rosenfeld was to have the investigator there about the failed attempts to serve witness Thomas Collimore, whose preliminary hearing testimony appellant wanted read into the record because Collimore was unavailable. He stated that Cotton not showing up showed that Rosenfeld was trying to help the prosecution. Appellant wanted Gill to order that Cotton show up with the proof that Collimore had been served, which he thought Gill could do because Cotton was being paid by the court or by Rosenfeld. (60RT 12028.) According to appellant, Rosenfeld claimed that Cotton had served Collimore and now she was trying to keep Cotton from coming to help the prosecution. (*Id.* at 12029.) Gill stated that they would deal with the issue later and Rosenfeld said that she would give Gill the report. Appellant objected to Gill getting any report that he did not have and that he should have it before Gill and before the prosecution. (*Id.* at 12030.) Rosenfeld gave the report to both the prosecution and to Gill. (*Id.* at 12031.)

On October 7, 1991, Elizabeth Cotton testified about diagrams and photos she had made of the area where the stop of the Honda occurred. Gill noted that appellant was not prepared for the examination and that he had to talk to Rosenfeld for two or three minutes before each question. Appellant disagreed with Gill's characterization of Cotton as appellant's investigator

and stated that she had not been investigating on his behalf. (61RT 12143.) Towards the end of his examination of Cotton, appellant stated that he could not think of any more questions, but that he would have to ask Rosenfeld. (*Id.* at 12154.)

On October 8, 1991, Gill called Elizabeth Cotton to the stand regarding her interviews of witness William Reiker. The reason for this was that DDA Carpenter noted that Cotton had mentioned that she had interviewed Reiker and he had not received a report of the interview, in violation of the court's discovery order. (61RT 12211.) Appellant protested that there were no notes made and that he should not be victimized if prosecution agent Rosenfeld hired an investigator who made notes. (*Id.* at 12215.)

Appellant stated that he wanted FBI agent Wesley Swearingen to testify before appellant did. (61RT 12240.) Gill ruled that appellant had to testify before he would let Swearingen do so, because the relevance of Swearingen's testimony depended upon what appellant said.

Appellant began the examination of himself on October 8, 1991. (61RT 12242.) He examined himself by asking himself questions.

At a sidebar, appellant stated that he wanted to bring out evidence of what happened to end the history of Cherokee autonomy when appellant's grandfather was thirteen years old on the grounds that the history of the confrontation between the United States government and the Cherokee nation was crucial to understanding his cointelpro defense. (61RT 12245.) He needed to establish that Cherokee sovereignty had been taken away so that he could show that he was the subject of cointelpro in trying to reestablish that sovereignty. (*Id.* at 12246.) Gill sustained the prosecution's relevance objection. (*Id.* at 12252.) Appellant asked himself some questions about his Cherokee ethnicity. DDA Carpenter objected when

appellant asked himself about whether in the Cherokee culture, Cherokee identity was based solely on racial identity. Appellant explained that he needed to show the jury that he was 100 percent Cherokee because for the Cherokees race did not matter. (*Id.* at 12262.) This would show the motive for the FBI and the CIA targeting him. (*Id.* at 12261.) DDA Carpenter argued that appellant had to first establish that he had been discriminated against because he did something. Gill did not let the evidence in. (*Id.* at 12262.) Appellant asked some questions about whether his family members had Cherokee names. In response to a relevance objection, appellant argued that the answers helped establish the FBI and CIA motive because it established his Cherokee identity, and it was this that caused him to be a victim of cointelpro. (*Id.* at 12272.)

During a break in appellant's examination of himself, Rosenfeld examined expert witness Scott Frasier, an expert on eyewitness identification. (61RT 12282-12336.)

At the beginning of proceedings on October 9, 1991, Gill considered the issue of the admissibility of Swearingen's testimony. Appellant said Swearingen would testify that various political groups, including Indian activist groups such as the United Nations of Autonomous Peoples (UNAP), were the target of cointelpro. Gill was skeptical that the CIA and FBI even knew appellant had founded UNAP, and that appellant would be the target of cointelpro since he was "out in the world spreading peace and goodwill." (62RT 12360-12362.) Gill opined that evidence appellant had founded Indian activist organizations was hearsay, and Birgitta's testimony that she was a director of his organizations was incredible. (*Id.* at 12363-12365.) As for the second "symptom" of cointelpro, whether the person was claiming to be innocent, Gill said the assumption was "bootstrapping of the rankest sort." (*Id.* at 12366.) The third symptom was whether the

complaining "victim" had a non-criminal history. The fourth symptom was whether the "complaining victim" had a following or the potential of acquiring one. (*Id.* at 12367) Appellant said Birgitta's testimony showed the FBI knew he had a following or the potential for one, and Gill said he did not understand what her testimony showed about the FBI committing many of the robberies. (*Id.* at 12370.)

Appellant argued that the next symptom was whether a stranger befriended the victim and offered extravagant assistance to the cause, including illegal assistance. (62RT 12371.) He argued that Brigitta Sequoyah's testimony met this. (*Id.* at 12372.) In sum, Gill thought appellant's cointelpro theory was all in his mind. "That's where it germinated, and that's where it is going to stay" until appellant showed that there was admissible evidence to close the gap between the evidence of cointelpros generally and one against appellant. (*Id.* at 12374)

Gill stated that he thought it was incredible that the FBI and/or CIA or whoever "these guys with these federal agent t-shirts" had committed murders and robberies just to get at him because "you're out spreading peace and goodwill and you're the founder of Poliespo." (62RT 12375.) Appellant pointed out that he was not contending that the FBI or CIA committed these crimes. Gill thought that it was incredible that the FBI came upon a series of crimes committed by the same person and then put it all together (including one that occurred five minutes before the person bailed out of the Honda) to frame appellant. (*Id.* at 12376.) Gill asked what the evidence was that the FBI got a hold of evidence of unsolved crimes. (*Ibid.*) Gill stated that appellant's was a third party culpability defense and appellant had to have evidence raising a reasonable doubt, when what they had was "fanciful . . . doubt." (*Id.* at 12376-12377.)

Appellant asserted that he was claiming that the FBI got the evidence and put it in his car. Gill queried how the FBI got Meredith's purse in his car because someone must have stolen the car after the FBI, put the evidence in it, committed a robbery, and jumped out. (62RT 12379.) Appellant stated that he did not know how it happened because he was not there. (*Id.* at 12380.) However, he still contended that all of the evidence was put there as part of a cointelpro. Gill asked what facts there were that showed that the jury could reasonably infer this. (*Ibid.*) He asserted that appellant was asking the jury to infer from other FBI activities against other groups that the FBI or CIA planted evidence against him because he was a "self-proclaimed" autonomous activist. Appellant thought that it was reasonable to infer that "cointelpros" were still going on because people had always done that kind of thing. (*Id.* at 12381.)

Appellant stated that the FBI had planted disinformation that he was a homosexual and had AIDS, and indeed some people had decided not to support him because they believed he was a degenerate homosexual with AIDS. (62RT 12382.) Appellant argued that if the defense was ridiculous, then there should be no problem about him being allowed to present it. Gill disagreed because he had an obligation not to confuse or mislead the jury. (*Id.* at 12383.) Appellant argued that when a person claimed to be framed, that facts of the framing were relevant, including who framed him and why. There was nothing else relevant in his case. (*Id.* at 12384.) Gill pointed out that the FBI poster came out only *after* appellant claimed he was framed. (*Ibid.*)

Appellant stated that another symptom was: had the victim suffered obstructive actions from unknown or known sources? Appellant stated that there were cancellations of meetings. (62RT 12385.) Gill asked what this testimony would be and Gill then noted a "rather significant pause."

Appellant stated that he would testify that there were significant obstacles when traveling. (*Ibid.*)

Gill stated that he thought that claiming to be a victim of cointelpro made it possible to vent frustration about anything that has ever happened. (62RT 12386.) Appellant responded: "It gives one opportunity to die in the gas chamber for something that you did not do." Appellant asked whether Gill would enjoy dying in the gas chamber for something he did not do and whether Gill would enjoy a judge mocking him for presenting what little evidence he could. Appellant returned to the self-representation issue, stating that had he not been given that right, his key witnesses would never have testified. (*Ibid.*) Instead he would have been put in a mental asylum. He thought it was a disgrace that Gill would not allow him to present evidence of the denial of his self-representation rights. (*Id.* at 12387.) Appellant argued that the court was devoted to making certain that his evidence was not presented. (*Id.* at 12388.)

Gill said he had a problem with what appellant's defense was because appellant was conclusory. (62RT 12393.) Gill did not think the evidence of motive to frame appellant of the crime was enough to raise a reasonable doubt about guilt. The links were too speculative and this was not reasonable doubt, even fully crediting these testimony about the agents from Brigitta. (*Id.* at 12397.) The jury would have to infer that there were federal agents who planted the evidence in appellant's car – including evidence from the Meridith robbery. (*Id.* at 12398.) The chain of reasoning was fanciful, imaginary and too speculative to conclude that these were agents acting out a cointelpro, thus, the Swearington evidence was irrelevant and Gill would not allow appellant to call him. (*Ibid.*) Gill stated that he was overwhelmingly convinced that it should not come in. (*Id.* at 12399.)

After Gill's ruling, appellant continued his testimony. Appellant testified without objection that he was the leader of an Esperanto youth delegation which traveled to Augsberg, where he met with Mark Williams and a CIA agent named William Dickerman. (62RT 12417-12418.) Appellant thought Dickerman was watching him and was at appellant's United Nations of Autonomous Peoples meetings. (*Id.* at 124121.) Later he testified that Mark Williams was there on the day he was arrested and that he and other men in ski masks kidnaped him. (*Id.* at 12476-12478.) During a recess, Gill commented that he thought that appellant was making things up as he went along. He noted that the books he had cited were published in 1990 or 1989. Gill surmised that appellant got them and ". . . said ha, there's my defense . . . . (*Id.* at 12433.)

Gill also noted appellant had been conferring with Rosenfeld before almost every question. (62RT 12465.) He stated that he thought that Rosenfeld was supposed to be giving him legal advice, not feeding him questions like a "ventriloquist dummy." Gill, recalling that one of the questions appellant asked himself was whether he had applied for unemployment insurance, wondered what the jury would think about the fact that he huddled with Rosenfeld before he asked himself the question. (*Id.* at 12466.)

Later, Gill agreed to reconsider his ruling on Swearingen. (62RT 12513.) Appellant asked for time to take the issue to the Court of Appeal, stating that this was the only issue that advisory counsel suggested that he bring up on a writ. (*Id.* at 12515.)[116] Appellant argued that he had shown

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[116]Appellant later did so, filing a petition for writ of mandate on the issue, D01552, on October 18, 1991. (38CT 8423-8435.) On October 19, 1991, the Court of Appeal denied the petition, stating that there existed an adequate remedy by way of appeal should the ongoing trial result in a

(continued...)

that Mark Williams should have been charged with one of the crimes, i.e., the theft of the Mustang appellant was with when he was arrested. (*Id.* at 12519.) Appellant argued that Spruth's testimony connected Williams to the cointelpro. (*Id.* at 12520.) Gill stated that appellant still had not shown that the evidence was relevant. (*Id.* at 12523.) Appellant argued that this was his only defense and that by refusing the evidence Gill was preventing him from making a defense. (*Id.* at 12524.)

Appellant then continued his testimony. He testified that he was forced into a Mustang by Williams. (62RT 12533.) After concluding his testimony for the day, appellant asked Gill to rule on the renewed motion to let Swearingen testify. Gill stated that letting this evidence would open up "an incredible Pandora's box of misleading, confusing issues." His ruling remained the same given the present state of the record. (*Id.* at 12558.)

After Gill's ruling, appellant continued his testimony. (62RT 12571.) Appellant testified that he went to the library to look for a book called *In the Spirit of Crazy Horse*. Appellant asked himself if this book was an authority on cointelpros.[117] (*Ibid.*) Gill sustained a relevance objection. In a sidebar discussion about Gill's ruling, appellant argued that Gill had kept out the cointelpro expert on the grounds that he was making this up as he went along, and that the books did not come out until 1990.

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[116](...continued)
conviction. (39CT 8420.) On October 21, 1991, appellant filed a petition for review and application for stay in ths Court, S023468, from the denial of D015502. (39CT 8414.) This was denied on October 31, 1991. (39CT 8411.)

[117]Appellant is referring to the book *In the Spirit of Crazy Horse* by Peter Matthiessen which chronicles the confrontation between the FBI and members of the American Indian Movement (AIM) which culminated in the death of two FBI agents. The book features the trial and conviction of Leonard Peltier and the later controversies surrounding the case.

He was trying to show this was not true and the court would not let him. Gill stated that he did not think this was relevant to his legal ruling. (*Id.* at 12572.) Gill did allow appellant to ask a question about the book on the grounds that appellant's belief that it was cointelpro might explain why he did not turn himself into the authorities. (*Id.* at 12573.) Appellant then testified that he did not turn himself into the authorities because he did not wish to be convicted of crimes of which he was innocent. (*Id.* at 12575.)

At the beginning of proceedings on October 15, 1991, Gill said his position was that the Swearingen testimony was irrelevant and whatever slight probative value it had was outweighed by the danger of confusing the jury. (63RT 12617-12619.)

Gill asked Carpenter whom he was going to call as a rebuttal witness. Carpenter mentioned that his investigator had spoken to Rhonda Watson, appellant's ex-wife. He stated that Watson told him that Chambers and Atwell had already talked with her. (63RT 12627.) Appellant asserted that he had not authorized this interview and that this showed the treachery of advisory counsel. He stated that Watson talked to the prosecution because she had talked to Atwell which showed why there should not be prosecutorial agents in the false clothing of advisory counsel. (*Id.* at 12627-12628.)

Appellant then continued his testimony. He testified about his and Birgitta Sequoyah's activities in San Diego. Gill sustained relevance objections when appellant asked himself whether he had shown Birgitta Sequoyah a map of ancient Cherokee territory and a map of the trail of tears and whether a quarter of Cherokee's died on the trail of tears. (63RT 12645-12646.) Gill also sustained an objection to appellant's question to himself about what Poliespo was and a question about whether it was the "polysynthetic" qualities of Poliespo that caused appellant to be framed by

the FBI and CIA. (*Id.* at 12653.) After an objection by appellant that he needed to put this evidence on because Gill had not allowed him to put on Swearingen, Gill concluded that the connection between Poliespo being polysynthetic and appellant being targeted by the FBI was speculative and did not change his ruling. (*Id.* at 12654-12655.) A relevancy objection to appellant's question about why he created Poliespo was sustained, as were objections to appellant's questions about whether Poliespo was a lifetime project; whether the language brought the Cherokees any benefit; whether appellant's motivation in creating the language was to benefit mankind; and whether there was any other language, like Poliespo, that speeded up human thought. (*Id.* at 12657-12658.) Gill also sustained many other relevancy objections to appellant's questions to himself: about his work *The Fundamentals of Poliespo*, about whether Poliespo had spread, and about whether the CIA had tried to stop it. (*Id.* at 12660-12661.)

Appellant's examination of himself continued on October 16. He asked himself whether there was a Cherokee Constitution in his car and whether that was related to his work in connection with the Exiled Government of the Cherokee Nation. (63RT 12797.) At one point, Gill asked him why he did not have particular documents ready and Carpenter suggested that it was because he was making things up as he went along. Gill agreed. (*Id.* at 12800.) Gill then sustained relevancy objections to appellant's questions about whether his writing of a new constitution for the Exiled Government of the Cherokee Nation was needed because some people found that the old Cherokee constitution contained a provision that it could not violate federal law and about whether there was a movement to change the Cherokee constitution. (*Id.* at 12801-12802.)

On October 17, 1991, appellant continued his examination of himself, testifying that he discussed his organizations with Mark Williams.

(64RT 12896.) The prosecutor objected on hearsay grounds to a question as to how Williams had learned of the organizations appellant had founded, and appellant argued that the evidence was relevant to show that he had the state of mind of someone who has been framed which showed that he did not have the intent required for the crimes which he did not commit. (*Id.* at 12897.) He would testify that Williams said that he had been to Europe and had heard from other Esperantists that appellant founded the organizations and had gotten his address and phone number from them, which would show the reasonableness of appellant's belief that he was "cointelproed." (*Id.* at 12899.) Gill ruled that there had been enough of this kind of evidence. (*Id.* at 12903.) Appellant then asked questions about whether Russell Means had been cointelproed; whether Means had asked him to go to Nicaragua with him to form an army to support the Misquito and Suma Indians in their fight for autonomy against the Sandinistas; and whether the army was a "CIA event." Relevance objections were sustained to all these questions. (*Id.* at 12905-12907.) Appellant asked to be allowed to testify that the court had not let him call some of his witnesses, stating that it violated a juror's right not to be responsible for someone being killed when that person (i.e. appellant) was not getting a fair trial. (*Id.* at 12914.)

The next day (October 18) appellant's direct of himself continued. The court sustained many of the prosecution's objections to appellant's questions to himself about his activities with Esperanto groups and the Cherokee language. (64RT 12936-12948.) At a sidebar, after Gill sustained DDA Carpenter's relevance objection to appellant's question about whether he published a periodical called "Esperanto-Gram," appellant argued that he wanted to use this evidence and other evidence he had about media because Swearingen had stated that one of the symptoms of cointelpro is whether the target has a media presence. (*Id.* at 12950.) Gill

thought the point had already been made. (*Ibid.*) Gill then sustained many objections to appellant's questions about the Esperanto societies appellant with which appellant was involved. (*Id.* at 12952-12957.)

Just before the recess, Gill warned appellant that he would shortly stop appellant's direct. Appellant objected that he was not finished. Gill thought he was wasting time by going through the folders and looking for things that caught his eye. He noted that appellant kept asking questions after Gill had told him that something was not relevant. Gill noted that he stuck with the same line of questioning. He did that over and over and it did no good to sustain relevance objections. (64RT 12961.)

On October 23, 1991, after his direct examination concluded, appellant renewed his request that Swearingen be allowed to testify, citing *People v. Villada*, which held that the prosecution had the right to an expert when a subject matter was out of the experience of a juror. (65RT 13131.) Gill decided that there should be a section 402 hearing since he was worried about substituting his own judgment for that of the jurors. (*Id.* at 13355.) In response to Carpenter's contention that Swearingen had nothing to do with the CIA, appellant responded that Swearingen would testify that "cointelpros" are universal, whether done by the FBI, the CIA, the KGB or the local police. (*Id.* at 13357.) Gill stated that he thought that jurors were used to hearing bad things about governments after Watergate and Iran Contra, but that jurors would find it incredible that these things had anything to do with him. (*Id.* at 13357.) If all appellant meant by "cointelpro" was frame-up, the jurors did not need expert evidence, according to Carpenter. (*Id.* at 13358.) Carpenter thought that appellant was trying to elevate his traditional alibi evidence by connecting it to the FBI and CIA, when all that connected them to these things was appellant's sitting in a jail cell and reading about cointelpros. (*Id.* at 13358.) Appellant

asserted that his whole defense was that there was a cointelpro, so it was the most relevant thing possible. (*Id.* at 13360.)

On October 29, 1991, Gill held the section 402 hearing on the admissibility of Swearingen's testimony. (66RT 13480-13481.) The hearing is discussed in detail in argument below. After hearing Swearingen's testimony, Gill said the basic question was relevance. Gill thought that Swearingen would be asked to given an opinion and there was some doubt about the basis for his opinion because he had not been in the FBI for years and could not confirm current FBI activity, and he had said nothing about the CIA. (66RT 13520.) Gill noted that appellant's definition of COINTELPRO was from the 1970s. (*Id.* at 13521.) Gill did not think, for example, that appellant had shown that the FBI was interested in directing counter intelligence against Esperantists. (*Id.* at 13523.) No one in the American Indian Congress thought appellant was a leader. He was simply "Billy Ray Waldon." (*Id.* at 13524.) There was no credible evidence that appellant was a leader. (*Ibid.*) There was no evidence of lack of due process in appellant's case, which Swearingen thought was important, and there was no evidence that the FBI had made appellant's life miserable. (*Id.* at 13525.) Swearingen said that as the result of COINTELPRO people would abandon the targeted person and the opposite was true here because appellant had people supporting him. (*Ibid.*)

Gill thought that what they had here was appellant's "grandiosity" which was a part of appellant's problem. His saying something was so did not make it so. Gill thought that his alibi argument was specious. It was a traditional alibi defense and there was no relevance of expert testimony. (66RT 13526.) Appellant asserted that there was third party culpability testimony in relation to the Meridith robbery, but Gill thought appellant added this because he had trouble explaining how the materials got into his

car. (*Ibid.*) Swearingen had been clear that the FBI would not commit crimes against innocent persons as part of cointelpro. (*Id.* at 13527.) Gill concluded that his testimony was not relevant and any possible relevance was easily outweighed by 352 considerations. Gill stated that there was no evidence that cointelpro was still going on and that there was no evidence that it was directed against appellant. (*Id.* at 13529.) Gill thought appellant might have convinced himself of this. Gill thought appellant was burdened with a mental problem, but did not have a question about his competency. However, he did believe that appellant had disabilities which got in the way of rational thinking. (*Ibid.*) According to Gill, appellant might have convinced himself that there was a cointelpro, but there was no evidence. (*Id.* at 13530.) Gill thought that there was no evidence that the FBI knew that he or Poliespo existed. Even if they did they would not have the slightest interest in it. (*Id.* at 13534.)

Appellant's redirect examination of himself continued. As part of his examination, appellant testified that he had talked to Los Angeles Times reporter Amy Wallace. (66RT 13559-13560.) When appellant testified that sometimes the Los Angeles Times printed things that were outrageously not true, Carpenter objected. Out of the presence of the jury, Gill stated that this evidence was part of appellant's "campaign of disinformation" and there was no evidence that any media was part of cointelpro. (*Id.* at 13564.) He thought that appellant was "whistling in the dark" and "tipping at that windmill." Appellant asserted that there was no evidence of cointelpro because Gill would not allow it and now Gill was gloating about that. (*Ibid*)

Appellant testified that he had been friends with Nerida Spreitzer, but that after he was "arrested for crimes he did not commit," she became fearful of him and hostile to him. (66RT 13571.) Gill sustained the

objections to the questions about friendship, appellant continued with the same questions and continued to have the evidence ruled irrelevant. (*Id.* at 13574.)

On October 31, 1991, appellant continued his redirect of himself. Appellant testified that he had problems with traveling in Germany (Tubingen), where he was strip searched. (67RT 13606.) Even though Gill sustained relevance objections to questions about being strip searched while traveling, appellant continued to ask them. (*Id.* at 13610.) Appellant also asked himself questions about the death of Mary Barksdale. (Appellant had earlier brought out that Barksdale had helped found his organizations and that she was murdered by Mark Williams [63RT 12668, 12650].) Over repeated statements by Gill that the evidence was not relevant, appellant asked himself questions about Barksdale's death. For instance, he asked whether it was unusual for someone her age to die of an intra-cerebral hemorrhage and whether Barksdale told someone who told appellant that she was afraid of Mark Williams. (66RT 13626-13627.) He asked whether the CIA had an aerosol spray that could kill in the manner in which Barksdale died. (*Id.* at 13629.) Appellant asked if Phillip Agee, a former CIA agent, had made this technique public. (*Id.* at 13633.) Appellant asked whether the medical examiner who examined Barksdale was her political enemy. (*Id.* at 13636.)

After his testimony finished, appellant stated that he wished to call investigator Keith Faulder. He stated that he wanted to use this witness to bring out the attempts to serve Thomas Collimore. This was relevant to show that the prosecution and the court were intentionally keeping him from having these witnesses, which was a denial of due process and a symptom of cointelpro. (67RT 13653.) Gill stated that he would not let appellant ask these questions and would chastise him in front of the jury if

he did so. Gill noted that he had tried to find a gentle way to reign appellant in and used sidebars. (*Id.* at 13653-13654.)

After Faulder testified, appellant stated that he had no other witnesses ready because of scheduling problems. (67RT 13678.) When asked who they were, appellant stated that Rosenfeld had investigator Cotton out subpoenaing witnesses and he had Faulder and his clerks doing the same thing. (*Id.* at 13679.) Appellant stated they were trying to serve witnesses Edenhofer and Gottweig and that efforts to try had "started right away." After Gill asked what this meant, he observed that appellant was the "captain of the ship" but that he kept turning to Rosenfeld for every question. (*Id.* at 13685.) On November 1, 1991, there was a hearing on the jailer's motion to quash the subpoena of appellant's jail records.[118] Rosenfeld argued the defense opposition to the motion. Gill ordered the records produced for the penalty phase. (*Id.* at 13708-13733.)

Appellant asked on that day to call Chambers as a witness to show that he was denied due process by Chambers' "outrageous deceit" and fraud. Gill stated that this was irrelevant. (67RT 13737-13738.) Appellant also asked to call Gill as a witness, also to establish lack of due process, reminding Gill that he had challenged him for cause because he was going to be a witness. (*Id.* at 13738.) Appellant also asked to call other judges, Judge Simmons (the judge who ruled on appellant's cause challenge) and Judge Boyle (who granted his pro per status). (*Id.* at 13739) Appellant also asked to called Judge Milliken and Judge Greer to show that he had been denied funding – also a denial of due process and a cointelpro symptom. (*Id.* at 13741.)

Appellant asked to call Rosenfeld to show lack of due process, as well as Amy Wallace and Ann Kruger (newspaper reporters) to show that

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[118]This motion was filed on October 14, 1991. (18CT 4077-4089.)

outrageous information was spread about him through newspaper stories, arguing that this was disinformation. Gill thought that once again appellant had not shown a connection with the FBI or CIA. Appellant argued that he did not have to show a connection with cointelpro because the information spoke for itself. Gill stated that Swearingen testified that cointelpro involved an orchestrated campaign and appellant had not shown this. (67RT 13743.) Appellant stated that he did not think that he had to show a relationship between the false information and the FBI, stating that whether or not there was some connection with the FBI should be irrelevant. Appellant asserted that one could tell by the faces of the jurors that they had read a newspaper article and that by not letting him show that the article was false Gill was intentionally contaminating the jury. (*Id.* at 13744-13745.) Appellant asked to call Benjamin Sanchez, his former advisory counsel. (*Id.* at 13745.) Appellant stated that he wanted to call Judge Revak, Judge Malkus, and the court's staff attorney Glenn Niemy. He wanted to call James Fife (Geraldine Russell's law clerk), Michael Rhody, Gacond Chantal, and Dietrich Weidman, all to testify about his four organizations and his alibi. (67RT 13770.) He asked to call Ward Churchill and Jim Vander Wall, who would testify that cointelpro is on-going. He asked to call DDA Patrick (who had previously been involved in the case) and Carpenter. (*Id.* at 13771.)

After the close of appellant's case, the parties turned to the admission of exhibits. With regard to Defense Exhibit AS, a blank piece of paper, appellant wanted it admitted because the drawing he tried to have the witness draw on it got "cointelproed." (67RT 13809.) At the end of the session Rosenfeld stated that she was working on appellant's jury instructions. (*Id.* at 13837.)

On November 4, 1991, there was a discussion of jury instructions. (68RT 13839.) Rosenfeld also argued against the admission of the prosecution's proposed testimony from appellant's former wife, Rhonda Watson, to the effect that appellant had been involved in stealing from a Bible company, urging that appellant's behavior was a misdemeanor and that impeachment with such behavior was allowed only when there had been a conviction. (*Id.* at 13840.) Gill ruled that Watson could testify. (*Id.* at 13843.) As to the instructions, appellant stated that he would let Rosenfeld discuss them with his occasional objection. (*Id.* at 13844.)

After the close of the evidence and the instruction of the jury, Gill turned to the issue of closing arguments. Gill stated that he saw a copy of Matthiessen's book (*In the Spirit of Crazy Horse*) on appellant's desk. (70RT 14367.) Appellant declined to tell Gill what he would use it for. Gill said he would "come down hard" on appellant if he used it in front of the jury. (*Id.* at 14369.) In his closing argument, appellant argued that the jury had heard less than one percent of his case and that when his book, *The CIA vs N.I. Sequoyah* came out they would hear the rest of the 99 percent. (71RT 14710.)

After the guilt verdicts on November 18, 1991, Rosenfeld stated that she had a motion to strike the Ellermann burglary and robbery specials. (72RT 14816.)

E. Leading up to and During the Penalty Phase Gill saw More Evidence of Appellant's Inability to Work With Counsel and More Reasons to Question Appellant's Mental Condition

On November 21, 1991, Gill related that he received a letter from Rosenfeld through a family member of hers that she would be withdrawing as advisory counsel for health reasons. (72RT 14824-14826.) Appellant asserted that she might be able to resume. Gill disagreed that this was true

and asserted that appellant still had Mark Chambers as advisory counsel, who Gill thought was prepared to give him advice. Whether appellant chose to use him was up to appellant. Gill also stated that preparation of the penalty phase was largely left to Chambers. (*Id.* at 14828.) He knew that Chambers has been to Oklahoma with Atwell. Gill concluded that they would go forward. (*Id.* at 14829.)

Appellant protested. He stated that Chambers had given him a folder of reports when they were too late to use. He reminded the court that Chambers had violated his contract and stated that it was an obscenity. Any one who cherished the law would not tolerate his presence. He asked that Gill exclude him and take away his right to practice law. (72RT 14830.) He objected to advisory counsel hand-picked by the prosecution, stating that Revak had fired him for his deceitful and incompetent behavior. (*Id.* at 14831.) Carpenter asserted that Chambers had prepared one of the exhibits in the case. Appellant responded that had he known of this he would not have used the exhibit. Carpenter stated that it was obvious that Chambers had prepared the exhibit and appellant asserted that Carpenter was telling lies. (*Id.* at 14833.) Appellant asserted that Chambers had gone to Oklahoma and talked with his family and friends. They misrepresented themselves as his attorneys and told lies that hurt his case. Chambers was successful in his mission to help the prosecution. (*Id.* at 14834.)

Gill stated that Rosenfeld was going to argue two motions, one on empaneling a new jury and one on striking the Ellermann robbery and burglary specials. Rosenfeld provided him with case citations on the issues over the phone. (72RT 14837.) Gill ruled against the defense on the motion to empanel a new jury. (*Id.* at 14844.)

Gill asked Chambers if he was ready to provide advice. Appellant objected to him speaking. Chambers stated that he was ready and appellant

knew what had been prepared. Appellant asserted that he did not know what had been done and that he would refuse to find out. He objected to Chambers' lies. Chambers said that what he had done had been communicated through Rosenfeld. (72RT 14856.) Appellant asserted that Rosenfeld had not told him about Chambers work and appellant would not let her if she tried. (*Id.* at 14857.)

Gill said that he would give Chambers an opportunity to speak out of the presence of the prosecution. In a closed hearing, Chambers said that he had not manipulated the Oklahoma witnesses. (72-1RT 14859.) He prepared the exhibit and passed it along through Rosenfeld. Chambers asserted that appellant wanted to put his head in the sand, but that things were ready to go. (*Ibid.*) Chambers related that some victims of the Oklahoma crimes were willing to testify that appellant should not be put to death. There were family members who he had been alienated from for years willing to testify that he should get life without parole. Chambers stated that he had been working on the case since December and that he had funneled reports and that Rosenfeld did not want to get involved so as not to alienate appellant. (*Id.* at 14860.)

Appellant stated that Rosenfeld had not given him reports. (72-1RT 14861.) He stated that Rosenfeld wanted Chambers fired for the illegal things he had done. Chambers had promised appellant in writing that he would never speak without appellant's permission and here he was running off at the mouth with "verbal diarrhea." He had zero personal integrity. (*Id.* at 14862.) Chambers stated that when he agreed to become advisory counsel he did not know that appellant would continually misrepresent things to the court. Chambers did not think that he should let this happen even if appellant were representing himself. (*Id.* at 14863.) Chambers thought it was ridiculous that appellant said that he did not have CALJIC

because the first thing Chambers did was take in the law and ask how they were going to defend the case. Gill thought that Rosenfeld would have reported to the court if she thought Chambers were doing something illegal. She was in a difficult position and wanted to respect attorney client privilege. (*Ibid.*)

At the beginning of the penalty phase, on November 22, 1991, Gill announced that Chambers was assisting appellant, to which appellant objected. (72RT 14866.) The prosecution put on evidence of appellant's crimes in Oklahoma in aggravation. Appellant stated that he did not have discovery of the reports for the prosecutions witnesses. DDA Carpenter said that Chambers had a full set of the reports and noted that Chambers previously stated that he had done investigation in Oklahoma. (*Id.* at 14901.) Carpenter later stated that Chambers and Atwell had been to Oklahoma and had spoken to prosecution witness Cynthia Tankersley. (*Id.* at 14921.) In response appellant said: ". . . it doesn't matter how many investigators the prosecution has sent to Oklahoma. Sure, he's sent numerous. He's had Mr. Atwell. He's had many others. But that is – they're not defense investigators. Mr. Atwell's a prosecution agent. He's not a defense investigator. And the mere suggestion that he's anything else is an obscenity and a disgrace to any concept of basic justice." (*Id.* at 14923.) Later appellant asked for extra time to have his investigator interview prosecution witnesses because he could not find the discovery. DDA Carpenter noted that he only need to talk with Chambers to which appellant responded: "and we certainly will not be doing that." Court responded that they don't need to keep Chambers around then. Appellant replied: "I have a moral obligation not to participate in a criminal scam or any plot to deprive me of the right to control my defense." (*Id.* at 14946.)

On November 25, 1991, Faulder filed a declaration regarding Nancy Rosenfeld in which he related a phone call during which Rosenfeld said she would be available to assist at the penalty phase by December 15, 1991. (19CT 4372.) Appellant asked the court to continue the penalty phase until Rosenfeld could be available. (72RT 14952.)

Later that day, the bailiff noted that when he asked appellant if he wanted a particular report, appellant asked him who it was from. The bailiff told him that it was from the prosecution and not Chambers and he should stop complaining. (72RT 14984.) In cross-examination of prosecution witness Michael Huff, appellant at a sidebar stated that he thought there might be an hearsay exception he could use in eliciting a statement from Huff and asked to borrow the court's evidence code. Gill told him to get it from Chambers. (*Id.* at 14993.)

On November 26, 1991, appellant asked for permission to have Keith Faulder ask questions of witness Cyntia Tankersley. (73RT 15018-15019.) Gill denied the request on grounds that Faulder was not an attorney. Gill proposed that Chambers do the questioning. Appellant asked for an attorney other than Chambers. (*Id.* at 15021.)[119] Later Carpenter related that Chambers had the prosecution report regarding Michael Huff and appellant said that he would not accept it from him. Gill stated that was his business. (*Id.* at 15160.)

At the beginning of proceedings on December 2, 1991, appellant reminded the court that it had ordered Rosenfeld to turn over the documents that she had illegally stolen from him and she had not complied with the order and asked that Gill hold her in contempt. Gill stated that he would see what he could do. (73RT 15162.) Appellant complained that he did not

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[119]Appellant's law clerk, Agha, eventually did the cross-examination. (73RT 15097.)

have the materials he needed to cross-examine prosecution witness Frank Hensley. Gill stated that Chambers had them. Appellant stated that he would not take any materials from Chambers. Gill stated that was his choice to which appellant responded that Gill knew many months ago how appellant felt about him and forced Chambers on him. Gill thought that was absurd. (*Id.* at 15189.)

At the beginning of proceedings on December 3, 1991, Gill again stated that Chambers had access to reports from the prosecution and that if appellant did not want to take advantage of that it was his own foolishness. (74RT 15244.) When cross-examining prosecution witness Kimberly Fair, appellant brought out the fact that he had called her and told her that Chambers and Atwell were lying about him and misrepresenting themselves. (*Id.* at 15266.) Gill stated that appellant should get the report of the prosecution's interview with Julene Johnson from Chambers when appellant said that he did not have it. Appellant repeated that he would never accept anything from Chambers. (*Id.* at 15270.)

After the close of the prosecution's case, on December 5, 1991, Gill asked appellant if he had instructions in addition to those provided by the prosecution. Appellant said that he did not have access to the CALJIC volume, to which Gill stated that Chambers had given him instructions from CALJIC long before. Chambers said that the instructions had not included penalty instruction, but that he would provide them to appellant. Appellant said that he would not accept them from Chambers, he would "not be accepting anything from that deceit and fraud monger and I object to the court's soliciting his deceit in open court." Gill suggested that if he thought there had been fraud he could compare the copies Chambers gave him with what the CALJIC book the court had. (74RT 15446.) At the end of the proceedings on December 5, appellant asked for an instruction that he was

denied an investigator for five years and thus he could not defend himself from the Oklahoma crimes and was thus denied due process. Gill denied the request. Appellant also requested an instruction that he was denied the right to subpoena witnesses in Oklahoma. (*Id.* at 15477.) Gill stated that "if I believed for a minute that there was a shred of truth to that I might consider it further, but I don't." Appellant stated that "a big element of exactly that proof that the court is ignoring is standing over there in the corner, Mr. Chambers," because Chambers had hired an investigator that was not under the direction of the attorney of record. (*Id.* at 15478.)

On December 9, 1991, appellant began his penalty case. During appellant's opening statement, he said that if given life without parole he would have time in prison to compile works about what had happened to him, something which it was very important for the world to read about. Appellant stated that the most important witness who would testify on his behalf was Wesley Swearingen and the jury would be sorry that they had not heard his testimony in appellant's guilt phase case. Gill told the jury to disregard this statement. The next most important witness would be Ward Churchill. Gill again warned appellant not to pursue this. (75RT 15495.)

After the testimony of appellant's first witness (Bernice Garrett) Chambers stated that he wanted to put something on the record, to which appellant objected that Chambers could not speak without his permission. (75RT 15548.) Gill let Chambers speak. Chambers said that he had brought appellant a copy of the penalty phase CALJIC instructions and given them to the bailiff to give to appellant, but appellant refused to accept them. Gill asked appellant if this was true and appellant stated that he refused to accept anything from Chambers. The court stated: "That's complete foolishness. I indicated to you if you're so paranoid you think he

might have doctored them some way," appellant could compare them to the court's copy. (*Id.* at 15549.)

On December 13, 1991, appellant began questioning his witness, Katherine Carter-White, an acquaintance and attorney from Oklahoma who had been a law partner for Mary Barksdale. Appellant asked questions about her law practice, and about how she knew him. Then he asked her whether she had been under FBI surveillance, which was successfully objected to as irrelevant. Appellant asked more questions about surveillance and the court granted all of Carpenter's relevance objections. Gill finally told appellant that this line of inquiry was not relevant. (75RT 15681.) Appellant then asked her whether she was interviewed by the FBI and whether something caused her to believe that he had been the victim of cointelpro. Gill told appellant that if he continued with this line of questioning he would excuse the witness. Appellant then started to ask if she thought that he had the right to prove it, at which point Gill cut appellant off and asked him to discuss the issue at sidebar. (*Id.* at 15682.)

At sidebar, Gill told appellant that he was deliberately provoking the court and engaging in misconduct, leaving Gill with no choice but to embarrass him in front of the jury. Appellant stated that he had the right to show that he was innocent of the Oklahoma crimes. Gill replied just as he did not have the right to put on cointelpro at guilt he did not have the right to put it on at penalty. Appellant objected to Gill whitewashing the truth. (75RT 15683.) Gill stated that the evidence was not relevant. Appellant asked how the fact that he was framed was not relevant. Gill reiterated that the evidence was not admissible. (*Id.* at 15684.) Back in front of the jury with Carter-White, appellant asked more questions that drew objections: Was she aware that the district attorney DA presented evidence attempting to convince the jury that he committed crimes in Oklahoma; did she have

any reason to believe that appellant was innocent of the Oklahoma crimes; what reason did she have to believe he was innocent; what was the basis of her belief that he was innocent of the Oklahoma crimes. (*Id.* at 15685.) Finally appellant asked her whether the FBI had told her he had AIDS. Carpenter's relevance / hearsay objection was sustained. (*Id.* at 15687.)

Appellant then attempted to get Carter-White's testimony about the history of the Cherokee nation. Appellant asked her if she could see the map on the bookshelf and cabinet. Gill ruled that the history of the Cherokee nation was irrelevant and asked him not go through a list of objectionable questions. (75RT 15703.) Appellant elicited the testimony that Carter-White was aware that appellant had authored writings on the history and culture of the Cherokee people. Then began a series of questions about Cherokee history, all of which are objected to, successfully, as irrelevant and/or cumulative. (*Id.* at 15704-15705.) Appellant then asked whether Carter-White and Mary Barksdale worked on cases that some might consider a threat to the United States government maintaining cultural dominance over Indians and whether Barksdale was working on such a case when she was killed. Gill sustained Carpenter's objection. (*Id.* at 15705.) Appellant asked more questions about Barksdale and Gill told him to stop this line of inquiry. However, appellant asked more questions including whether there were other people besides appellant who thought Barksdate was murdered. (*Id.* at 15706.) Appellant returned to the topic of the FBI in redirect when he asked Carter-White to describe the disinformation campaign against him. Gill stated that this was completely irrelevant. (*Id.* at 15709.)

When examining Lewis Preston, a San Diego area speaker of Esperanto, appellant asked him whether there was a history of governments throughout the world persecuting and even framing Esperantists. DDA

Carpenter's objections to this question were sustained. Appellant asked other similar questions, objections to all of which were sustained. (75RT 15727.) Preston also stated that he considered appellant a political prisoner because of "the whole shady thing" and stated he would like to make a commentary which he was sure would not be let in. (*Id.* at 15733.)

Sharon Colligan testified for appellant. She stated that had assisted him and would continue to help him. Then she added the following which the district attorney successfully had stricken from the record: ". . . I and other people who have helped [appellan]t have been harassed and intimidated by various people, including people claiming that they were from the FBI, and carrying badges." (76RT 15778.) The court cut her off when Colligan tried to add another statement about being intimidated. (*Id.* at 15779.) Appellant then asked Colligan what her reason was for believing that there was a reasonable doubt about his guilt. DDA Carpenter's hearsay objection was sustained. (*Id.* at 15781.) Appellant then asked her if one of the things that made her think the death penalty was inappropriate was the sworn declarations of Wesley Swearingen. An objection to the question was sustained. (*Ibid.*)

In a break in the testimony Carpenter stated that he ran into Wesley Swearingen in the courthouse. Swearingen said that he was there to testify. Carpenter said that he told Swearingen that he thought the court would not permit the testimony. Swearingen then said that he wanted to be released. In response, appellant said that he was considering offering additional grounds as to why Swearingen should testify. (76RT 15792.) Gill asked how long this would take and appellant stated he had no estimate. Gill agreed to give appellant until after the noon recess to give reasons. (*Id.* at 15793.)

After the noon recess, Edwin Spruth testified for appellant. After his testimony, appellant called Wesley Swearingen to the stand. (76RT 15867.) Gill called for a sidebar at which appellant argued that the district attorney had brought in "so called evidence," and therefore he should have a chance to show he was an innocent victim of cointelpro. The only way he could show this was through the testimony of Swearingen. Appellant thought that when the jury heard this evidence after the verdict they would conclude that there was reasonable doubt. Gill stated that his ruling was the same as in the guilt phase, i.e., that the evidence was factually and legally irrelevant. The district attorney asked for sanctions because appellant mentioned him in front of the jury. (*Id.* at 15868.) The DDA also accused appellant of hiding Swearingen in the courthouse, stating that he had happened to run into him in the courthouse. (*Id.* at 15869.)

Gill told appellant that he knew it was clear he was not to mention Swearingen's name in front of the jury, and that Gill would so inform the jury. Appellant claimed that the court denied him a hearing about Swearingen's testimony at the penalty phase. Appellant argued that the court had said it would discuss it after lunch break, and as soon as the break ended, the court had proceeded with Spruth, giving appellant no choice but to call Swearingen as a witness. Appellant "assumed [the court] granted [his] request if the court wouldn't give [him] a hearing." (76RT 15870.) The court told appellant that his argument was unpersuasive, and stated that it would tell the jury that it was to disregard the name. Appellant urged that the jury would then think that he lied to them if Swearingen didn't testify because he told the jury Swearingen would testify. (*Id.* at 15872.) Back in front of the jury, Gill told the jurors to disregard appellant's last comment about calling a certain witness. (*Id.* at 15873.)

After the conclusion of the evidence, the court had marked as a court exhibit a small badge found in the courtroom with the words in English and Esperanto "Freedom for N.I. Sequoyah." Gill marked it because he thought it showed the court's atmosphere. He was also mindful of one witness's testimony that he thought appellant was a political prisoner. (76RT 15886.) Carpenter noted that Birgitta Sequoyah and Ditriech Weidman wore the badges, as did some others. (*Id.* at 15887.)

Appellant concluded his closing with an appeal that the jury not execute him in the gas chamber for his peaceful and nonviolent efforts to promote basic rights, but said that he would not hold it against them if they did. He said: "wiser people than I have told me that my death would motivate my supporters in ways that I could never motivate them in my life." (76RT 15994.) He concluded by saying he hoped the jury would read the Constitution, especially the First Amendment which stated "that we all have the freedom of speech. And ask yourself if I had that today when I most needed it." (*Id.* at 15995.)

The jury returned a death verdict on December 19, 1991. (76RT 16010-16011.)

F. Post-trial Proceedings Showed Again That Appellant Perceived the Trial Itself and all Those Involved in it to be Actors in the Cointelpro Plot Against him

Judge Gill held a hearing on motions on February 4, 1992. (77RT 16022.) On that date, Gill considered appellant's request to continue the deadline for the motions. (*Ibid.*) Rosenfeld was present and appellant gave her permission to speak. (*Id.* at 16030.) Gill noted that in appellant's motion requesting the continuance, he did not mention Rosenfeld. (*Id.* at 16033) Appellant said that she worked for herself, not for him, adding that he had requested an order that she work for him, but Gill never gave him one. Gill thought it was appellant's business if he foolishly squandered

Rosenfeld as an asset. (*Id.* at 16034.) Appellant also asked that Chambers' appointment be terminated and another attorney, Mr. Eiden, beappointed in his stead. (*Id.* at 16037.) Gill refused, stating that he would not be held to appellant's "idiosyncrasies and peccadillos about Mr. Chambers." (*Id.* at 16038.) Appellant stated that he wanted to bring up as grounds for a new trial the deceit and fraud of Chambers. (*Ibid.*) Appellant asked for both Rosenfeld and Chambers to be relieved so that he could have Richard Eiden as his attorney. He wanted this even if Gill did not give him an extension, because having Eiden for a day or two would be better than having Rosenfeld and Chambers. Appellant disagreed with Gill's opinion that Chambers and Rosenfeld were competent. (*Id.* at 16039.) Gill stated that he had read Eiden's declaration and that appellant had not made a showing as to why Eiden should be appointed. Gill thought that in a couple of weeks it would be the same thing and appellant would be saying that he could not work with Eiden because Eiden was part of a conspiracy or was a know-it-all attorney who wanted to tell appellant how to run things. Gill thought he could predict this. Eiden would tell him to cut the foolishness and get down to business and then that would be the last time appellant talked to the person. (*Id.* at 16040-16042.) Gill recalled that Chambers tried to get appellant to sit down with CALJIC and face reality and that was the last thing appellant had been interested in doing. Any responsible attorney would have to take a similar approach. He applauded Rosenfeld for having had to put up with appellant. (*Id.* at 16043.)

Gill allowed Eiden to address the court. Eiden stated that given appellant would not use Chambers, and Rosenfeld had been out of the picture, a continuance was appropriate. (77RT 16054.) Appellant noted that he planned to assert as part of his appeal the actions of Rosenfeld which helped the prosecution get a conviction. He wanted Eiden to help

him with that. (*Id.* at 16055.) Gill denied the appointment. (*Id.* at 16056.) Rosenfeld said she thought that she could work on the determinate sentencing analysis that needed to be done. (*Id.* at 16058.) Appellant objected to Rosenfeld having the transcript. (*Id.* at 16059.) Gill pointed out that appellant was creating a dilemma and then wanted Gill to help him out and noted that there was no way Rosenfeld could help him without the transcript. (*Id.* at 16060.) Gill gave appellant a week to consult with Rosenfeld. (*Id.* at 16062.)

On February 24, 1992, appellant filed a "Renewed Motion to Continue & Renewed Marsden Motion to Relieve Rosenfeld and Chambers and Appoint Attorney Richard Eiden." He sought a 90 day continuance of sentencing and new filing date for post-trial motions and asked the court to relieve his advisories and appoint Richard Eiden in their stead. (20CT 4536.) At the hearing on this motion on February 26, 1992, appellant asserted that Rosenfeld had not been assisting him on this and that he was not communicating with her. Gill stated that he was convinced that all of this was appellant's own doing. Appellant used resources as he chose, and had to live with the consequences. Gill thought that appellant had done this in part to manipulate the system. (77RT 16069.) Gill thought that if he appointed Eiden that he soon would hear the same complaints, i.e., that Eiden was not competent and was part of a conspiracy. (*Id.* at 16070.) Turning to appellant's *Marsden* motion, Gill stated that *Marsden* did not apply to advisory counsel. He noted that appellant was covering old ground with Chambers. Chambers was ready and willing to help and appellant chose not to use him. (*Id.* at 16073.) Gill thought this was a case where a person who brought unwelcome news was subject to the wrath of the person getting the news. Gill observed that Chambers had come with CALJIC to help get him ready but: "That was the last thing you wanted to hear from

your advisory counsel, because that required you to face up to reality, get down to business and – approach this matter – the situation you found yourself in, I say, in a realistic, rational manner." (*Id.* at 16074.) He thought that the motion to relieve Rosenfeld was disingenuous. The reason appellant initially had given for wanting a continuance was that he wanted to consult with Rosenfeld, but then appellant fired her. (*Id.* at 16075.) Gill thought appellant did that because she would have moved forward on the new trial motion in a competent manner and helped him present it, which was the last thing appellant wanted because he knew this would move them closer. (*Id.* at 16075.) Gill denied appellant's motion. (*Id.* at 16076.)

Gill then turned to consider grounds for a new trial. Appellant complained that he was not given the opportunity to present evidence against Chambers, stating that among the evidence he had in his boxes to present against Chambers was his contract with the lawyer. (77RT 16084.) Gill said that he did not want to hear anything else about the contract, since the contract could not be a basis for relief. Appellant complained that he did not have the opportunity to present evidence of Chambers' fraud and deceit. Appellant noted that Chambers had worked on the case for years without assistance or direction from him. He put in motions without his permission. Appellant stated that he was making the objections because he wanted Chambers relieved and for Gill to appoint someone else. (*Id.* at 16085-16086.)

Appellant objected that he had not been allowed to present evidence in the case. He asserted that he been prevented from doing this, which is always a defendant's right. He noted that the "Soviet authorities in Moscow have offered to provide me evidence of the identities and activities of CIA agent Mark Williams." This evidence warranted a new trial. (77RT 16088.)

Gill then affirmed the jury's verdict pursuant to Penal Code section 190.3, subdivision (e). (77RT 16088-16089.) He sentenced appellant on the death penalty counts. (*Id.* at 16188-16191; 26CT 5889-5893.)

On February 28, 1992, Gill sentenced appellant on the non-capital counts. Before he did so, he gave appellant the opportunity to speak. Appellant complained that his children had not been allowed to appear. Gill thought that an emotion for appellant's children was feigned. Appellant stated that his thoughts went out to all children, especially to the children in nations who do not have autonomy. (77RT 16167.) He was speaking of Cherokee children and African children and Amazon children. He was thinking of the children in the Amazon rain forest who were the victims of thousands and thousands of pieces of candy dropped by the CIA with poison. Appellant wondered where the emotion and tears for them were. He was thinking of Cherokee women forcibly sterilized by judges like Gill. He thought of the Choctaw neighbors whose women were forcibly sterilized and wondered about the concern for these people. He was proud to say they were his people and their children his children. This is why he founded his organization in Switzerland. (*Id.* at 16168.) Appellant mentioned William Campbell Douglas who was trying to do the work appellant was doing. Douglas published "Who Killed Africa," adding that 30 percent of black people were convinced that AIDS was created to kill black people.[120] (*Id.* at 16169.) Appellant asserted that Gill knew that before he was arrested appellant was involved in collecting evidence that

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[120]Appellant was referring to William Campbell Douglass, who in 1987 published a booklet: *W.H.O. Murdered Africa*, asserting that the World Health Organization created the AIDS as part of a plan to create a killer virus. (See reproduction at http://healingtools.tripod.com/who_africa.htmll (retrieved on August 4, 2012.)

the AIDS virus was created by the CIA. The CIA and FBI stopped him and took his material. (*Ibid.*) Appellant thanked Swearingen who told him on the phone that in cointelpro cases it was typical for the jurors only to hear things that would lead them to believe that the defendant was guilty. (*Id.* at 16169.) Appellant was concerned about the kind of evil that would rule that a defendant's evidence that he was framed was not relevant. (*Id.* at 16170.) Gill was the Dr. Jekyll to the prosecution and the Mr. Hyde to the defense. Appellant argued that some people are full of prejudice and prejudice was a form of evil. (*Ibid.*) Gill said he thought that appellant was trivializing the process, stating that appellant was trying Gill's patience. (*Id.* at 16172.)

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XV.

JUDGE GILL ERRED IN FAILING TO SUSPEND PROCEEDINGS BECAUSE THERE WAS SUBSTANTIAL DOUBT ABOUT APPELLANT'S COMPETENCE TO STAND TRIAL

A. Introduction

Appellant shows below that when a defendant is unrepresented at trial, common law principles dictate that the defendant must be able to rationally and factually understand the proceedings and to *actually make a rational defense*. Judge Gill well knew that appellant's defense was imaginary and it was irrational to believe that appellant was the victim of a cointelpro. Further, the record demonstrated to Gill that appellant's selection of this defense was not the product of a rational choice.[121] Gill should have suspended the proceedings and ordered appellant evaluated to assess whether appellant was competent to stand trial and to represent himself. His failure to do so was reversible error.

B. To Meet Constitutional Standards of Competence an Unrepresented Defendant Must Have the Ability to Make a Rational Defense

The United States Supreme Court has recognized a due process right to competence during a trial. (*Cooper, supra*, 517 U.S. 348, 354; *Medina, supra*, 505 U.S. 437, 453; *Pate, supra,* 383 U.S. 375, 378.) The rule prohibiting the trial of an incompetent defendant has ancient roots in common law. (*Medina, supra*, 505 U.S. 437, 446 ["The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common law heritage."].)

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[121]If this Court finds that appellant's defense was a rational defense rationally selected, then it was error for Judge Gill to refuse to permit appellant to put on the defense, as appellant requested.

It was long the rule at British common law that a defendant could not be tried, if because of his infirmities, he was unable to defend himself: "if, after he has pleaded, [a] prisoner becomes mad, he shall not be tried; for how can he make his defense?" (Blackstone, Commentaries *24; see also 1 Hale, The History of the Pleas of the Crown *34-*35 (1736) [same]; *Frith's Case* (1790) 22 How.St.Tr. 307 [there can be no trial until the defendant "by collecting together his intellects, and having them entire, he shall be able so to model his defense and to ward off the punishment of the law."].) The purpose of the ancient rule prohibiting the trial of insane persons is to avoid the conviction of those whose mental disabilities have prevented them from raising proper defenses or divulging exculpating facts. (*Regina v. Berry* (1876) 1 Q.B.D. 447.) As explained by New York's high court in the mid-nineteenth century: "[T]he humanity of the law of England had prescribed that no man should be called upon to make his defense at a time when his mind was in such a situation that he appeared incapable of doing so; that however guilty he might be, the trial must be postponed to a time when, by collecting together his intellects, and having them entire, he should be able so to model his defense, if he had one, as to ward off the punishment of the law . . . ." (*Freeman v. People* (N.Y. Sup. Ct. 1847) 4 Denio 9, 27; see also *Youtsey v. U.S.* (6th Cir. 1899) 97 F. 937, 943 [noting that the test at British common law was "whether the accused [could] make a rational defense"].) Thus, as the United States Supreme Court put it in laying out the common law rule relating to competency to stand trial: Beginning with the earliest cases, the issue at a sanity or competency hearing has been "whether the prisoner has sufficient understanding to comprehend the nature of this trial, *so as to make a proper defense* to the charge." (*Cooper, supra*, 517 U.S.348, 357, fn.8, quoting *King v. Pritchard* (1836) 7 Car. & P. 303, 304, 173 Eng. Rep. 135, emphasis added).)

Early American courts followed this British common law precedent, holding that a defendant may only be tried if he "is so far sane as to be competent in mind to make his defense, if he has one; for, unless his faculties are equal to that task, he is not in a fit condition to be put on his trial." (*Freeman, supra*, 4 Denio 9, 28, emphasis added); *Guagando v. State* (1874) 41 Tex. 626, 630 [The competency question is whether the accused is "mentally competent to make a rational defense."]; *U.S. v. Lawrence* (C.C.D.D.C. 1835) 26 F.Cas. 887, 889-891; see also *State v. Upton* (1955) 60 N.M. 205, 211 [the defendant is competent to stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to the proceedings, and to make a rational defense]; see also ABA Criminal Justice Mental Health Standards (2d ed. 1986) 7 IV Introduction ["The British common law rules preventing trial of mentally incompetent defendants were transposed virtually intact into early nineteenth-century United States jurisprudence"].)

California was one of the states that adopted the common law standard early in the twentieth century. Citing *Freeman, supra*, this Court adopted the same standard as New York requiring that no person who cannot mount a rational defense should be required to stand trial. (*In re Buchanan* (1900) 129 Cal.330, 332-333; citing *Freeman, supra*, 4 Denio 9; see Grant H. Morris, J.D., LL.M. et. al., *Competency to Stand Trial on Trial* (2004) 4 Hous. J. Health L. & Pol'y 193, 204 [citing *Buchanan* and *Freeman*].)

The focus of the common law competency standard on defendant's ability to rationally defend himself or herself flows naturally from the unavailability of counsel for most defendants at common law, under which there was no right to counsel. (See, e.g., *Godinez, supra*, 509 U.S. 389,

400, fn.11; 4 Blackstone, Commentaries *349 (citing 2 Hawk. P.C. 400) [describing "a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial . . . unless some point of law shall arise proper to be debated"]; *Betts v. Brady* (1942) 316 U.S. 455, 471 ["[I]n the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right essential to trial."]; *Faretta, supra*, 422 U.S. 806, 850 (Blackmun, J., dissenting) [recognizing that "self-representation was common, if not required, in 18th century English and American prosecutions"]; see *Rohan ex rel. Gates v. Woodford* (9th Cir. 2003) 334 F.3d 803, 808-809 ["Capacity for rational communication once mattered because it meant the ability to defend oneself, (citations omitted), while it now means the ability to assist counsel in one's defense (citations omitted.)".])

The common law test for competency, allowing a defendant to be tried only if he or she is capable of making a rational defense, continued to be applied by courts well into the middle of the twentieth century. Indeed, in 1954 the United States Supreme Court acknowledged the ongoing vitality of the common law test for competency. In *Massey v. Moore* (1954) 348 U.S. 105, the Court considered a defendant's claim that he was "insane and unable to defend himself" during his trial in state court where he was unassisted by counsel. (*Id.* at pp. 106-107.) The High Court granted the defendant's petition and reversed the lower court's ruling on the grounds that the defendant had not had a hearing on his competency to stand trial. (*Id.* at p. 107.) As recounted by Justice Douglas in his opinion, the District Court had merely ruled on the question of whether "'since [the defendant] was not represented by counsel at his trial, he is in custody in violation of the Constitution, etc. of the United States,'" with the District Court holding

that his trial accorded with the Constitution. (*Id.* at pp. 107-108.) Justice Douglas concluded that the District Court could have meant that the standard for competency to stand trial with counsel is the same as the standard for competency to stand trial without counsel. Douglas disagreed, explaining that "evidence to support the finding that petitioner was competent to stand trial with a lawyer" was not necessarily "sufficient to sustain the conclusion that he was competent to stand trial without a lawyer" and remanded for a hearing on the matter. (*Id.* at p. 108.) Justice Douglas concluded: "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. Even the sane layman may have difficulty discovering in a particular case the defense which the law allows. [citation omitted.]." (*Id.* at pp. 108-109.) Thus, the Court reaffirmed in *Massey* that competency (at least when the defendant is not represented by counsel) requires the ability to make a rational defense at trial.

The common law rule that an unrepresented defendant must be able to make a rational defense is consistent with the standard in *Dusky*, which articulated the standard for competence to stand trial when a defendant *is* represented. It was just six years after *Massey* applied the common law test for determining competency that the High Court issued the two paragraph, per curiam, decision in *Dusky* that restated the test for competency based on an assumption that counsel would be present, viz, whether the defendant has sufficient present ability to *consult with his lawyer* with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him. (*Godinez, supra*, 509 U.S. 389, 396, quoting *Dusky, supra,* 362 U.S. 402, 403, emphasis added).) *Dusky* itself concerned only the scope of a recently-enacted federal statute

governing competency in federal cases, (1949) 18 U.S.C.A. § 4244 (West) (current version at (2006) 18 U.S.C. § 4241. (*Dusky*, *supra*, 362 U.S. 402, 403.) Under this statute, a defendant could not be tried in federal court if he was "unable to understand the proceedings against him or *properly to assist in his own defense*." (18 U.S.C.A. § 4244 (West 1949) (current version at 18 U.S.C. § 4241(a)), emphasis added).) That Congress would focus the competency inquiry on a defendant's ability to "assist" another in his defense - a refinement of the common law standard - is not surprising because, at the time the statutory language in question was enacted, all federal defendants had a Sixth Amendment right to counsel. (See *Johnson v. Zerbst* (1938) 304 U.S. 458, 462-463.) A state defendant's right to counsel under the Sixth Amendment was also recognized in 1963. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 343.)

The common law approach is also consistent with the United States Supreme Court case law following *Dusky*. For instance, the High Court has stated that the ability to consult with a lawyer is not synonymous with the requirement for competence to stand trial. As the concurrence in *Godinez* explained, "ability to consult with [a] lawyer" is not the touchstone of the competency standard: Although the *Dusky* standard refers to "ability to consult with [a] lawyer," the crucial component of the inquiry is the defendant's possession of a "reasonable degree of rational understanding." (*Godinez*, *supra*, 509 U.S. 389, 403, concurring opin. of Kennedy, J.) In other words, the "focus of the *Dusky* formulation is on a particular level of mental functioning, which the ability to consult counsel helps identify. The possibility that consultation will occur is not required for the standard to serve its purpose." (*Ibid.*)

The common law understanding of the trial competence of an unrepresented defendant is also consistent with the High Court's opinion in

Edwards. In *Edwards*, the issue was whether a state trial court's "refusal to permit him to represent himself . . . deprived him of his constitutional right to represent himself." (*Edwards*, *supra*, 554 U.S. 164, 169.) The Court held when a defendant falls in a gray area such that he is above the *Dusky* standard of trial competence but is "incapable of conducting his trial defense unless represented" (*Id.* at p. 176), a state does not violate that individual's right to represent himself by insisting that he have counsel. In coming to this conclusion, the Court cited *Massey* for the proposition that the trial of an defendant without the assistance of counsel who is incompetent is impermissible. (*Id.* at p. 178, citing *Massey*, *supra*, 348 U.S. 105, 108.)

The High Court has also used the language of "rational understanding" and "rational choice" in other contexts, where the defendant's mental competence is at issue. So in *Rees v. Payton* (1966) 384 U.S. 312, 314 (per curiam), the Court considered whether a defendant has the right to waive federal habeas corpus review. Retaining jurisdiction over the case, the Supreme Court remanded and directed "the District Court to determine Rees' mental competence in the present posture of things, that is, whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." (*Id.*, at p. 314.) As pointed out by the Fifth Circuit Court of Appeals, while the *Rees* standard is different from that of *Dusky* "both standards inquire about the discrete capacity to understand and make rational decisions concerning the proceedings at issue . . . . [citations]." (*Mata v. Johnson* (5th Cir. 2000) 210 F.3d 324, 329.) Hence, part of the inquiry in determining whether the defendant is competent to abandon post-conviction proceedings is whether

the defendant, because of some defect or disease, was prevented him "from making a rational choice among his options[.]" (*Rumbaugh v. Procunier* (5th Cir. 1985) 753 F.2d 395, 398.) The common law standard is fully consistent with these cases.

As noted above, California adopted the "rational defense" standard early in its history. This state also continued to apply the standard well into the twentieth century. The same principle was enunciated in *People v. Perry* (1939) 14 Cal.2d 387, 399: "If [a defendant] is capable of understanding the nature and object of the proceedings against him and can conduct his defense in a rational manner, he should be deemed sane for the purpose of being tried . . . ." (See also, *People v. Merkouris* (1956) 46 Cal.2d 540, 550, [the test for competency is whether the defendant can "understand the nature and purpose of the proceedings against him and to conduct his own defense in a rational manner."].) The CALJIC instruction defining competency defines a defendant as mentally competent if he or she is either "able to assist [his][her] attorney in conducing [his][her] defense in a rational manner," or "able to *conduct [his][her] defense in a rational manner*." (CALJIC No. 4.10, emphasis added; *People v. Huggins* (2006) 38 Cal.4th 175, 189 [Citing similar language from a prior version of CALJIC 4.10].)[122]

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[122]The standard for when a trial court may deny a defendant his right to self-representation was articulated by this Court earlier this year in *People v. Johnson* (2012) 53 Cal.4th 519. In *Johnson*, this Court stated: "[P]ending further guidance from the high court, we believe the standard that trial courts considering exercising their discretion to deny self-representation should apply is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel. (*Ibid.*) The standard articulated in *Johnson* is fully consistent with the common-law standard which dictates that a defendant who has asserted his right under

(continued...)

Moreover, last year in *People v. Murdoch* (2011) 194 Cal.App.4th 230, 239, the Court of Appeal held that where a defendant represents himself, the test for competency is if "he is able to understand the nature and purpose of the proceedings taken against him *and to conduct his own defense in a rational manner*. [citations]." In *Murdoch*, the Court of Appeal concluded that appellant's defense that he was not guilty of burglary because his neighbors were not human, but were angels in human bodies, together with expert reports about the defendant's mental condition was sufficient evidence that the trial judge should have declared a doubt about Murdoch's competency and suspended proceedings. Its failure to do so was error. The Court of Appeal noted that its findings were based on what was before the trial judge. However, it also observed that subsequent information from a psychiatrist indicated the depths of Murdoch's difficulties. A prior report indicated that Murdoch believed he saw aliens crawl out of his body and burn off his tentacles. The Court of Appeal recognized that the content of appellant's proposed defense itself indicated problems with the defendant's competency to stand trial. The Court of Appeal concluded that "for [Murdoch], the existence of nonhumans in human bodies is, at times, his reality, but it is not a rational defense (absent a plea of not guilty by reason of insanity.)" (*Id.* at p. 239, fn. 3.)

In Argument I.E., *supra,* appellant discussed the meaning of the term "rationality" in the context of *Dusky's* standard that a defendant must be able to *rationally* assist counsel. (*Dusky*, *supra*, 362 U.S. 402, 403.) Noting the connection the High Court has made between decision-making and competency (see *Godinez*, *supra*, 509 U.S. 389, 403 (Kennedy, J. concurring); *Cooper*, *supra*, 517 U.S. 348, 398; *Edwards*, *supra*, 554 U.S.

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[122](...continued)
Faretta to represent himself must be able to make a rational defense.

164, 176), appellant showed that the meaning of "rationality" in the *Dusky* context was the ability to meaningfully participate in trial-related decisions. Appellant showed above that decision-making required the capacity to understand information, to appreciate the significance of the information with regard to a decision, to think logically about different courses of action and, finally, to choose between the different courses of action. (See, *Edwards, supra*, 554 U.S. 164, 175-176, citing N. Poythress, R. Bonnie, J. Monahan, R. Otto, & S. Hoge (2002) *Adjudicative Competence: The MacArthur Studies* p. 103.)

One commentator has usefully summarized the components of rationality as follows:

> Rational understanding and decisional abilities relate to whether the defendant can appreciate the importance of relevant legal information in his case; whether the defendant can understand, reason, and choose among various courses of action; whether he can apply logical thought processes to distinguish the benefits and risks of decisional options; whether he has delusional beliefs relevant to his trial process; whether he can protect himself in court and utilize legal safeguards made available to him (such as applying a plea bargain to his case); and whether he should choose to testify. A defendant must appreciate their legal predicament and recognize the significance of the legal information as applied to oneself. They must possess sufficient reasoning ability to rationally process information regarding legal decision making.

(Fabian, *Rethinking "Rational" in the Dusky Standard: Assessing a High-Profile Delusional Killer's Functional Abilities in the Courtroom in the Context of a Capital Murder Trial* (2006) 25 Quinnipiac L. Rev. 363, 373, footnotes omitted.) The important notion is that the defendant must be able to appreciate information uninfluenced by delusional beliefs and to assess and use that information rationally. (See Bonnie, *The Competence of Criminal Defendants: Beyond Drope and Dusky* (1993) 47 U. Miami L.

Rev. 539, 575.) "What is important here is the decisional *process,* not its *outcome,* although if others consider an outcome to be misguided or irrational, this may signal a problem with the defendant's reasoning process." (*Ibid,* emphasis in original.) The person must be able to give a reason for his or her decision that is grounded in reality. (*Id.* at 574.)

In *McKaskle v. Wiggins* (1984) 465 U.S. 168 the United States Supreme Court considered the issue of when stand-by counsel impermissibly interferes in a defendant's right to self representation. In so doing, the High Court, articulated the tasks an unrepresented defendant must be permitted to do without interference from counsel. They must be permitted "to control the organization and content of [their] 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." (*Id.* at p. 174.) In deciding in the case before it that the trial court had not impermissibly permitted stand-by counsel to interfere with the defendant's self-representation rights, the High Court noted that the trial judge had repeatedly explained "*that [the defendant's] strategic choices,* not counsel's, would prevail. [Cites.]" (*Id.* at p. 181, emphasis added.)

State law also holds that a self-represented defendant controls the defense. As this Court has pointed out, where a defendant has chosen to represent himself, he or she retains control of and responsibility for the defense. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1165, fn. 14, citing *McKaskle, supra,* 465 U.S.168, 176-178 and *People v. Moore* (1988) 47 Cal.3d 63, 77-78.) Where the defendant is *represented,* absent an explicit conflict between the defendant and counsel, it is counsel who controls the tactical choices, including what defense will be presented. (See *People v. Glover* (1967) 257 Cal.App.2d 502, 507 [in guilt trial, avoiding weak evidence of diminished capacity (saving it for insanity trial) and using more

understandable provocation defense was proper decision for counsel]; *People v. Welch* (1999) 20 Cal.4th 701, 728 [represented defendant is not entitled to present defense of own choosing, but merely to adequate and competent defense]; see also *In re Burton* (2006) 40 Cal.4th 205, 215 ["Thus, *Frierson* means that 'a defense counsel's traditional power to control the conduct of a case does not include the authority to withhold the presentation of any defense at the guilt/special circumstance stage of a capital trial when the defendant openly expresses a desire to present a defense at that stage and when there exists credible evidence to support that defense."].) Self-representation, in contrast, gives a defendant "control over tactical decisions that usually would be made exclusively by primary counsel" (*Moore*, *supra*, 47 Cal.3d 63, 77), which thus would include a defendant's exclusive right to select what defense to present.

Since to be competent to stand trial, a self-represented defendant must be able to "rationally"conduct a defense (*Massey*, *supra*, 348 U.S. 105, 108), it follows that a competent self-represented defendant must be able to rationally make strategic choices about the selection of and conduct of a defense. Applying the definition of rationality discussed above, it follows that a competent self-represented defendant must be able to understand the information related to the choice of – and the presentation of – a defense, be able to appreciate the significance of the decision, and then rationally choose the defense.

C. If There is Substantial Evidence of Incompetence, Trial Proceedings Must be Suspended

Although the Supreme Court has never "prescribe[d] a general standard with respect to the nature or quantum of evidence necessary to require resort to an adequate procedure for determining competency," it has explained that "evidence of a defendant's irrational behavior, his demeanor

at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required. In some circumstances, even one of these factors may be sufficient." (*Drope*, *supra*, 420 U.S. 162, 172, 180.) The right to be tried only while competent is so critical a prerequisite to the criminal process that "state procedures must be adequate to protect this right." (*Pate*, *supra*, 383 U.S. 375, 378; *Drope*, *supra*, 420 U.S. 162, 172.) The Due Process Clause thus demands adequate protective procedures to minimize the risk that an incompetent person will be convicted. The Supreme Court has expressly recognized that one of the required procedural protections is "further inquiry," when there is a sufficient doubt raised about a defendant's competency. (*Drope*, *supra*, 420 U.S. 162, 180.) When a reasonable doubt has been raised, a court's failure to make further inquiry violates due process by depriving the defendant of his right to a fair trial. (*Pate*, *supra*, 383 U.S. 375, 385-86.)

State law requires "substantial evidence" of incompetence. As this Court explained in *People v. Jones* (1991) 53 Cal.3d 1115: "When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing. Evidence is "substantial" if it raises a reasonable doubt about the defendant's competence to stand trial. (*Id.* at pp. 1152-1153 [citations omitted]; see also *People v. Danielson* (1992) 3 Cal.4th 691, 726, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.); *People v. Lawley* (2002) 27 Cal.4th 102, 131; *People v. Koontz* (2002) 27 Cal.4th 1041, 1063.)

The court must consider "all of the relevant circumstances" when determining whether a reasonable doubt exists. (*People v. Howard* (1992) 1 Cal.4th 1132, 1164.) "When there exists substantial evidence of the accused's incompetency, a trial court must declare a doubt and hold a

hearing pursuant to section 1368 even absent a request by either party." (*People v. Aparicio* (1952) 38 Cal.2d 565, 568; §1368, subd. (a).)" Failure to conduct a full evidentiary hearing violates fundamental due process and is reversible per se. (*Pate*, *supra*, 383 U.S. 375, 385; *People v. Pennington* (1967) 66 Cal.2d 508.)

In assessing whether a defendant has presented substantial evidence of incompetence, this court has noted that "'more is required to raise a doubt [of competence] than mere bizarre actions or bizarre statements . . . or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense.'" (*People v. Deere* (1985) 41 Cal.3d 353, 358 [citations omitted]; *People v. Ramirez* (2006) 39 Cal.4th 398, 467.) Instead, the evidence must raise a reasonable doubt "that [the defendant] lacked an understanding of the nature of the proceedings or the ability to assist in his defense." (*Koontz*, *supra*, 27 Cal.4th 1041, 1064; *People v. Lewis* (2008) 43 Cal.4th 415, 525.)

"Substantial evidence" of incompetence is judged by an objective standard. It does not mean unconflicting evidence. (See, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1219; *Welch*, *supra,* 20 Cal.4th 701, 738.) It does mean persuasive evidence. (*People v. Hale* (1988) 44 Cal.3d 531, 539; *People v. Ary* (2004) 118 Cal.App.4th 1016, 1024-1025.) It does not mean evidence sufficient to raise a *subjective* doubt regarding the defendant's competence in the mind of the trial judge. (See, e.g., *Jones*, *supra*, 53 Cal.3d 1115, 1153; *People v. Castro* (2000) 78 Cal.App.4th 1402, 1415). As the Ninth Circuit Court of Appeals has explained:

> Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that *cannot be dispelled by resort to conflicting evidence.* The function of

> the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is *any* evidence which, *assuming its truth*, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court *sua sponte* must order an evidentiary hearing on the competency issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial.

(*Moore v. U.S.* (9th Cir. 1972) 464 F.2d 663, 666, emphasis added.)

The court's duty to conduct a competency hearing arises when substantial evidence of incompetence is presented at "*any time* prior to judgment" (*People v. Rogers* (2006) 39 Cal.4th 826, 847), even if such evidence arises after a prior finding of competency. (*Jones*, *supra*, 53 Cal.3d 1115, 1152-1153; accord, e.g., *Drope*, *supra*, 420 U.S. 162, 181; *Moore*, *supra*, 464 F.2d 663, 666.)

In the case where the defendant represents himself, error is established if there is substantial evidence that the defendant lacked the ability to rationally conduct his own defense. (*People v. Merkouris* (1956) 52 Cal.2d 672, 678, overruled on other grounds in *Pennington*, *supra*, 66 Cal.2d 508, 518-519.)

"In resolving the question of whether, as a matter of law, the evidence raised a reasonable doubt as to the defendant's mental competence, [the reviewing court] may consider all the relevant facts in the record." (*Young*, *supra*, 34 Cal.4th 1149, 1217.)

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D. Evidence That Appellant Could not Make a Rational Defense was Substantial Evidence That Appellant was Incompetent to Stand Trial

It is clear that there was substantial evidence before Judge Gill that appellant could not rationally understand, consider, and then choose a defense. This raised a reasonable doubt about appellant's competency to stand trial.

1. Appellant Could not Discuss Options for his Defense

Appellant's capacity to make a rational choice regarding a defense was doubtful, given his incapacity to even discuss options put forth by counsel or by the trial court itself. There was ample evidence from appellant's behavior with his appointed attorney, Geraldine Russell, and his later-appointed advisory counsel that he could not even discuss – let alone formulate or present a rational defense. Appellant never discussed with Russell any details of a defense during the years she represented him. For example, in a 1990 memorandum to Judge Edwards in relation to the issues in front of him, Russell explained appellant's inability to discuss a rational defense. (38CT 8348-8351.) She noted that initially appellant had refused to discuss the case, guilt or penalty, with anyone on the team. (*Id.* at 8348.) Then in 1987, he had disclosed that his theory of the defense was that he had been kidnaped and forced to put his fingerprints on all the evidence seized from his car. (*Ibid.*) When Russell confronted him with how absurd this all was, he cut off communication and henceforth resisted all her efforts to get him to put together a rational defense. She stated: "Despite many efforts by the defense team to impress upon Mr. Waldon the need to pursue a rational defense he has steadfastly refused to cooperate." (*Id.* at 8349.)[123]

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[123]She also wrote: "That all the investigation, expert consultation, (continued...)

Instead, Russell noted, appellant launched into persistent and repeated attacks on her, which persisted throughout years of trial proceedings.[124]

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[123](...continued)
penalty phase workup, and psychiatric issues raised in this case are crucial to a full and proper defense at trial. But Mr. Waldon's inability to pursue this matter warrants intervention by the court either by a 1368 hearing or withdrawal of his *pro per* status. He refuses particularly to allow presentation of any psychiatric issues. He has a significant psychiatric history." (38RT 8349.)

[124]Russell repeated similar contentions later in the proceedings before Edwards. In response to appellant's allegations that he needed the material in Russell's file to pursue malpractice claims against Russell and to present his defense (4RT 359-360), Russell stated:

> Basically, Mr. Waldon's problem is he is irrational and illogical. The difficulty now is he would like these matters to pursue a malpractice claim, but in the event they don't arise to malpractice, he would certainly like to use them in trial as a defense. Neither of these things is valid.
>
> I would urge the court to consider the fact that he has previously been held mentally deficient and not considered competent to represent himself. He has a history of psychiatric problems. He's been through a 1368 trial. He has not and never has intended to use any material for a defense in this case.
>
> He has had contacts with the district attorney's office before. He is not rational enough to know how to conduct his own defense or how to avoid dissemination of information given to him. The case law does not touch upon the problem of a death penalty client going pro per with the psychiatric history that Mr. Waldon has. He has done nothing to forward his own defense while he has been pro per.
>
> [¶] . . . [¶]
>
> I would submit that in an abundance of caution and in an effort to protect him from himself over the last four years, the material is simply not in his best interests at this time. There has been no showing that he is prepared to conduct a rational defense at trial. There's no showing that he can conduct a defense at trial. There's no indication that any

(continued...)

Russell related similar details about appellant's unwillingness to discuss a defense in the 1988 hearing before Judge Zumwalt on appellant's motion to relieve counsel. As Russell explained to Zumwalt: "[T]o my knowledge [appellant] has never discussed a rational defense to any of the charges in this case with anyone, either his family members or members of the defense team." (42ART 223.)[125]

Appellant was no more capable of discussing a rational defense with his advisory counsel Benjamin Sanchez. So, for example, Sanchez stated in a letter to appellant copied to Judge Gill that appellant would not work on a defense with Sanchez, repeatedly avoiding the issue when Sanchez attempted to talk with appellant about a defense, instead spending his time with motions and writ petitions which Sanchez characterized as "specious." In that letter, Sanchez asserted that appellant simply would not ask for advice that was related to his defense. (38CT 8295.) Later, Sanchez complained that he was not able to help appellant because he would not tell him what was going on. (96ART 29.) Nancy Rosenfeld, appointed as appellant's second advisory counsel in 1990, documented similar problems in her letter to appellant of July 1990. (38CT 8305-8307 [stressing the imperative that appellant work on his *"defense,"* and stating "if you refuse to discuss it, I am working in the dark and cannot possible do my best" (emphasis in original)].)

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[124](...continued)
work he's doing on the case now is somehow tied to any past work done, and in fact, the claim is quite the contrary. He intents to use it to show malpractice.
(*Id.* at 361-362.)

[125]Appellant has argued below that to the extent that Gill was not aware of the information in the proceedings before other judges, appellant was denied a fair trial because Gill was unable to meaningfully exercise his discretion.

2. Anyone who Questioned Appellant's Cointelpro Defense was Accused of Being in a Conspiracy Against him

That the cointelpro defense was based on delusion is shown by appellant's tendency to expand the claimed conspiracy against him to include anyone involved in court proceedings who questioned him. Appellant demonized all who crossed him and labeled them as participants in the ever-growing conspiracy. Anyone who explained to appellant that there was no evidence to support his proposed cointelpro defense and that it was not rational became the target of appellant's screeds. Appellant's attacks against Russell have been well-documented. Rosenfeld too was a victim. To take but one example: in a complaint to the 987.9 panel that he had to have his own funding for a typist, appellant asserted that "Rosenfeld has never been anything except a *cointelpro agent and a prosecution agent* in the false clothing of a defense advisory counsel. Anything and everything she obtained of a confidential strategically important nature about the defense she leaked to the prosecution through a host of ways." (36CT 8074-8076, emphasis added.) Chambers was the object of even more tirades by appellant. After Chambers was taken off the case by Judge Revak and then returned back to the case after the intervention of the prosecution, appellant repeatedly referred to Chambers as the "agent of the prosecution." (See, e.g., 37RT 6414; 33RT 5385; 37RT 6414.)

Judge Gill was no less the object of appellant's jeremiads. Appellant alleged that Gill slept with Russell, who was trying to kill him. Later, he compared trial Judge Gill and one of the 987.9 funding judges (Judge Milliken) to Soviet judges who sent "political and ethnic" activists to mental institutions where they were made zombies by psychiatric drugs. These two judges "and their cohorts in crime - local psychiatrists who willingly do their dirty work for them . . . by labeling my valid Cherokee

ethnicity and language to be a mental illness." (36CT 8077-8078.) Appellant included anyone who might have conveyed information suggesting that his defense was not rational: Appellant asserted that the psychiatrists who examined him for trial were also trying to show that his invented language of Poliespo was "evil," when, appellant claimed, he would show that in addition to its positive effect on world peace, Poliespo had a positive effect on one's psychiatric condition. (*Ibid.*) The entire justice system was aligned against him because of his political / pro-Cherokee identity, pro-Poliespo activities.[126]

When DDA Carpenter argued that appellant's intended evidence of his Cherokee background and name was irrelevant, appellant accused him of holding "contempt" for appellant and his ethnicity. This showed the prosecution wanted to commit fraud. (61RT 12271; see also 61RT 122270-12271.) In appellant's mind, the very fact that the prosecution opposed the

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[126] So in a motion to dismiss on the grounds that his speedy trial right and rights under the First Amendment were denied, appellant wrote:

> I have been denied my right to a speedy trial by state agents dedicated to cheating me out [of] my rights . . . on the basis of an invidious criteria that being the fact that I am cherokee [*sic*], claim cherokee [*sic*] identity, speak the cherokee [*sic*] language, I am involved in the American indian [*sic*] movement to restore cherokee [*sic*] autonomy.
>
> I have also been denied the right on the basis of my membership and position in the World Humanitarian Church; therefore because of my religious beliefs I have been denied said right to a speedy trial because of my participation in what the government deems an "anti-English movement," that being the cherokee [*sic*] language movement, the Esperanto movement[,] the Poliespo movement and the movement for endangered languages. I have also been denied said right to a speedy trial due to my participation in international organizations promoting world government, indian [*sic*] autonomy, and autonomy for all people who desire it.

(17CT 3839.)

admission of cointelpro evidence showed that it was relevant. (66RT 13361.) So Appellant stated in the discussion of the admission of Swearingen's testimony: "Nothing could be more relevant in this case than having Mr. Swearingen testify. And the fact that it's so extremely relevant is manifested by the prosecutor's enthusiastic resistance." (66RT 13360-13362.) Appellant included his advisory counsel in the conspiracy. When Gill suggested that his lawyers had no possible motive to hurt him, appellant compared them to Hitler, suggesting that the lawyers hated him like Hitler hated the Jews. (16RT 1697-1698.) A rational player might have taken the evidence that Chambers and Rosenfeld had no motivation to hurt appellant's case as evidence that they did not act to hurt his case. Not so appellant. Rather, for him, there *must* have been a base and conspiratorial motivation.

Chambers also noted that appellant's delusion that he was the victim of a cointelpro conspiracy was expanding to include as conspirators those involved in the trial, and connected that to mental illness. Early on in the case, Chambers told Judge Gill that he thought that appellant's notion that he was a Cherokee Indian was connected to his delusion that appellant thought that he and other advisory counsel were agents of the prosecution. Chambers stated that he thought this was all a part of his underlying illness. (17-1RT 1970.)

Appellant's diatribes against the psychiatric profession illustrate his incapacity to even talk about, much less rationally deliberate as a prelude to choosing, a rational defense related to mental state (such as a mental state defense or mitigation realistically related to his mental condition). So, for example, when the issue of seeing a psychiatric came up before Judge Edwards, appellant asserted that seeing a psychiatrist violated his freedom of religion. (2RT 292.) He repeatedly refused, however, to say what its

tenets were that would be violated by seeing a psychiatrist. One of appellant's repeated complaints about Russell was her attempt to use his psychiatric records. One of appellant's most bitter complaints against Chambers was that he had stolen his medical records against his will and was using Dr Kalish who had committed perjury against appellant in his hearing to go pro per. Appellant said that he would file a civil suit against Kalish. (14RT 1209-1210.) Gill challenged the wisdom of appellant spending the time to file a civil suit when he was on trial for his life. (*Id.* at 1210.) Appellant stated that he felt that he *had* to do this. (*Id.* at 1211.)

In a telling exchange with Judge Gill, appellant illustrated his anathema to science-based psychiatry by explaining that he needed funds to hire Esperanto psychiatrists. As background: appellant asserted that he needed massive copying of the personal papers the prosecution had seized from him, which were sitting in the court room. Gill pressed him for an explanation for why he needed all the documents. He needed the materials for psychiatrists, who were "fluent Esperantists" who would testify "concerning the effect of Esperanto, and my past activities in the Esperanto Movement upon my mind and mental state."[127] (38CT 8392.) Even as Gill

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[127]Appellant also later asked for funding before the section 987 court regarding Esperanto psychiatrists. In his "Emergency Declaration re: Tazio Calevaro and Claude Piron," filed December 12, 1991, appellant pointed out that psychiatrists in the Soviet Union testified in front of judges to keep political activists in prison. These judges are like Gill, Milliken and "their cohorts in crime." To get truthful psychiatric opinions, appellant needed psychiatrists from neutral countries like Switzerland. Appellant asserted he was framed due to his Native American activism and his international language and political activities. Local psychiatrists have labeled his valid Cherokee ethnicity and language to be a mental illness. They have deceived him. Chambers has sneered at him and said that no local psychiatrist will ever say anything good about him. Calvaro is a clinical psychiatrist and an expert in linguistics. He is fluent in Esperanto and Ido. He knows "planned

(continued...)

allowed the copying, he was concerned that appellant needed the material not for the trial, but for some "personal agenda." (46-1RT 8572; see also 47RT 8862 [appellant had an entirely separate agenda].) Later, Gill asked appellant if the psychiatrists would testify about some mental disease or defect and appellant refused to say. (50-1RT 9504.) Finally, Gill realized that appellant had no intention of using psychiatrists to construct a psychiatric defense; rather, something that was superficially called "psychiatric evidence" would be shoe-horned into appellant's view of himself as an Esperanto/Native American activist unjustly persecuted. So, Judge Gill noted that the people appellant wanted to contact were Esperantists and that the issue of mental state and Esperantists was "hogwash," adding that no responsible psychiatrist would say that speaking Esperanto or being an Esperantist had anything to do with mental state. (*Id.* at 9521.)[128]

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[127](...continued)
languages." Only he could give an opinion on appellant's mental state at penalty. He could testify that Poliespo has a positive effect on one's psychiatric condition. Calvaro and Piron would testify that it would be a crime to kill him because he is "a person of a specific mentality and mental state to which violence and criminal activity is extremely foreign." They will testify that Poliespo is not insane or evil; it is a good thing and has good effects on all who use it. They could also give their opinion about the prosecution, which a local psychiatrist could not do. They could give neutral and fair testimony about what makes his mind tick. Calvaro and Prion both hold appellant in high regard. They know that Poliespo increases the speed of human thought. (37CT 8077-8078.)

[128]Of course, appellant did allow psychiatrists to see him, but these were the psychiatrists Earnst Giraldi and Ricardo Weinstein. (38CT 8237-08243; 38CT 8244-8249.) They were given no information whatsoever about appellant's psychiatric history, much less about the crimes for which he was on trial. This is another example of appellant taking the concept of what psychiatrists do, filtering it through his own self-concept as an
(continued...)

3. The Trial Judge and Advisory Counsel Recognized the Irrationality of Appellant's Cointelpro Defense

Judge Gill's own words show he saw how irrational appellant's defense was and how Gill strongly suspected it was based on subjective delusion born from mental incapacity. Gill often noted that appellant's theories were "imaginery," "incredible," "fanciful," a product of "fantasy," or otherwise absurd. For example, during jury selection, Gill called appellant's assertion that he was targeted because of his involvement in Native American movements a "fantasy," stating that he would be "amazed" if appellant presented any evidence of this. (31RT 4874-4875.) Although Gill initially suggested that appellant's theory that cointelpro agents framed him by putting evidence in his car was a deception (viz., a ploy to convince jurors that appellant was insane) (54RT 10342-10343), Gill later characterized the defense as "imaginary," or unhinged from reality. During a hearing where appellant asked to introduce into evidence an FBI poster accusing him of crimes, on the grounds that it showed that the FBI had lied (because he did not commit the crimes and because it stated that he might have AIDS[129]), Gill excluded the poster stating that all appellant's allegations about the FBI were in his mind: "That's where it germinated, and that's where it is going to stay." (62RT 12374.) Gill said he thought it was incredible to believe that the FBI and/or CIA or whoever "these guys with these federal agent t-shirts" were committed murders and

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[128](...continued)
important target of enmity by the government, and getting as a final product something that had nothing to do with appellant's mental capacities.

[129]He states: "The FBI went around telling people that I was a victim of AIDS and that I was a homosexual. And I've never been a homosexual in my entire life. They even put it on the wanted poster." (62RT 12381-12382.)

robberies just to get at him because "you're out spreading peace and goodwill and you're the founder of Poliespo." (62RT 12375.) Scoffing any notion that law enforcement had solved the crimes appellant had been charged with "and let the crook go free so they could get you; is that it?," Judge Gill said "This is fantasy, Mr. Sequoyah. . . . This is in the realm of fanciful, imaginary, possible doubt that I tell the juries every day is not reasonable doubt." (62RT 12376-12377.) Elsewhere Gill expressed the opinion that it was absurd to think that the FBI would persecute Esperantists, as appellant suggested. (66RT 13523-13524.)

At one point Gill saw that appellant's problems with seeing nefarious motivations with people who were supposed to help him could be a reason for Gill to find appellant not competent. So, when appellant asserted that Chambers had deliberately mixed-up his files, Gill replied stated that these problems might be the manifestation of some "serious mental illness," which might overwhelm him and prevent him from effectively representing himself. (12RT 877-878.) Later, Gill stated that appellant's assertion that advisory counsel were working against his interests was "paranoia." (13RT 912-913.) Gill later made statements showing he recognized that appellant's mental impairments interfered with rational thought, and that appellant seemed to hold a subjective belief in the truth of his obviously fantastic defense. For example, Gill concluded that there was no foundation for testimony from appellant's proposed witness, Wesley Swearingen, the former FBI agent and COINTELPRO "expert," asserting that he might have convinced himself that he was "cointelproed" as a kind of defense mechanism. Gill thought this might be a manifestation of a mental disorder. (66RT 13529-13530.) However, Gill ignored the connection between competence to stand trial and defendant's ability to make a rational defense, stating that he did not question appellant's competence – while at the same

time saying that appellant had "disabilities that [appellant is] contending with that I think get in the way of rational thought on [his] part." (*Ibid.*) Later, Gill elaborated on the delusional nature of the defense, observing: that there was no evidence that the FBI knew who he was, much less that they were interested in persecuting him. (*Id.* at 13533-13534.)

Appellant's advisory counsel Rosenfeld also recognized that there was no basis in reality for the cointelpro defense. In a request for money to fund Ward Churchhill as an expert on cointelpro, she stated that appellant told the jury that he was going to present a cointelpro defense and that "without such testimony [like Churchhill's] "the jury is likely to believe the whole concept is nonsense and that [appellant] is *truly out of his mind.*" (36CT 7935-7936, emphasis added.)

The bizarre character of the cointelpro defense was not lost on the jury. The prosecutor observed the jury laughing during appellant's case. (63RT 12768.) Defense witness Spruth also testified that the jurors were laughing during appellant's defense evidence. (75RT 15862.) Appellant also noted that the bailiffs were laughing. (60RT 12043.)

Additional evidence before Gill of the chimerical nature of appellant's claim that he was the target of the FBI and/or CIA because of Poliespo was appellant's *The Fundamentals of Poliespo* when it was admitted as an exhibit during the penalty phase. It is a densely typed, nearly impossible to read document – written in Esperanto – with very technical and elaborate definitions and linguistic rules, and full of invented symbols and abbreviations that make it nearly incomprehensible. There is simply no possibility that this language was something that any government official

had to fear. This document should have been conclusive proof that appellant's belief in being targeted by the government was not rational.[130]

4. Appellant's Actions at Trial Showed That he was not Competent to Stand Trial

Appellant's religious fixation, irrational thought processes, obsession with cointelpro, obdurateness, grandiosity, and actions contrary to his self-regard are further evidence that his selection and presentation of the cointelpro defense was the product of mental impairment and showed an inability to deliberate rationally about a defense. Appellant often expressed his odd religious fixations, which were unrelated to any traditional or accepted precepts. So, for example, appellant offered a religious explanation for his reasons not to have anyone but himself present his case at trial. The church to which he belonged (the World Humanitarian Religion) required him to represent himself and required him not to accept the help of anyone who had violated his right to represent himself by in any way taking on any decision-making pertaining to his case. (12RT 817-818.) For another example, he asked that the motions Russell had filed on his behalf be withdrawn on grounds that "[t]he church to which I belong requires me to represent myself and requires me not to utilize anything that was acquired or produced in violation of that right to represent myself." (*Id.* at 700.) Gill clearly understood that there was no basis for this and later stated that there was no legitimate religious basis for the "nonsense" he was trying to perpetrate. (32RT 5191-5193.) Appellant also asserted that

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[130]The document which was identified for the record as *The Fundamentals of Poliespo*, and admitted as Defense Exhibit BZ (76RT 15914) was really a document entitled: *La Fundamento de Poliespo.* Defense Exhibit BZ was not made part of the record on appeal. At the appropriate time, appellant will request that the document be transferred to this Court.

there was a religious basis for the use of his name "Nvwtohiyada Idehesdi Sequoyah" rather than "Billy Ray Waldon." (2RT 258.) Appellant argued that it was against his religion to see a psychiatrist. (2RT 292.)

Appellant's tendency to re-define terms, such as legal terms, to fit his beliefs showed that his thought processes were irrational. Appellant tried to put on evidence that he was Cherokee, partially by race, and 100 percent when one considered the Cherokee culture. He argued that he should be allowed to do this to show his mental state, arguing that his mental state was other than the one necessary to do the crimes. He wanted to show "that I've always been in my life the mental state of Cherokee" and this mental state is not based on race or blood. He also believed this showed the motive of the FBI and CIA against him. (61RT 12260-12261.) "Mental state" had nothing to do with the legal definition; rather, appellant re-defined mental state as being the kind of person he was – so that he could assert that he could put on all the evidence he wanted about Cherokee history and culture and all the evidence he wanted about cointelpros.

Appellant's obsession with his core belief, unconnected to reality, that he was the target of an overarching conspiracy, showed his irrationality. True, on a concrete level, appellant sometimes appeared to superficially understand what it meant to present evidence, what role the judge was supposed to play in evaluating the evidence, etc. In fact, appellant filed many motions and made many objections in the course of his trial – citing many cases. However, appellant was unable to appreciate legal information and rationally integrate it into his case. Instead, appellant showed signs that his mental disability caused him to focus on a defense even though it had no basis in fact or law. Appellant characterised his victimization by a cointelpro as the most important part of his defense. In places, he even said

that it was his "only" defense. (See, e.g., 54RT 10342 [cointelpros have everything to do with the defense]; 62RT 12524; 66RT 13360.)

Appellant was completely obdurate in seeking to present the cointelpro defense irrespective of Gill's rulings. The clear message from Gill's rulings to anyone who was rationally constructing a defense was that the defense strained reality, which for any rational person would have been a signal to seek another way to defend the case. Appellant, on the other hand, instead of adjusting to the court's ruling and trying to put on a defense connected to reality, stuck to his belief that cointelpro was his defense, and argued that the law should dispense with any need for a factual nexus as a predicate for defense evidence. So, appellant argued to Gill: "The whole issue of whether or not there is some connection with the FBI should be irrelevant. The point is that the defense should have a right to present that the symptoms [of a cointelpro operation] exists. That's the symptom [media disinformation] and it does exist in this case. It exists on a massive scale." Judge Gill responded, "You've just made my case for the correctness of my ruling, I think, earlier. That's right. You take the position there's absolutely no need to show any evidence of any connection." (67RT 13743.)

Rather than making some adjustment based on the judge's rulings, appellant irrationally and perversely clung to the cointelpro notion as his ultimate and only defense. In closing argument at the guilt phase, appellant argued that the jury had heard "less than one percent" of his defense. When his book, "The CIA vs N.I. Sequoyah" came out they would have a chance to read the other 99 percent. (71RT 14710.) Nor did it make any difference to appellant that the judge thought that the defense was "ridiculous." Instead, appellant used the characterization of his evidence as ridiculous as a reason it should be admitted. When Gill characterized

appellant's argument that the jury should infer from the fact that the FBI had conducted activities against communists and AIM and SDS members, that they planted evidence against him because he was a "self-proclaimed" autonomous activist as not reasonable (62RT 12381), appellant urged that if the defense really was fantasy and ridiculous, Gill should have no problem in letting the cointelpro evidence in. (*Id.* at 12383.)

In his penalty phase argument, appellant stayed bent on his themes of political persecution and his attempts to bring out evidence of cointelpro, despite Gill's explicit and repeated warnings that appellant's proferred evidence was inadmissible and irrelevant. For example, appellant had previously testified that Mary Barksdale (who was deceased) had been a founding member of his political and humanitarian organizations. Over repeated rulings by Gill that the evidence was not relevant, appellant asked himself questions about Barksdale's death, suggesting with his questions that she had been the victim of a special aerosol spray designed by the CIA. (67RT 13626-13629.)

Moreover, there was plenty of evidence before Gill that appellant was not acting rationally before the jury, after appellant's repeated assertions that he was not properly before the court because he was innocent. Many times the judge expressed bewilderment that appellant seemed to be alienating the jury. For instance, Gill commented that appellant's manner of cross-examination, which was to go line by line through either the preliminary examination testimony or line by line through the witnesses report (see, e.g., 37RT 6413; 71RT 14639), was boring the jury. (35RT 6170.) During his closing argument at guilt phase, when appellant went page by page through the testimony, Gill reminded appellant that closing argument was supposed to be a summation, not a reading of the transcript. He stated that appellant was simply boring the jurors. Gill

offered that if this was appellant's purpose with argument, he had done so. (70RT 14548-14549.)

To take a penalty phase example: appellant put on several witnesses at the penalty phase whom he used to delineate aspects of his invented language. He asked one witness, Bernice Garette, about Poliespo in excruciating detail. With her, appellant appears to have gone through his book *The Fundamentals of Poliespo* page by page, with detailed questions about the word forms in Poliespo, the alphabet in Poliespo, the writing system for Poliespo, the relation between Poliespo and Navajo, Aztec and Seneca, etc., etc., etc. (75RT 11500-11509.) Appellant even asked about a table on page 43 of the book – inquiring whether it appears that one "could imagine a pronoun object and imagine a pronoun subject and coordinate the two columns and arrive at a specific affix that would be used for that specific subject and object." To this, Garrett responded that she has not studied it well enough to answer. (*Id.* at 15513.) Gill brought appellant to a sidebar and stated that appellant was getting too much in to the minutia of the language and stated that he did not see the relevance of all this. Appellant insisted on his right to put in the details, stating that Poliespo was an important contribution to humanity and that the jury needed to know about it. Gill disagreed and DDA Carpenter observed that this was simply alienating the jury. (*Id.* at 15514.) The court agreed with the district attorney and told appellant he was "boring and alienating the jury . . . but that doesn't seem to be of any concern to you. I query how much – I ought to be concerned about that on my own I guess." Gill told appellant that if he continued asking for the tiny details of Poliespo he would start sustaining relevance objections. (*Id.* at 15515.) Immediately after the sidebar, appellant returned to asking the very same kinds of questions. (*Id.* at 15516.)

It is difficult to describe the oddness of appellant's questioning of Bernice Garrett. Appellant invites the Court to closely review the testimony. Included in the questioning of Garrett was an exchange where appellant asked her whether they removed the margins, reduced the spacing, reduced the type size and took out paragraph indentations to print *The Fundamentals of Poliespo* on less paper. (75RT 15500.) Appellant appeared to believe that it was important to know that if this had not been done the work would have possibly been 100 pages long rather than fifty pages. (*Ibid.*) Later appellant asserted that the World Poliespo Organization would help the world by saving paper. (*Id.* at 15532.) Equally odd is appellant's long description of linguistics in his opening statement at penalty phase: He explained polysynthetical languages, eglutive languages, melting languages and isolating languages, noting that a good example of isolating structure in English sentences is "I saw the dog run," noting there is not one single compound word. (*Id.* at 15492.) Gill finally told appellant that he was getting into irrelevant matters. (*Id.* at 15493.)

Another manner in which appellant's actions show he was driven by his compulsion, rather than by a goal to persuade the jury, was in the manner he paused when he was asking questions during examination. At one point, Gill observed that during his cross-examination between witness questions he drank water, shuffled papers, looked at the clock, ultimately taking four or five minutes between questions. Gill stated that appellant appeared oblivious to the fact that this was driving the jurors crazy. (67RT 13645-13646; see also 63RT 12784 [appellant looked at the birth certificate of his son for three to four minutes, and at his high school transcript for five minutes and seemed unconcerned that this was "driving the jury crazy"].)

It is clear that appellant had to connect himself to something bigger and grandiose, and this grandiosity further proved that he and his defense were irrational. Gill recognized appellant's tendency to grandiosity when denying appellant's renewed motion to admit the testimony of FBI agent Wesley Swearingen. Gill did not see how appellant could categorize himself with the Black Panthers or the Communist Party. Appellant could not show that he was a rising Messiah, like those Swearingen said the FBI targeted. No one at the American Indian Congress recognized him as a leader. He was just "Billy Ray Waldon." (66RT 13523-13524.) Gill thought that this was an example of appellant's grandiosity, which was part of his problem – however, appellant saying that something was so, did not make it so. (66RT 13526.) Appellant also compared himself to the Indian activist from Pine Ridge reservation, Leonard Peltier. (16RT 1699.)

Even appellant's use of the term "cointelpro" as the basis for his defense shows that it was not reality based. As noted above in the Statement of Facts, COINTELPRO was a real FBI program from the 1950's through 1970's targeting certain kind of groups. Appellant repeatedly used the word cointelpro to mean any kind of conspiracy by any kind of important authority. So, when DDA Carpenter pointed out that Swearingen's testimony was not admissible because Swearingen was an expert on the FBI and appellant was claiming persecution by the CIA, appellant was unfazed. Appellant asserted: "Well, cointelpro activity, you know, is sort of universal, whether its conducted by the KBG [*sic*] or the French security forces or the FBI or the local police, you know." (66RT 13357.) If nothing else, appellant claimed, Swearingen could be an expert on "cointelpro-type" activity. (*Id.* at 13360.)

At the very end of the proceedings, just before he was to be sentenced by Gill for the non-capital counts, appellant made strange

references to other extravagant plots. He noted that Cherokee and Choctaw women had been sterilized by judges like Gill. He stated he was part of them and that was why he founded his Swiss organizations. (77RT 16168.) Appellant said he had been doing the same work as William Campbell Douglas, arguing that 30 percent of black people are convinced that AIDS was created to kill black people. Appellant asserted that Gill knew that before he was arrested appellant was involved in collecting evidence that the AIDS virus was created by the CIA. It was the FBI and the CIA who, appellant asserted, stopped appellant's very important work in that area. (77RT 16168.)

According to the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV 2000, p. 765), delusions are false beliefs based on incorrect inference about external reality that persist despite evidence to the contrary:

> Delusion: A false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary. The belief is not one ordinarily accepted by other members of the person's culture or subculture (e.g., it is not an article of religious faith). When a false belief involves a value judgment, it is regarded as a delusion only when the judgment is so extreme as to defy credibility.

Appellant's obdurateness in pursuing a cointelpro defense was a sign that appellant's notion that he was pursued by government agencies was pure delusion. His inability to alter his behavior in response to the trial court's relevance and admissibility rulings, as well as to the jury's visible incredibility to his defense, shows that his selection of the defense was not the product of a rational choice; rather, it was the product of his mental problems. As Judge Goldberg put it in his dissent in *Rumbaugh*, *supra*, 753 F.2d 395, 404: "[R]ational choice requires that the ends of [a person's]

actions are his ends. That is, rational choice embraces 'autonomous' choice. If a person takes logical steps toward a goal that is substantially the product of a mental illness, the decision in a fundamental sense is not his: He is incompetent." There was ample evidence before Gill that appellant could not reason about the choices he was making at trial. If asked about why he was making the choices he was making, it is clear that appellant would not have been able to give a reason that had "a plausible grounding in reality." (Bonnie, *supra*, 47 U. Miami L. Rev. 539, 574.)

5. The Evidence Easily Raised a Reasonable Doubt Regarding Appellant's Competence to Stand Trial

In short, there was ample evidence before Gill easily raising a reasonable doubt about appellant's ability to rationally choose and make a rational defense and, hence, his competence to stand trial. (*Lawley*, *supra*, 27 Cal.4th 102, 131; *Koontz, supra*, 27 Cal.4th 1041, 1063.) As with the defendant in *Murdoch,* the existence of a frame up on the part of the FBI/CIA seems to have been reality in appellant's mind, but it was "not a rational defense." (*Murdoch*, *supra*, 194 Cal.App.4th 230, 239, fn. 3.) Appellant's behavior when confronted by attorneys, judges and others who tried to sway him to adopt a reality based defense, as well as his lashing out at anyone who suggested that his psychiatric deficiencies might form the basis for his defense, and his perserverative reaction as it was demonstrated to him over and over again that he was not "cointelproed," all taken together, easily raised a doubt about his ability to make "a rational choice among his options[.]" (*Rumbaugh, supra*, 753 F.2d 395, 398.)

E. Allegations That Appellant was Acting to Delay the Case did not Excuse Judge Gill From Suspending Proceedings and Assessing Appellant's Rational Capacities

Once substantial evidence exists from which a reasonable trier of fact could find the defendant to be incompetent, "it is immaterial that the

prosecution's [or other conflicting] evidence may seem more persuasive. The conflict can *only* be resolved upon a special trial before the judge or jury, if a jury is requested. (Pen. Code, § 1368.)" (*Pennington, supra*, 66 Cal.2d 508, 518-519, emphasis added; see also, e.g., *People v. Cuevas* (1995) 12 Cal.4th 252, 260, and authorities cited therein ["substantial evidence" is evidence from which "'a reasonable trier of fact could find'" the disputed fact]; accord *People v. Breverman* (1998) 19 Cal.4th 142, 162, 177 ["in deciding whether evidence is 'substantial' . . . a court determines only its bare legal sufficiency, not its weight" and "should not evaluate the credibility of witnesses, a task for the" trier of fact].)

Throughout appellant's trial, the prosecution asserted that appellant's actions were manufactured by appellant for the purposes of delay. The record contains many instances of the prosecution complaining that appellant had done something simply to slow things down. At points during the trial Judge Gill agreed. He stated that he thought that appellant was manipulating the court in other ways to delay matters.[131] For instance, Gill thought that appellant examined the jury in the torturesome manner he did in order to stall. (See, e.g., 35RT 6170.) However, at the same time, Gill recognized that appellant could not face up to the reality of the guilt trial going forward, and then once appellant had been convicted of capital crimes, the reality of the penalty phase and the possibility that he would be sentenced to die. So, for example, in a last ditch effort to get rid of Chambers, appellant made a motion after the penalty verdict for a new advisory counsel. Gill stated that he believed appellant insisted that Chambers had to go because Chambers had kept asking appellant to get ready for trial, but: "That was the last thing you wanted to hear from your

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[131]For example, Gill suggests that appellant was being manipulative at 74RT 15438, 77RT 16056-16057, 16069-16070, 167072, 16206; 16229.

advisory counsel, because that required you to face up to reality, get down to business and – approach this matter – the situation you found yourself in, I say, in a realistic, rational manner." (77RT 16074.)

Early on, Judge Gill appears to have thought that appellant's complaints about his counsel communicating with one another were absurd and petty and that because they were petty they must have been for the sake of delay. It is quite true that appellant's frustrations with advisory counsel and appellant's insistence on complete secrecy caused delays in the case.[132] However, it also is clear that instead of talking with his counsel about a proper defense in the case, appellant asked counsel to assist him in litigating matters peripheral to the preparation of any rational defense. Furthermore, it is also true that the attempts of counsel and, later, advisory counsel to get appellant to talk about a defense that made sense based on the facts of the case caused appellant to turn to distracting issues related to procedure, or become preoccupied in asking the court to police the attorneys to do only what appellant directed to build the cointelpro defense.

Thus it is true that appellant's complaints and obsessions about irrelevant matters delayed the case. It is also true that appellant's many digressions during trial, where appellant insisted on picayune interpretations of his rights, resulted in many hearings which did not facilitate the presentation of his defense. However, without a hearing about what was the cause of all this behavior, Judge Gill could not possibly know whether appellant was just a stubborn defendant who wanted to put off what Gill and the prosecutor clearly thought was his inevitable conviction and death

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[132]Appellant argues above that there was a factual and legal basis for appellant's complaints about advisory counsel and their role and that the trial court's errors in connection with those issues indeed interfered with appellant's rights under *Faretta*.

sentence; or, instead, was a disturbed individual who did not have the capacity to put on a rational defense based upon the realities of his case.

To be clear: appellant is not arguing that appellant's defense was not rational because it fell short of what a competent attorney would have presented. Rather, he argues that his defense was not rational because it did not have a basis in reality and because appellant could not ponder alternative strategies, pick one, and then take steps in executing the strategy. There was no evidence that appellant was the object of an FBI or CIA sponsored frame-up because he was the leader of a world religion and the creator of a new language, or an Indian activist, or the champion of all the world's oppressed. Appellant does not claim that Gill would have been certain that appellant could not rationally present a defense, but there was plenty of evidence before Gill that appellant would not give up the belief that he was the object of such a conspiracy even in the face of ample evidence to the contrary and even when appellant was faced with many people who tried to persuade him otherwise. This raised a reasonable doubt about appellant's competence to stand trial, especially since Judge Gill knew that appellant's competence had long been in question.

F. Alternately, There was new Evidence Showing That Appellant was not Competent Because he Could not Rationally Assist Counsel

Assuming that appellant must show that even a self-represented defendant is only incompetent to stand trial if he does not have the ability to factually and rationally understand the proceedings and rationally assist counsel (*Dusky*, *supra*, 362 U.S. 402, 403), the record clearly shows that appellant did not have that ability, and Gill's failure to call a halt to the proceedings and order a competency evaluation requires reversal.

Where there has been a competency hearing and the defendant has been found competent to stand trial "a trial court need not suspend

proceedings to conduct a second competency hearing unless it 'is presented with a substantial change in circumstances or with new evidence' casting a serious doubt on the validity of that finding." (*People v. Jones* (1997) 15 Cal.4th 119, 150, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823.) The same rule was articulated in *People v. Marshall* (1997) 15 Cal.4th 1, 33; *Lawley, supra*, 27 Cal.4th 102, 136.) This substantial evidence standard of proof is "the same standard applied by the trial court in determining whether an original competency hearing should be held." (*People v. Kaplan* (2007) 149 Cal.App.4th 372, 376.) A trial court always has a duty to monitor for substantial evidence of defendant's incompetence. (See *People v. Mixon* (1990) 225 Cal.App. 3d 1471, 1485). If at any time after the restoration hearing a doubt arose in the mind of the judge as to the mental competence of the defendant, the judge had a duty to initiate mental competency proceedings. (*Ibid.*) The trial court's duty includes sua sponte reconsideration of pro se status where there is substantial evidence bringing the defendant's competency into doubt. (See *People v. Castro* (2000) 78 Cal.App.4th 1402, 1416, citing *People v. Poplawski* (1994) 25 Cal.App.4th 881, 890-891.)

Appellant's competence verdict was in September, 1988 (5CT 882), and most of the evidence the jury had before it showed that appellant could not assist his then counsel Geraldine Russell, which the prosecution was able to leverage into an argument that appellant's non-cooperation with Russell was a choice, a rational choice based on Russell's actions with which appellant disagreed.[133] The Court of Appeal in its order relieving

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[133]Judge Gill also knew that the prior competency proceeding had been determined on the understanding that appellant's problems were solely with Russell. The prosecutor told Gill on January 22, 1990, that appellant had been found competent to stand trial. He also informed Gill that there

(continued...)

Russell from appellant's case concurred. It observed that "[i]t is obvious that if Russell is to be relieved, it must be on the basis of a conflict which is peculiar to her and not be a perceived mental deficiency of the defendant that would disqualify any potential defense counsel." (10CT 1924, fn. 3.) However, the Court of Appeal then gave three reasons why the particulars of Russell's representation of appellant showed could not work with appellant: Russell's representation of a defendant who had attacked appellant, her active presentation of psychological evidence in opposition to his motion to represent himself, and the dispute about how his medical records would be used. (*Id.* at 1924-1926.)

The Court of Appeal rejected Zumwalt's conclusion that substituting counsel would not result in improved communications. (10CT 1926-1927.) Notwithstanding Zumwalt's finding and its own express agreement that a substitution of counsel might not result in improved communication, the Court of Appeal held that the breakdown between the two required relief. It noted that the record reflected that appellant was having better communication with advisory counsel than with Russell, reasoning "the record currently before us reflects the possibility the apparent cooperation will carry over to a newly appointed lead counsel." (*Id.* at 1928-1930.)

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[133](...continued)
had been proceedings that resulted in the Court of Appeal removing Russell from the case. The prosecutor observed that the psychiatrist who evaluated appellant for the competency proceeding thought that appellant was incompetent because he did not communicate with his lawyer. (90ART 7.) He also noted that the Court of Appeal removed Russell from the case because it believed that the reason appellant was "not communicating with his lawyer" was simply because "he didn't like his lawyer." (*Ibid.*) After appellant's actions before him Gill had plenty of evidence that the jury's verdict had been based on a misconception, all the more reason for him to call a halt to the trial and get someone to evaluate appellant with the benefit of all the evidence.

Subsequent proceedings have shown how wrong the Court of Appeal was. After the competence verdict, after Russell was removed as counsel, there was substantial evidence that appellant could not cooperate with any attorney. As appellant has detailed extensively above, Sanchez had problems with appellant as appellant's trial began. Very soon, Sanchez was shut out by appellant, with appellant claiming that Sanchez had violated appellant's trust by asking the court for funds. Chambers too was tossed off the defense team for attempting to get funding and because he attempted to get appellant to see the realities of his case. Even Rosenfeld, whom appellant allowed to work on some aspects of his case, never gained enough of appellant's trust to be permitted into the inner workings of appellant's cointelpro defense. Appellant viewed both Rosenfeld and Chambers as working against him.

This new evidence of appellant's inability to cooperate with his advisory counsel is evidence raising a reasonable doubt that appellant could not rationally assist counsel. It is also evidence that casts serious doubt on "the validity of [the jury's] finding (*Lawley, supra*, 27 Cal.4th 102, 136) that appellant was competent, since it clearly showed that appellant's troublesome behavior with counsel was not limited to one attorney, but extended to all lawyers. Once the evidence raises a reasonable doubt, the trial court is required on its own motion, to suspend proceedings in the case until the question is determined in a competency hearing. (*People v Tomas* (1977) 74 Cal.App.3d 75, 78.) Gill should, therefore, have called a halt to the trial. His failure to do so was error and violated appellant's rights to Due Process under the state and federal constitutions. (*Pate, supra,* 383 U.S. 375, 385-386.)

G. Judge Gill's Failure to Halt the Proceedings Requires Reversal of the Judgment

As appellant has discussed above, in *People v. Lightsey* (2012) 54 Cal.4th 668, this Court considered the issue of the appropriate remedy when the trial court erred in permitting a defendant to represent himself at a section 1368 competency proceeding. The remedy in *Lightsey* was to remand to the trial court with orders to hold a feasibility hearing where the issue would be "[the] availability of sufficient evidence to reliably determine the defendant's mental competence when tried earlier." (*Id.* at p. 710.) However, this Court explicitly held that the error at issue in *Lightsey* did not involve "a procedural constitutional due process violation of the type in which the trial court has failed to hold a hearing despite sufficient triggering evidence showing the defendant might be mentally incompetent. [citations omitted]." This Court stated that "[b]ecause the appropriate analysis and course of remedial action in a case of true *Pate* error is complex and subject to debate, we do not express any view on how that error should be remedied." (*Id.* at p. 623, fn. omitted.) Appellant showed above that the remedy for a violation of a defendant's rights under *Pate* is automatic reversal of the verdict. Appellant here shows that, even assuming that such reversal is not automatic, in this case Judge Gill's failure to halt the guilt trial and hold a competency trial when there was substantial evidence that appellant was not competent to stand trial demands reversal of the verdicts.

This Court has observed that although a trial court's failure to hold a proper hearing in the face of substantial evidence raising a reasonable doubt regarding the defendant's competency was once considered automatically reversible (*Lightsey*, *supra*, 54 Cal.4th 668, 704), more recently lower courts in this state have held that a remand for a competency determination

is permissible in some cases (*id.* at p. 706, discussing *Ary*, *supra*, 118 Cal.App.4th 1016, 1030, and *Kaplan*, *supra*, 149 Cal.App.4th 372, 388-389). Nevertheless, this Court has never held that the remedy for an error in failing to hold a competency hearing is a remand for a retrospective hearing. Rather, if remand is permitted at all, it is permitted only in the "rare" and "highly unusual" case in which there is extensive record evidence, including qualified expert opinions, on which a reliable retrospective competency determination might be possible. (*Ary*, *supra*, 118 Cal.App.4th 1016, 1028-1030, cited without approval or disapproval in *Young*, *supra*, 34 Cal.4th 1149, 1217 [while reliable retrospective competency determinations are often impossible, under "highly unusual" circumstances where, only four and five years earlier, there were two pretrial proceedings on defendant's competence to waive *Miranda* rights at which "extensive expert testimony and evidence was proffered regarding defendant's mental retardation and ability to function in the legal arena," a reliable retrospective determination *might* be possible].)

Indeed, in *Drope* itself, the High Court held that a reliable retrospective competency determination would be impossible and inappropriate "[g]iven the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances." (*Drope*, *supra*, 420 U.S. 162, 183.) Of course, as the *Pate* Court recognized, these "inherent difficulties" are most acute when a substantial period of time has passed since the trial. (See, e.g., *Pate*, *supra*, 383 U.S. 375, 387 [six years]; see also, *Drope*, *supra*, 420 U.S. 162, 183 [seven years]; *Dusky*, *supra*, 362 U.S. 402, 403 [more than a year]; *Pennington*, *supra*, 66 Cal.2d 508, 511 [two years]; see also, e.g., *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 963 [more than 11 years]; *U.S. v. Day* (8th Cir. 1991) 949 F.2d 973, 982& fn. 9 ["to require a . . . court to decide whether a defendant was

competent during proceedings that took place years earlier would be an exercise in futility"].) In fact, in every case in which the United States Supreme Courthas found error in the failure to hold a competency hearing, complete reversal has been ordered. (*Drope*, *supra*, 420 U.S. 162, 183; *Pate*, *supra*, 383 U.S. 375, 386-387; *Dusky, supra*, 362 U.S. 402, 403; *People v. Marks* (1988) 45 Cal.3d 1335, 1344; *Hale*, *supra*, 44 Cal.3d 531, 541; *People v. Stankewitz* (1982) 32 Cal.3d 80, 94; *Pennington*, *supra*, 66 Cal.2d 508, 521.)

Furthermore, because this is a capital case, state law and the Eighth and Fourteenth Amendments demand a heightened degree of reliability in all stages of the proceedings. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 732 ["'we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding'"]; accord, *Ford v. Wainwright* (1986) 477 U.S. 399, 411 [applying heightened scrutiny standard to determination of competency to be executed]; *Spaziano v. Florida* (1984) 468 U.S. 447, 456; *People v. Coffman* (2004) 34 Cal.4th 1, 44 [pre-trial rulings]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [guilt phase]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340 [penalty phase].) Thus, the question is not merely whether a retrospective competency determination is possible, but whether a *highly reliable* determination that appellant was competent to stand trial is possible. In this case, the answer is no.

As of this writing, over 25 years have passed since the original competency proceedings. More years will pass before this appeal is resolved and any retrospective competency hearing could be held. This is a *far* greater passage of time than the time that the Supreme Court has held was too great to allow for a reliable retrospective competency determination in *Drope*, *Pate*, and *Dusky*, *supra*.

Moreover, none of the psychiatrists who evaluated appellant evaluated him with the correct standard, i.e., whether appellant could rationally make a defense. Dr. Kalish's mandate was to determine whether appellant had the mental ability to make the necessary voluntary and knowing waiver of the right to counsel and represent himself. (11A-1ART 21, 33.) Kalish and the others testified at trial about appellant's ability to assist counsel. No one testified about his ability to rationally make his defense. (See *Moran*, *supra*, 972 F.2d 263, 267-268, disapproved on another ground in *Godinez*, *supra*, 509 U.S. 389, 396-400[134] [no retrospective competency determination possible where only contemporaneous psychiatric report in record considered issue of competency under incorrect legal standard]; see also *Dusky*, *supra*, 362 U.S. 402, 403 ["in view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency of more than a year ago," Court reversed outright rather than ordering remand].)

If, as the United States Supreme Court has repeatedly recognized, reliable retrospective competency determinations are extraordinarily difficult even under the "most favorable circumstances" (*Drope*, *supra*, 420 U.S. 162, 183), the circumstances here make a *highly* reliable determination, consistent with appellant's Eighth and Fourteenth

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[134]While the United States Supreme Court overruled the Ninth Circuit opinion in *Godinez* to the extent that it had held that different standards of competency apply to competency to stand trial and competency to plead guilty (*Godinez*, *supra*, 509 U.S. 389, 396-400), the Ninth Circuit opinion in *Godinez* nevertheless continues to stand for the proposition that when a prior evaluation assessed competency under the wrong standard, it cannot form the basis for a reliable retrospective competency determination under the correct standard.

Amendment rights, that appellant was competent to stand trial 25 years ago, impossible. (See, e.g., *McGregor*, *supra*, 248 F.3d 946, 962-963 [reliable retrospective determination of competency impossible where there was a lack of contemporaneous evidence regarding the competency issue, psychiatrists who testified at original competency hearing provided "limited" testimony, and witnesses would have to rely on their memories of defendant more than 11 years earlier].) Hence, this Court should reverse appellant's conviction outright. Of course, the state is free to retry appellant, but only if he is competent to be retried. (See *Drope*, *supra*, 420 U.S. 162, 183.) Accordingly, this Court should direct that, if, after reversal, the state elects to retry him, the trial court must suspend criminal proceedings, appoint experts to perform a competency evaluation, and consider that evaluation in assessing appellant's current competence to be retried. (See *People v. Castro* (2000) 78 Cal.App.4th 1402, 1420.)

H. It was Error For Judge Gill to Permit Appellant to Continue to Represent Himself Since There was Evidence That Appellant did not Have the Capacity to Knowingly and Intelligently Waive Counsel

Even if there was not sufficient evidence to require Judge Gill to suspend proceedings because appellant was not competent to stand trial, there was certainly sufficient evidence for him to call a halt to the trial because of the evidence that appellant was not able to knowingly and intelligently waive his right to counsel. As appellant has previously shown, at the time of appellant's trial, state and federal precedent dictated that a defendant could not represent himself if the defendant's mental condition prevented him from voluntarily and intelligently waiving his right to counsel. Judge Gill abused his discretion in his failure to halt the proceedings because there was evidence before him showing a substantial doubt about appellant's ability to meaningfully waive the right to counsel.

There was ample evidence before Gill that appellant's decision to represent himself was driven by an obsession to put on evidence that he was the innocent victim of a cointelpro, which as shown above, was not a reality based defense and was not one appellant chose as the result of a rational deliberative process. These same facts were powerful evidence that appellant had not chosen to represent himself as the result of a voluntary and intelligent waiver. Once Gill knew that there was some question about appellant's mental capacity to waive counsel, Gill had the obligation to make a careful inquiry into the issue. (*People v. Lopez* (1977) 71 Cal.App.3d 568, 573 ["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."]; see also *People v. Teron* (1979) 23 Cal.3d 103, 113 [before granting a *Faretta* request a court 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'"].)

For example early in voir dire, appellant requested that his advisory counsel not be permitted to sit at counsel table with him because they were agents of the prosecution and because Judge Gill had permitted them to speak in court without his permission. Gill refused to grant this and continued with voir dire. Prospective Juror Christine Smith then stated that she thought she should be excused because she was not well and because she thought that appellant was guilty. Gill asked appellant to stipulate to Smith's dismissal. Appellant refused to speak on the grounds that Gill had deprived him of advisory counsel.[135] Rosenfeld requested an opportunity to

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[135]Appellant stated that he would answer the question when the court "would be kind enough to allow me to represent myself here at defense

(continued...)

talk with appellant about the Smith issue, and a break was taken so that she could do so. Rosenfeld returned to state that appellant turned his back on her and would not talk with her and only repeated that he wanted advisory counsel in the audience and not at counsel table. (17RT 1919; 17-1RT 1967.) Judge Gill stated on the record that appellant would not listen to Rosenfeld's advice. (19RT 2420.) Later, Rosenfeld put on the record that appellant was not listening to her advice and that when she tried to hand him a piece of paper, he threw it on the ground. (32-1RT 5212-5213.)

To take another example: after Chambers filed a funding motion without appellant's permission, appellant refused to have anything to do with him. Appellant stated many times on the record that he would not talk to, much less take advice from Chambers. Appellant stated that he would never communicate with that "dishonest creature." (38RT 6707.) Because of the funding motion Chambers had filed, appellant asserted that Chambers was "permanently terminated" by him and that appellant would never permit Chambers to give him advice. (8RT 476.) Appellant refused even to take material from the prosecution if it had passed through Chambers hands. (See, e.g., 74RT 15270; 44RT 8032; 29RT 4521.)

Appellant was also unable to allow others who were assigned to help him do any of the work, particularly when it came to discussing the details of his defense that he was targeted by a cointelpro. Instead, appellant insisted that all matters be done through him and that even if advisory counsel wanted to talk about the case with each other, it had to be done through him, and to speak to each other they had to get his prior permission. Rosenfeld characterized this order as a "gag." (9RT 547.) Appellant

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[135](...continued)
table and have the autonomy and the respect that the appellate courts have ruled that a person should have." (17RT 1917.)

asserted that advisory counsel also could not speak in court without his permission. (96ART 13; 1RT 47; 1RT 66.) Gill stated that he thought that appellant really wanted "advisory slaves," and that he did not want to hear unwelcome advice. (9RT 590; 11RT 653.) Gill characterized the rules appellant set down as "impossible." (9RT 619.) Judge Gill observed that appellant was paranoid about his advisory counsel, wondering out loud whether this meant that he was competent to represent himself. (17RT 1905-1906.) Even when appellant sometimes relied on Rosenfeld, she was kept in the dark about his defense. Gill's admonition to appellant that his was a complicated case and that he needed to cooperate with advisory counsel as a team fell on deaf ears. (1RT 69; 3RT 330-331.)

Judge Gill knew that there were extensive proceedings where appellant's capacity to waive his right to counsel had been challenged. He also knew or should have known that Judge Zumwalt had held that appellant did not have the capacity to waive counsel and he knew, or should have known, that Judge Boyle reversed that finding without any inquiry into appellant's capacity. It is likely that Gill was influenced by the Court of Appeal's remarks that appellant's case had a "long and tortured history." (See 6RT 409.) Judge Gill noted: "I think the not too subtle message there is that let's get on with this guys, let's – let's get the motions heard, let's get the trial heard, and – and the chips will fall as they may." (*Ibid.*) However, the Court of Appeal's remarks did not relieve Gill of his obligation to halt proceedings when there was evidence of appellant's incapacity to waive counsel or to present a rational defense. His failure to do so violated appellant's rights to Due Process and a fair trial under the state and federal constitutions.

In *Lopez*, *supra*, where the record did not adequately show that the defendant who had waived counsel at a sentencing hearing did so as the

result of a knowing and intelligent waiver, the Court of Appeal remanded for resentencing. (*Lopez*, *supra*, 71 Cal.App.3d 568, 575.) In this case, reversal is required. Should appellant again elect to represent himself, the trial court must hold a hearing, which should include a psychiatric examination, on whether appellant has the mental capacity to meaningfully represent himself.

I. Evidence That Appellant Could not Meaningfully Represent Himself in his Capital Case Required Gill to Suspend Proceedings and Hold a Hearing About Whether Counsel Should be Appointed

Appellant has shown above that it violates a capital defendant's rights to fair trial, to due process, and to reliable guilt and penalty verdicts to permit a capital defendant who as a consequence of mental disabilities cannot meaningfully represent himself.

Gill knew that appellant had not been meaningfully representing himself at his trial. Aside from the evidence that the core of appellant's defense was driven by appellant's unreasoned desire to put on a cointelpro defense, there was plenty of evidence that appellant was not communicating with the jury, not adequately performing the tasks required for a defense and not meaningfully testing the prosecution's evidence. Gill explicitly said so. For example, appellant insisted that he needed a second preliminary hearing because the first one had been a charade because he was not representing himself. He asked for an "honest and upright" preliminary hearing where he would represent himself. (13RT 921.) Gill stated that appellant's statement "assumed a fact not in evidence" because "the contrary is becoming more and more evident to me, that representing yourself there could be an honest and upright preliminary examination, because I'm *not sure you're capable of effectively representing yourself.*" (*Ibid.*, emphasis added.)

On another occasion, Gill recognized that appellant seemed unable to put aside the side-lining motions – "claptrap" as Gill called them – and get the actual work done that needed to be done. Gill thought this was evidence that appellant was "just incapable of ever producing those matters" because he could not face up to what needed to be faced up to. (13RT 915.) Gill thought appellant put form over substance. In an exchange with Gill, where appellant asserted that he was being denied his rights because he did not get to stand during argument as the prosecution did, Gill noted that appellant was "puting [*sic*] form over substance here and I think, frankly, that's sort of a manifestation of your mental condition, if you will, that you, you know, get fixated on some little relatively insignificant point and we spend a whole lot of time on that point and we never get to some substance of the real issues that need to be addressed." (*Id.* at 981.) Gill also showed his awareness of appellant's problems in his remarks about appellant's failure to file some of the motions he asserted he would. In one case, appellant claimed that advisory counsel had not helped him on his speedy trial motion. Gill responded that appellant was "no more capable of representing himself than – than the man on the moon." (*Id.* at 1217-1218.)

The evidence upon which Gill based these remarks was sufficient to require Gill to suspend the proceedings to determine whether appellant, because of his mental limitations, lacked the cognitive and communicative capacities to represent himself in a capital trial. Was he unable because of those mental disabilities to "meaningfully test the prosecution's case"? (*Herring*, supra, 422 U.S. 853, 862.) And could he or could he not: "control the organization and content of his own defense, [ ] make motions, [ ] argue points of law, [ ] participate in voir dire, to question witnesses, and [ ] address the court and the jury at appropriate points in the trial"? (*McKaskle*, *supra*, 465 U.S. 168, 174.) Gill's failure to halt the trial and

make this inquiry was error requiring reversal of the conviction. Should the State once again seek death and appellant seek to represent himself, the trial court must make an inquiry into appellant's mental limitations and determine whether appellant's disabilities prevent him from meaningfully representing himself.

* * * * *

XVI.

THE TRIAL COURT'S INSISTENCE THAT APPELLANT USE CHAMBERS' SERVICES, AFTER CONVERTING CHAMBERS' ROLE FROM ADVISORY COUNSEL TO STANDBY COUNSEL, ITS DEFERENCE TO CHAMBERS OVER APPELLANT ON STRATEGIC CHOICES CONCERNING FUNDING, INVESTIGATION, AND PREPARATION OF THE DEFENSE, AND ITS FAILURE TO CONTINUE THE PENALTY TRIAL UNTIL ROSENFELD COULD BE PRESENT VIOLATED APPELLANT'S RIGHTS TO SELF-REPRESENTATION AND DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND STATE LAW

A. Introduction

Almost all of the previous arguments herein demonstrate that the trial court erred by allowing trial proceedings to continue, and by granting appellant pro se status, due to the court's failure properly to consider his competence to stand trial and his mental condition as related to self-representation. The present argument explains that, if it is assumed that appellant's mental state *did* not pose a bar to appellant standing trial and representing himself in that trial, and the trial court did not commit reversible errors pertaining to appellant's mental capacity, the trial court nonetheless breached appellant's *Faretta* rights under the Sixth Amendment of the federal constitution by permitting advisory counsel to interfere with appellant's strategic control of the case and by interfering with appellant's right to present his *chosen* defense.

B. Legal Background

When a defendant exercises his right to represent himself under *Faretta*, the federal constitution provides no blanket rule that the trial court grant a defendant's request to appoint advisory counsel to assist him.

(*People v. Bigelow* (1984) 37 Cal.3d 731, 742-743.)[136] However, it is equally clear that California law permits the appointment of advisory counsel[137] within the trial court's discretion. (*People v. Mattson* (1954) 51 Cal.2d 777, 797; *People v. Linden* (1959) 52 Cal.2d 1, 15; *People v. Bourland* (1970) 5 Cal.App.3d 811.) "[F]ederal courts also endorse the appointment of advisory counsel." (*Bigelow, supra*, 37 Cal.3d 731, 742, citing *Faretta*, inter alia.)

If a defendant chooses professional representation, the defendant "waives tactical control; *counsel* is at all times in charge of the case . . . . [and] *retains complete control over . . . all tactical and procedural decisions*." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1164, fn. 14, emphasis in original [citing *Faretta, supra*, 422 U.S. 806, 835, fn. 46, and comparing *People v. Doane* (1988) 200 Cal.App.3d 852, 863-864.) "On the other hand, if the accused decides to represent himself under *Faretta, he* assumes primary control of, and responsibility for, his defense." (*Ibid.*, emphasis in original [citing *McKaskle, supra*, 465 U.S. 168, 176-178].) Therefore, when a court appoints advisory counsel to "assist" a pro se

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[136]This Court, however, has recognized that in a complex capital case in which the defendant is representing himself, the refusal to appoint advisory counsel when requested is an abuse of discretion. (*Bigelow, supra,* 37 Cal.3d 731, 743.) In such instance, a rule of per reversal is the only way to protect the right of the defendant to a conscientious exercise of judicial discretion on the appointment of advisory counsel, and to vindicate the state's independent interest in the fairness and accuracy of a capital proceeding. (*Id.* at pp. 744-745.)

[137]The definition of "advisory counsel," especially as distinguished from "standby counsel," is explained in detail below. In *Faretta* itself the United States Supreme Court affirmed that trial courts have authority to appoint advisory counsel to assist a pro se defendant, and/or to appoint standby counsel to assist the court and to step in and try the case in the event pro se status should be revoked or disclaimed. (*Faretta, supra*, 422 U.S. 806, 835, fn. 46.)

defendant, the scope of counsel's role must not exceed what the defendant "desires," and must not compromise the defendant's "right to present his case in his own way." (*Ibid.* [citing *McKaskle, supra*, 465 U.S. 168, 176-177]; *People v. Blair* (2005) 36 Cal.4th 686, 725 [advisory counsel is "appointed to assist the self-represented defendant if and when the defendant requests help"].)

A trial court has an affirmative duty to ensure that appointed advisory counsel's "assistance" to the pro se defendant stays within constitutional limits. One way it can do so is to address conflicts between advisory counsel of which it becomes aware and assure that all parties understand their "respective rights and duties." (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1040 ["after the court made defendant solely responsible for the defense and reduced [advisory counsel's] role to that of his assistant, all parties clearly understood and observed their respective rights and duties"].)

In *McKaskle, supra,* 465 U.S. 168, the United States Supreme Court considered the question of when an advisory attorney's excessive involvement in trial court proceedings might deprive the petitioner of his Sixth Amendment right to present his own defense. *McKaskle* claimed that the advisory attorney appointed to assist him in the trial court had crossed that line in his case, resulting in a constitutional violation requiring reversal. The district court denied relief, which the federal court of appeals reversed. Although the United States Supreme Court reversed the court of appeals and affirmed the conviction and sentence, the high court clarified the rights of the pro se defendant and the role of advisory counsel. The Court stated this rule:

> A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The pro se defendant must be allowed to control the organization and content of his 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.

(*Id.* at p. 174.)

The Court broke down the test further, describing two specific ways in which the pro se defendant is entitled to "have his voice heard":

> First, the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby [or advisory] counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any manner of importance, the *Faretta* right is eroded.
>
> Scond, participation by standby [or advisory] counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.

(*McKaskle*, *supra*, 465 U.S. 168, 178.)

The guarantee that a self-represented defendant shall "have his voice heard" operates during pretrial proceedings as well as trial. In proceedings outside the presence of the jury, *Faretta* rights are "adequately vindicated" so long as "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." (*McKaskle*, *supra*, 465 U.S. 168, 179.)

Applying these precepts, the Court held that counsel's participation outside the presence of the jury in that case did not infringe the defendant's rights under *Faretta*:

> [The defendant] was given ample opportunity to present his own position to the court on every matter discussed. He was given time to think matters over, to explain his problems and concerns informally, and to speak to the judge off the record. .

> . . [The defendant] was given abundant opportunity to argue his contentions to the court.

(*McKaskle*, *supra*, 465 U.S. 168, 181.)

The Court continued:

> Equally important, all conflicts between [the defendant] and counsel were resolved in [the defendant's] favor. The trial judge repeatedly explained to all concerned that [the defendant's] strategic choices, not counsel's, would prevail. [Citations.] Not every motion made by [the defendant] was granted, but in no instance was counsel's position adopted over [the defendant's] on a matter that would normally be left to the discretion of the defense.

(*Ibid.*)

C. Factual Background

Judge Boyle appointed Sanchez as "second chair" or advisory counsel in November of 1989, and promised to appoint a second attorney in the same capacity. Soon thereafter, appellant started appearing before the 987.9 funding panel in his own capacity, with Sanchez sometimes present, sometimes absent. Appellant and Sanchez soon began to grapple over questions concerning control of the defense.

For example, on February 1, 1990, the 987.9 court met with appellant without advisory counsel present (987.9-7ART 2-4), but later that month (February 27) the panel convened with both Sanchez and appellant present. (987.9-7BRT 2-3.) The latter date, appellant complained to Judges Greer, O'Neill, and Wagner that Sanchez had submitted briefs to the court without first showing them to him, in violation of appellant's right to self-representation. (987.9-7BRT at 3-5.) Sanchez explained that since appellant had been granted pro se status, Sanchez had been trying to provide a "defense team" for appellant, but had been struggling to figure out the scope of his obligations in the case. (*Id.* at 5-6.) Sanchez said he was not trying to "get in the way" of appellant's right to represent himself, but that

Sanchez believed he had to be prepared to advise appellant and prepared for the penalty phase, even over appellant's objection, and that was the "sole purpose of [his] being" in court that day. (*Id.* at 6-7.) The judges noted that there perhaps were some "unsettled legal issues" on the roles of a pro se defendant and advisory counsel, and ruled that "in the meantime before there is some determination as to exactly who is obligated to do what," both appellant and Sanchez would be allowed to file pleadings in the court, although in Sanchez's case all filings would have to be served on appellant. (*Id.* at 7-8.) The matter was put over two weeks for Sanchez to provide appellant with a copy of his filing. (*Id.* at 8.)

At the follow-up hearing on March 13, 1990, the 987.9 court tipped its hat to appellant's right to steer the defense. Both appellant and Sanchez were present at the hearing. Sanchez had submitted a motion to the court and had served a copy of it on appellant, but the court refused to consider the motion because appellant said that he objected to it doing so. (987.9-7CRT at 3.) In March and April of 1990, the 987.9 panel continued to meet with appellant without advisory counsel Sanchez present. (987.9-8RT 3, 987.9-9RT 1.)

Sanchez appeared before the 987.9 judges O'Neill and Greer on May 8, 1990, without appellant present, to discuss funding, and informed the panel that Judge Gill, the assigned trial judge, had appointed Nancy Rosenfeld as second advisory counsel and set trial for September of 1990. (987.9-10RT at 3.) Sanchez requested the court to grant him funds to hire staff (law clerks, a typist, etc.) to assist appellant. (*Ibid.*) The judges refused to proceed on Sanchez's request without appellant present, Judge O'Neill stating: "I don't think that we should hear anything on this case without his presence since he is both the defendant and the lead counsel, like it or not." (*Id.* at 4.) Judge O'Neill inquired, rhetorically, why second

advisory counsel had been appointed when appellant would not "cooperate" with first advisory counsel. (*Ibid.*) O'Neill opined that Sanchez and Rosenfeld should review Russell's file and investigation and determine what remained to be done, while remaining aware that nothing would be "double funded," given that Sanchez and appellant both were submitting requests at the same time. (*Id.* at 4-5.) O'Neill said the court wanted to see what still needed to be done, "particularly in a case where there has been a couple of hundred thousand dollars spent already in preparing [the] defense." (*Id.* at 5-6.) O'Neill directed Sanchez to do an "accounting for what's been done" and "make an action plan or investigative plan as to where" Sanchez wanted to go. (*Id.* at 7.) O'Neill said he would be "inclined" to authorize Sanchez's funding request along those lines, but acknowledged that if there were an "absolute objection" from appellant, the court would have to let appellant "dig his own grave." (*Ibid.*)

The 987.9 panel met again with appellant without either advisory counsel present on May 15, 1990 (987.9-10ART 1) and June 12, 1990. (987.9-12RT 1-4.) The latter date, appellant requested funding for paralegal services, which the court granted while expressing doubt as to whether a paralegal could provide the type of support appellant really needed. (987.9-12RT 1-4.)

Again before Judge Greer in a 987.9 proceeding with neither advisory counsel present on June 19, 1990, appellant complained that Sanchez and Rosenfeld were behaving as advisory counsel in "name only," but they were not providing effective assistance and "refused to fulfill the function of valid advisory counsels." (987.9-12A 4.) Greer commented as an aside that what appellant really needed was a "full-time lawyer who is competent," but said that at any rate he would order Russell to turn over all

notes of investigation to appellant's investigator, John Atwell, who would be authorized for 100 hours of work to go through the material. (*Id.* at 4-5.)

After Judge Gill, on appellant's motion, on July 8, 1990, substituted Chambers to replace Sanchez as advisory counsel (1RT 153, 171), appellant appeared again before the 987.9 panel without advisory counsel present on July 17, 1990. (987.9-12BRT 1.) Later that month, on July 31, 1990, appellant again appeared at a section 987.9 hearing with no advisory counsel present, and requested further funding for assistance to prepare his defense. (987.9-13RT 1.) Judge Greer reminded appellant that he had two appointed advisory counsel to aid him, but appellant explained that advisory counsel had told him they had no law clerks to assist him and it was appellant's responsibility to obtain funding for law clerks. (*Id.* at 4-5.) The court noted that advisory counsel did not "understand their role," and that it would meet with appellant and both advisory counsel the following week to clarify that role, if appellant gave his "permission." (*Id.* at 6.) After confirming that appellant gave leave to do so, the court took up and denied a motion submitted by Chambers, for funding to hire a venue expert to look at pretrial publicity in support of a change of venue motion. (*Id.* at 6-9.)

The 987.9 hearings took a hiatus when Judge Edwards ordered renewed inquiry into appellant's mental condition as related to self-representation. When they resumed on October 23, 1990, the trial court continued to hold funding hearings with appellant present without advisory counsel. Appellant moved to disqualify Judge Greer, and Greer replied that he would proceed with funding questions under 987.9: "We are going to begin cleaning up the mess that has been created in this matter." (987.9-14RT 3-4.) Greer explained that appellant's "job as [his] own lawyer was to defend [himself] properly with proper representation," and Greer noted that appellant had working for him two lawyers and the court would grant him

the assistance of one law clerk, one paralegal, and one investigator, all of whom he could select so long as the designated individual was qualified. (*Id.* at 4.) Greer denied appellant's request for funds to reimburse him for a typewriter/word processor he had purchased, warning appellant that such expenditures were an improper use of state funds and if appellant made further similar expenditures all state funding would cease. (*Id.* at 5.) Greer clarified that appellant chose Melaku Agha for the law clerk slot, Bekele for the paralegal slot, and Atwell for the investigator slot. (*Id.* at 5-6.) Appellant complained that advisory counsel had been handling Bekele's billing while keeping appellant in the dark, and Greer directed appellant to meet personally with Bekele to go over his billing. (*Id.* at 7.)

Greer ascertained that Chambers had picked up Russell's files, and asked court staff to call Chambers and have him report to the court and confirm that he was going through the material with Atwell, so that the court could determine "what investigation needs to be done." (14RT at 8.) Greer explained that the court would not pay for "three investigations," and that work already done under Russell would not be repeated. (*Id.* at 8.) He noted that out of state travel would be granted only under extraordinary need, local investigation would be authorized when "necessary," and the telephone could be "used when appropriate." (*Ibid.*) Greer denied appellant's request to be designated as trustee of 987.9 funds, and reminded appellant that support staff were not "personal servants" to appellant but rather were "supposed to be working on getting to trial." (*Id.* at 10.)

The 987.9 panel again met with appellant without advisory counsel present on October 30, 1990. (987.9-16RT 2-4.)

On November 14, 1990, appellant filed a request for a 987.9 hearing to address payment of his legal assistants Agha and Bekele for hundreds of hours of work. (33CT 7213-7225.) He also requested funding for Atwell,

as investigator, to go through boxes of material recently received from Russell and Sanchez. (*Ibid.*) Attached to the written request was a declaration of Chambers, stating that the boxes of materials were relevant to appellant's defense, and that Atwell should be hired to go through them to prepare the defense. (*Ibid.*)

At a 987.9 hearing on November 27, 1990, before Judges Greer, Gamer, and O'Neill, appellant (again with no advisory counsel present) requested investigative funding and funding for hours for Agha and Bekele. (987.9-15RT 1-2.) The court expressed confusion about what work Chambers had done with the Russell materials, explaining that it was Chambers, and not an investigator, who needed to go through the files and assess what investigatory work had been done and what still was needed. (*Id.* at 1-2.) Appellant objected to Greer meeting with Chambers outside of appellant's presence. (*Id.* at 2.) On November 30, 1990, appellant filed an emergency request to fund 50 more hours of work by Agha. (33CT 7288-7290.)

The 987.9 hearing on December 4, 1990, marked a turning point on the question of funding and the role of Chambers in the case. (987.9-16RT 1-2 (Dec. 4, 1990).) Chambers was present, to which appellant objected; dismissing appellant's objection, Judge Greer confirmed that Chambers was appointed and appearing as advisory counsel. (*Id.* at 2.) Greer said he had met with Chambers and asked him to go through certain boxes of material to prepare for trial and in connection with motions; Chambers confirmed that he was in the process of doing so. (*Id.* at 3-4.) Chambers said once he had completed the review, he would inform the court what investigative services were needed and what experts should be hired. (*Id.* at 4.) Greer said the case was in an emergency situation because it appeared to be going to trial in January 1991, and that therefore he would authorize "whatever is

necessary" that Chambers endorsed as "reasonable" for investigation and/or experts. (*Ibid.*)

Greer complained about expenditures on the case, noting that the court had "pumped dollar bills and dollar bills and dollar bills in the front end of this case, and nothing comes out the back end towards the benefit of defending Mr. Waldon [and that he would not] pour money in the front end for people to carry [appellant's] briefcase around." (*Id.* at 5.) Greer cast doubt on the efficacy of work done by Agha and Bekele on the case, saying that appellant had "created a cottage industry," and that in the future only work pre-authorized by Greer would be compensated by the court. (*Id.* at 6, 8-9.)

At a 987.9 hearing on December 11, 1990, appellant again objected to Chambers being present without appellant's permission, and the panel again ignored the objection. (987.9-16RT 1 (Dec. 11, 1990).) The panel addressed and approved Chambers' request for funds for hours for his investigator, Atwell. (*Id.* at 13.) In discussing whether a Kelly-Frye motion would be filed concerning evidence from an expert related to the arson charge, after appellant said that Gill had indicated such motion would be proper, the panel turned to Chambers for his view, and Chambers said he did not believe the motion would be "valid." (*Id.* at 19.) The court said that it wanted to help appellant to prepare for trial, but not to "commit suicide." (*Id.* at 24.) Appellant noted that he was busy filing petitions for writ of mandate, some of which had been granted. (*Id.* at 24-25.)

At a 987.9 hearing on December 17, 1990, appellant again objected to Chambers being present without appellant's permission, to no avail. (987.9-16RT 2 (Dec. 17, 1990).) Chambers said that the investigator, Atwell, had been trying to contact the investigators who worked under Russell, but Russell was forbidding them to speak to Atwell. (*Id.* at 3.)

Following a discussion of the boxes of materials from Russell and the progress of the defense in going through them, appellant complained: "[W]hat Mr. Chambers said is completely incorrect, and I object to him being here and the court allowing him to represent me. I'm not going to be filing any further motions with this court if the court continues to allow Mr. Chambers in here." (*Id.* at 7.) Appellant requested funding and incidental costs for Agha and Bekele, and Greer said that their funding would be limited to 40 hours each for the next week. (*Id.* at 8-9.) Judge Greer then asked Chambers' opinion as to what Agha and Bekele should be funded to do that week, and Chambers advised that they should focus their work on the *Hitch* and section 995 motions. (*Id.* at 10.) After conferring with appellant, the judge said he would authorize 25 hours each for the law clerks to work on the motions, and 25 hours each for them to work on organizing the files for trial. (*Id.* at 11.)

The 987.9 hearing continued before Judge Greer on December 24, 1990; appellant again objected to Chambers' presence, and Greer overruled the objection. (987.9-16RT 1 (Dec. 24, 1990).) Greer took up a funding motion filed by Chambers under his own signature; Chambers explained that he had asked appellant to review and sign the motion, but appellant had refused. (*Id.* at 4.) Chambers asked for hours to consult with John Sotille, a fire expert. (*Ibid.*) Appellant objected to the motion because he desired the expert work for and consult with appellant, not Chambers. (*Id.* at 5.) The court approved the funding nevertheless, and then turned to Chambers' request for funds to hire Buxton, an expert in fire causation who had been examining for the defense physical evidence gathered at the Ellerman house. (*Ibid.*) Appellant again objected to the motion and funding, and again the court granted Chambers' request over appellant's objection. (*Id.* at 5-6.)

Appellant complained:

> Mr. Chambers is not my advisory counsel and there will be no further communication between myself and Mr. Chambers, and I don't want . . . an investigation done that he has recommended or in any way authorized.

(*Id.* at 6.) Regarding further efforts of investigator Atwell, appellant opposed additional funding absent a court order directing Atwell to cease communication with Chambers and to work only under appellant's direction. (*Ibid.*) Greer nevertheless granted the funding, stating that the question of to whom Atwell reported was "up to the trial judge." (*Ibid.*)

On January 3, 1991, at a 987.9 hearing before Judge Milliken, appellant again objected to Chambers being present, and said that Chambers was not his advisory counsel and Atwell no longer was appellant's investigator. (987.9-17RT 3 (Jan. 3, 1991).) Appellant objected to the court granting Chambers' motion to fund the services of Mr. Bell, a criminalist. (*Id.* at 4.) Appellant also complained that Chambers' presence violated his confidentiality. (*Ibid.*) Milliken denied appellant's motion to have Chambers removed from the proceeding, denied the motion to have Chambers relieved as advisory counsel, and denied the motion to have Atwell relieved as investigator. (*Id.* at 4-5.) Milliken said that in addressing whether funding for work would be authorized in the future, he would consider whether or not the argument or claim supported by the work had "potential merit," as related to the question of whether "the work done is reasonable and necessary to the defense of the case." (*Id.* at 11.) Milliken cited his "fiduciary obligation" to make sure that the expenses made in the case were "reasonable and necessary." (*Id.*) Milliken asked appellant whether there was anything he wanted Chambers to do "with reference to advising" him on the merits of any other motions, and appellant replied:

> There will be absolutely no communication between Mr. Chambers and I [*sic*] at any time in the future. And I object to having to take my time out now from preparing a defense just

> to get up the paperwork to file a lawsuit against him. The court should not force me to spend my time on such a matter; that just takes away from my time preparing for trial. Mr. Chambers is not my advisory counsel.

(*Id.* at 12.)

At a 987.9 hearing on January 8, 1991, Judge Milliken asked about the status of motions and, over appellant's objection, asked Chambers his opinion on whether appellant's intended motions were "necessary." (987.9-17RT 16-19.) Milliken debated with appellant whether the hours he requested the court to fund for Agha and Bekele were reasonable (*id.* at 20-21), and then turned to requests the court had received from "advisory counsel." (*Id.* at 21.) Over appellant's staunch objection, Milliken approved Chambers's request for funds for Dr. Bruce Hubbard, a psychiatrist, to prepare to testify in the penalty phase, and for investigator Atwell to travel to Oklahoma to examine scenes of crimes alleged to have occurred there, and to interview appellant's family members. (*Id.* at 21-24.) Appellant objected to the court's consideration of motions filed by Chambers that appellant had not seen, and complained that the court was violating his rights under *Faretta.* (*Id.* at 24.)

Regarding funding for Dr. Hubbard, appellant said that he wanted funding for psychiatrists he had selected himself, and that Chambers would use Hubbard to undermine appellant's defense in both the penalty and guilt phases. (987.9-17RT 24-25.) As to an investigator, appellant said he had his own person he wanted the court to fund, and that he would reveal the name of that person if the court promised not to reveal it to Chambers. (*Id.* at 26.) Milliken said that if appellant submitted such request in proper form, the court would be "happy to consider it" and would "make a judgment . . . why this individual would be needed *over and above* what I have previously authorized for Mr. Atwell" (*id.* at 26-27, emphasis added), but that it would

not "debate the rectitude of [its] ruling insofar as Mr. Atwell [was] concerned," which was "fait accompli." (*Id.* at 27.) Milliken refused appellant's request for further funding hours for Bekele and Agha and to seek writ review of the court's violation of appellant's *Faretta* rights by entertaining Chambers' funding requests over appellant's objection. (*Id.* at 28-29.)

On January 15, 1991, Milliken held further 987.9 proceedings, with Rosenfeld present over appellant's objection. (987.9-17RT 1.) Appellant requested 137 hours of funding for Agha and Bekele. Milliken granted a portion of the hours, questioned the efficiency of the law clerks' work, and said that in future they would need to present detailed affidavits regarding their work. (*Id.* at 2-5.) Addressing Rosenfeld, Milliken said that he wanted to know what advisory counsel believed was necessary to prepare for trial, even if appellant did not want to hear from them. (987.9-17RT 35.) Milliken said: "If the defendant doesn't choose to speak with advisory counsel, we can lead the horse to water, but we can't make him drink." (*Ibid.*) Even so, Milliken asked Rosenfeld to attend the next 987.9 session and express her thoughts in that regard. (*Ibid.*) Appellant informed Milliken of his need for funds for costs including typist services, parking, photocopying expenses; Milliken granted only $200 for such purposes. (*Id.* at 36-37.) Milliken refused to fund Agha or Bekele for more than 40 hours in the coming week. (*Id.* at 38.)

At a 987.9 proceeding on January 22, 1991, Rosenfeld and Chambers stated their presence as advisory counsel, over appellant's objection, and Milliken said the lawyers were appointed by the court and "expressly" had the court's permission to be present, though it was up to appellant whether he chose to follow their advice and "utilize their services." (987.9-17RT 39.) Milliken checked in on the status of drafting of defense motions, and

solicited the opinions of Chambers and Rosenfeld whether such motions would be "meritorious" and necessary. (*Id.* at 41-43.) Appellant said he needed assistance in organizing 36 boxes of trial preparation material. (*Id.* at 44-45.) Milliken said that between the 40 hours each funded for Agha and Bekele, plus the resource of "advisory counsel," he was satisfied that all "tasks [could] get accomplished on the authorizations he [had] made." (*Id.* at 45.) Milliken authorized $200 in costs in connection with organizing the materials, which was something he felt should already have been done "by advisory counsel and the law clerks." (*Ibid.*) Milliken then turned to and granted Chambers' written January 22 request for funding for penalty phase witnesses, over appellant's objection that advisory counsel submitted the request without his knowledge or permission. (*Id.* at 46.) Milliken again refused to authorize funding for Agha or Bekele to work more than 40 hours in the coming week. (*Id.* at 47.)

At a 987.9 hearing on January 29, 1991, Milliken again consulted Chambers on whether he believed motions that appellant intended to file had "any potential merit." Chambers said the intended motions would present nothing not already addressed elsewhere. (987.9-17RT 48-49.) Milliken granted Chambers' request for funds for a fingerprint expert, over appellant's staunch objection. (*Id.* at 50-51.) Appellant complained that he was being deprived the advisory counsel and witnesses and experts that he needed for his defense, to which Milliken replied:

> Well it's the judgment of the court that advisory counsel need to get the appropriate experts ready to testify at trial. I've previously indicated, sir, that advisory counsel are employees of the court and are going to get the appropriate witnesses necessary to defend this case. If you choose not to use them or the witnesses, I can't force you to do that, but we're not going to have delays in this case by virtue of your making new decisions about your representation.

(*Id.* at 51-52.) Milliken denied appellant's request to fund more than 40 hours of work by Agha and Bekele, each, in the coming week. (*Id.* at 53.)

On February 1, 1991, Chambers filed a declaration in support of 987.9 funding for Dr. Hubbard to interview appellant, meet with Drs. Kalish and Di Francesca, and testify. (34CT 7460-7465.) Appellant objected to Chambers' efforts at a 987.9 hearing on February 5, 1991, as well as objecting to funding for continued investigation by Atwell. (987.9-17RT 56-59.) Milliken authorized 40 of the 60 hours, each, requested by appellant to fund Agha and Bekele's work in the coming week. (*Id.* at 54-55.)

In another 987.9 hearing on February 14, 1991, Judge Milliken stated doubt whether the paralegals, Agha and Bekele, were doing anything useful because motions recently filed by appellant were exact copies of some previously filed by Russell and withdrawn by appellant; thus, Millikan refused more funds for Agha and Bekele. (987.9-18RT 4-6.) Milliken took up Chambers's request for funds for a psychologist to aid with jury selection (over appellant's objection that he did not join in the motion as attorney of record), and denied it on the merits. (*Id.* at 2-3.)

On February 19, 1991, appellant filed a petition for writ of mandate in the court of appeal seeking control over advisory counsel and to get rid of Chambers, D013911. (80CT 17110-17127.)

At a 987.9 hearing on February 20, 1991, appellant objected to the presence of Rosenfeld and Chambers. (987.9-19ART 1.) Milliken again limited funding for Agha and Bekele to 40 hours of work each for the week, for "trial preparation pursuant to the defendant's direction and pursuant to Ms. Rosenfeld's direction." (*Id.* at 2.) Milliken checked in with Chambers, "I take it that as standby counsel, or whatever it is that you are at this time, that you're continuing to prepare for trial in this matter." (*Id.* at 5.) Chambers replied, "that's correct, your Honor." (*Ibid.*) Milliken confirmed

that he previously had denied appellant's request to vacate all the court's orders granting requests submitted by Chambers without appellant's approval. (*Ibid.*)

On February 25, 1991, the Court of Appeal denied appellant's petition for writ of mandate in D013911, stating that it was permissible for the trial court to cast Chambers in the role of "standby counsel," over appellant's objection, to step in if the court eventually decided to terminate self-representation. (80CT 17248.) Such arrangement would not "interfere" with appellant's *Faretta* rights, so long as the trial court ensured that its funding of Chambers did not diminish its funding of appellant's own defense preparation, including the use of a defense investigator. (*Ibid.*)

At a 987.9 hearing on February 26, 1991, Milliken granted the funding request of Chambers submitted as "standby counsel," over appellant's objection to Chambers' presence, his status as standby counsel, and his submission of the request. (987.9-19ART 6-8.) Appellant objected that the court had taken away his second advisory counsel and replaced it with standby counsel, in violation of Judge Boyle's orders. (*Id.* at 8-9.) Milliken said appellant's position was "nonsensical," and that the funding he had authorized for Chambers was in his capacity as standby counsel. (*Id.* at 9-10.) Milliken denied some of the hours appellant requested to fund the work of Agha and Bekele. (*Id.* at 11-12.)

At another 987.9 hearing on March 12, 1991, Judge Milliken granted Chambers' request for funding for investigation and to "be prepared in the event" his services as standby counsel need to be "called upon," over appellant's objection. (987.9-19BRT 3-4.) Similarly on May 7, 1991, again over appellant's objection, Milliken conferred with Chambers on the status of Chambers's request for expert funding. (987.9-20RT 1-2.) On May 14, 1991, Milliken in a 987.9 hearing denied appellant's request for money for a

typist, reasoning that appellant could utilize the secretarial help of his "advisory counsel" Rosenfeld. (987.9-21RT 1-7.)

At a 987.9 hearing on June 25, 1991, Milliken approved Chambers' request for costs for Atwell to travel to Oklahoma to interview witnesses. (987.9-24RT 16-17.)

At a 987.9 hearing on July 9, 1991, Judge Milliken denied appellant's request for funding to hire Jeffrey Frederick as a paralegal, with Millikan commenting that the case was of a type where appellant needed tactical planning, execution, and the assistance of counsel – not law clerks. (987.9-25RT.) On July 16, 1991, Milliken denied appellant's 987.9 request for $500 in costs for telephone calls. (987.9-25RT 13-14.)

At a 987.9 hearing on July 26, 1991, Milliken granted costs requested by Chambers, over appellant's objection, and took under submission appellant's request for costs for telephone calls to interview witnesses. (987.9-25RT 15-17.)

On July 30, 1991, appellant filed a request for 987.9 money, complaining that without money for phone calls he could not contact and interview witnesses before subpoenaing them, like any other attorney, and that he had been unable to file some items in the Court of Appeal for lack of funds. (35CT 7860.)

On September 3, 1991, Milliken granted Chambers' funding request for court reporters and for an arson expert. (987.9-26RT 1-2.) On September 10, 1991, Milliken denied appellant's request for funding to have a model of a crime scene made and to have his Esperantist psychiatrists ready to testify. (987.9-27RT 2-10.) Milliken chastised appellant for not using Rosenfeld, saying that appellant's statements about her as advisory counsel were "preposterous." (*Id.* at 6.)

At a 987.9 hearing on October 28, 1991, Milliken reluctantly approved Rosenfeld's request for costs for services of a second investigator, Elizabeth Cotton, to carry out tasks requested by appellant, after Rosenfeld reminded him that previously-funded investigation costs for Atwell were not at appellant's request and did not further appellant's chosen defense. (987.9-31RT 5-13.) Milliken expressed frustration that there were "a number of people working at cross purposes" in the case. (*Id.* at 5.)

D. The Trial Court's Actions Concerning Chambers as Advisory Counsel Interfered with Appellant's Right to Control Strategic Decisions and his Right to Present his own Chosen Defense

In its dealings with Chambers and, to a lesser extent, Rosenfeld, the trial court violated the principles of this Court set forth in *People v. Hamilton* and other state law, and permitted such interference in appellant's right to prepare and present his own defense under *Faretta,* that his rights under the Sixth Amendment were violated. By failing and refusing to clarify roles among the defense team (*Stansbury*); deferring to Chambers's strategic choices over appellant's; allowing the funding of Chambers as standby counsel to prepare a "shadow defense" to interfere with the funding of appellant's preferred defense; and continually pressuring appellant to cede control of the case to Chambers, the trial court compromised appellant's "right to present his case in his own way" (*Hamilton*) and his rights under *Faretta*. The error is reversible without consideration of prejudice, and thus this court must overturn the conviction and sentence.

The trial court's errors centered around discussions and rulings during 987.9 hearings. Section 987.9 of the Penal Code governs trial courts' distribution of state funds in capital trials of indigent defendants, for preparation of the defense. It states:

> In the trial of a capital case . . . the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are *reasonably necessary* for the preparation or presentation of the defense. The fact that an application has been made *shall be confidential* and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, *other than the trial judge presiding over the case in question*, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made *at an in camera hearing*. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

(*Ibid.*, emphasis added.)

Appellant is aware of no published case addressing the application of section 987.9 in a case where a capital defendant is representing himself. Reasonably interpreting section 987.9 in light of *Hamilton*, however, it is clear that trial courts applying 987.9 are to grant funds requested by or with the permission of the self-represented defendant that are reasonably necessary for the defendant to control, prepare, and present his *own* defense of his *own* choosing. Due Process requires no less.

Here, however beginning in December 1990, the trial court violated the letter and spirit of 987.9 and state law by ignoring appellant's demands for confidential in camera 987.9 hearings outside the presence of Chambers and Rosenfeld (unless he gave permission to include them), by entertaining motions submitted by Chambers in which appellant did not join, and by soliciting the views of appointed advisory counsel on whether appellant's requests were both "reasonable" and "necessary" (or even "meritorious"), rather than the "reasonably necessary" standard stated in the statue. As will

be shown below, the trial court's errors grew throughout the spring of 1991 and led to an abrogation of appellant's rights under *Faretta* in violation of state and federal constitutional law.

1. The Trial Court Started off on the Right Foot by Cabining the Role of Sanchez as Advisory Counsel, but Changed Direction as Trial got Closer and Permitted Chambers as Advisory Counsel to Usurp Appellant in Planning and Preparing a Defense

The trial court basically stayed on the right track while Sanchez served as advisory counsel after appellant was granted pro se status in November 1989. On eight separate dates from February through July of 1990, the 987.9 court appropriately honored appellant's full status in his own capacity by meeting with him and addressing his concerns outside the presence of advisory counsel. (987.9-7RT 2; 987.9-8RT 3; 987.9-9RT 1; 987.9-10ART 1; 987.9-12RT 1; 987.9-12ART 1-2; 987.912BRT 1; 987.9-13RT 1.) The funding court refused to entertain any motions by Sanchez not served on appellant (987.9-7BRT 78), then denied a motion, though served, because appellant objected to the court considering it. (987.9-7CRT 3.) On May 8, the 987.9 panel met with Sanchez alone, but told him the court would not proceed in appellant's absence. (987.9-10RT 4.)[138] When Sanchez moved for funding for "support services," in May of 1990 so that he could hire two paralegals, a typist, two law clerks, and an investigator, to

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[138]Although the court came close to the boundary line after Rosenfeld was appointed second advisory counsel, when it advised her and Sanchez to review Russell's file and investigation, determine what remained to be done, and submit an "action plan or investigative plan" as to where the case should go (987.9-10RT 4-7), the court checked itself by reiterating that it would not fund such plan if appellant entered an "absolute objection," because the court was required to let appellant "dig his own grave." (*Id.* at 7.)

further "proper preparation" of the defense so he could "competently represent" appellant, Judge Gill on June 8, 1990, properly denied the motion stating that Sanchez misconstrued his role, which was to serve as appellant's "advisor" but never his "representative." (32CT 6933-6938; 1RT 136-139.)

Judge Gill took seriously appellant's dissatisfaction with Sanchez's performance, admitting that he was aware of "disharmony" on the defense team and on July 9, 1990, appointed Chambers to replace Sanchez as advisory counsel. (1RT 158, 171.) On July 31, 1990, the 987.9 court met with appellant with no advisory counsel present, reminded him that he had advisory counsel to "aid" him, noted that advisory counsel appeared to misunderstand their role re law clerk funding, and planned to meet with appellant and advisory counsel the following week, with appellant's "permission." (987.9-13RT 4-9.)

Even after the hiatus involving Judge Edwards, the 987.9 court continued to honor appellant's pro se status by meeting with him outside the presence of advisory counsel in October and November of 1990. (987.9-14RT 2-3; 987.9-16RT 2-4; 987.9-15RT 1-2.) In a 987.9 hearing on October 23, 1990, Judge Greer afforded appellant the prerogative of choosing who the paralegal, investigator, and law clerk on the defense team would be, so long as those selected were qualified. (987.9-14RT 4.) Greer took up a funding request supported by Chambers declaration on November 14, 1990, but only when appellant personally presented the document and made his own oral request for the investigator funding sought therein. (33CT 7213-7225.) Meanwhile, in 987.9 hearings held in October, November, and December, Judge Greer began to chastize appellant and admonish him to make greater use of the services of Mr. Chambers.

The court veered off in a dramatically different direction, however, in 987.9 proceedings on December 4, 1990. Judge Greer ignored appellant's

objection to the fact that Chambers was present, and admitted that he had met with Chambers without appellant being present. (987.9-16RT 1-4.) Greer encouraged Chambers to review the file and inform the court what investigative and expert services were needed, and indicated that he would authorize whatever was "necessary" that Chambers endorsed as "reasonable" in that regard. (*Id.* at 4.) Greer complained about the money wasted on the case, questioned the worth of hours expended by appellant's law clerk and paralegal, Agha and Bekele, and accused appellant of "creat[ing] a cottage industry" and causing the court to waste money for "people to carry [appellant's] briefcase around." (*Id.* at 5-9.)

The 987.9 court continued in the same wrong direction over several hearings, by allowing Chambers to be present over appellant's objections; vesting Chambers with control over the investigation and interviewing experts; conferring directly and exclusively with Chambers on what needed to happen in the case; entertaining Chambers' funding requests made without the endorsement of appellant and sometimes even over appellant's explicit objection; consulting Chambers' opinion on whether appellant's own planned actions and motions were "valid," "reasonable," or necessary; and ignoring appellant's complaints and objections to Chambers claiming to "represent" appellant and controlling the defense and/or investigation. (987.9-16RT (Dec. 4, 11, 17, and 24 hearings); 987.9-17-RT (Jan. 3, Jan. 8, Jan. 15 hearings).)

On January 8, 1991, when Milliken granted Chambers' request for funds to hire Dr. Hubbard as a psychiatric expert, the court crossed the Rubicon and cemented Chambers' role as usurper of appellant's chosen defense. From spring of 1987 appellant had battled with Russell over control of the case because Russell's steps toward preparing a psychiatric case in mitigation was anathema to appellant. Yet now under Chambers'

direction *after* the court granted appellant pro se status, Dr. Hubbard in 1991 was meeting with Drs. Kalish and Di Francesca, who long had bespoken appellant's incompetency to stand trial and/or represent himself due to his mental incapacity, in preparation of a mitigation defense related to mental illness. (34 CT 7460-7465.) In light of this, and other affronts, appellant swore to the court again and again that he would not and could not work with Chambers as advisory counsel.

Judge Milliken went further astray in 987.9 hearings on January 22 and 29, and February 5 and 14, 1990. On January 22 Milliken overruled appellant's objection to advisory counsel's presence by stating that they were appointed by the court and "expressly" had the court's permission to be there. (987 .9-17RT 39.) Milliken again solicited the opinions of Chambers and Rosenfeld as to whether motions appellant intended to file would be "meritorious" and necessary. (*Id.* at 41-43.) Milliken granted Chambers' motion for funding for penalty phase witnesses, over appellant's objection that the request was submitted without his knowledge and permission. (*Id.* at 46.)

Again on January 29, Milliken solicited Chambers' view that motions appellant intended to file lacked "potential merit,"and granted Chambers' request to fund a fingerprint expert over appellant's staunch objection. (*Id.* at 18-51.) When appellant complained that the court was depriving him of the advisory counsel and witnesses and experts he needed for *his* defense, Milliken replied that advisory counsel acted as "employees of the court" and were going to "get the appropriate witnesses necessary to defend this case." (*Id.* at 51-52.) Milliken entertained and granted, over appellant's steadfast objection, continued funding for investigation by Atwell at the behest and under the direction of Chambers, and for an expert psychiatrist, Dr. Hubbard, who would continue with the work initiated by Russell through

Drs. Kalish and DiFrancesca. (34CT 7460-7465; 987.9-17RT 21-25, 56-59.) At a 987.9 hearing on February 14, 1991, Milliken took up Chambers request for funds for a psychologist to aid with jury selection, over appellant's objection, although he denied it on the merits. (987.9-18RT 2-3.)

During the same period, the funding court began to deny in part appellant's own requests to fund the work of Agha and Bekele, the law clerk and paralegal appellant had selected and who reported directly to him. (987.9-16RT 10-11 [court asked Chambers' opinion on what work Agha and Bekele should be funded to perform that week]; 987.9-17RT 20-21, 28-29 [debating with appellant whether the hours he requested for Agha and Bekele were reasonable, and refusing to fund further hours for them to seek writ review of appellant's challenge to the role of Chambers]; 987.9-17RT 38, 47, 53, 54-55 [refusing to fund Agha and Bekele for more than 40 hours of work, each, in each of four consecutive weeks]; 987.9-18RT 4-6 [refusing appellant's request to fund more work by Agha and Bekele].) On one occasion, Milliken indicated that appellant would have to turn to advisory counsel in order to do all the work the court deemed necessary. (987.917RT 45 ["tasks [could] get accomplished" given the resource of advisory counsel].) Another time, Milliken told appellant that to establish the need for an investigator, appellant would need to show such person "would be needed over and above" what Milliken previously had authorized for Atwell, who at that time worked under the exclusive direction of Chambers. (987.9-17RT 26-27.)

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2. The Trial Court Breached its Duty to Monitor and Clarify the Proper Role of Advisory Counsel Vis-a-vis the Pro Se Defendant

As illustrated by this Court's decision in *Stansbury*, *supra*, 4 Cal.4th 1017, it is essential that the trial court, after appointing advisory counsel to assist a pro se defendant, take an active supervisory role, as necessary, and send a clear message that it is appellant who controls the defense. (*Stansbury, supra,* 4 Cal.4th 1017, 1040 [trial court properly designated the defendant solely responsible for the defense and made appointed counsel his assistant, helping all parties to clearly understand and observe their "respective rights and duties"].)

From the time Judge Boyle granted appellant *Faretta* status through the conclusion of trial two years later, the trial court failed to clearly define the roles of second-chair, advisory, and standby counsel and failed to send a clear message that it was appellant who controlled the case. In November of 1989, Judge Boyle agreed to appoint two "second chair" counsel while blurring the question of whether such attorneys were the same as or different from advisory counsel or standby counsel. (84ART 69.) Ths was completely unlike the trial court's careful guidance in *Stansbury* where, after granting the defendant *Faretta* status, the court delineated four choices for him: he could elect pure *Faretta* status with no assistance; self-representation with the assistance of "advisory counsel"; self-representation in partnership with an attorney as "cocounsel"; or continued representation by two lawyers as counsel. (4 Cal.4th at p. 1035.) The defendant chose the third option as re one attorney (Daugherty), and the second option as re another attorney (Robusto). (*Ibid.*)

Here, as in *Stansbury*, problems erupted with respect to the scope of the assisting lawyers' role. Starting in early 1990, Judge Gill failed to show concern about the apparently growing conflict between appellant and

Sanchez, or hold a hearing to explain that it was appellant, and not Sanchez, who held the "power to 'make all the decisions' concerning the conduct of the defense." (*Stansbury, supra*, 4 Cal.4th 1017, 1036.) Instead, Gill explicitly refused to "interject" himself into or "referee" conflicts between appellant and advisory counsel over control in the case.

For example, on April 9, 1990, appellant complained to Judge Gill about his relationship with Sanchez as advisory counsel, asking the court to "order" Sanchez's cooperation. (1RT 16.) Gill said the court should not "interject" itself into that relationship, and that advisory counsel had a "duty" under their personal and professional integrity to advise appellant and opine whether appellant's decisions (which he did have the power to make) were wise or foolish. (*Ibid.*) Gill said he was in no "position" to order Sanchez to do things Sanchez believed were unwarranted. (*Id.* at 17.) The following week, when Gill appointed Rosenfeld as appellant's second advisory counsel on April 13, 1990, Gill stated that while appellant could "set the priority" for advisory counsel, the court would not "interject itself" into the defendant/advisory counsel relationship. (1RT 26, 30.) Gill refused appellant's request for an emergency hearing to discuss Sanchez's cooperation as advisory counsel, saying that it was the 987.9 committee, not he, who should address the issue.[139] (*Id.* at 42-43.)

Similarly, on April 27, when appellant objected to advisory counsel speaking in court without his prior permission, Gill said that he would not get involved in issues between appellant and counsel any more than "absolutely necessary," adding that he doubted that any judge in the "Court

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[139]In a game of ping pong, judges at 987.9 hearings typically ignored appellant's complaints about appointed advisory counsel and his control of the case or told him that his concerns should be directed to Judge Gill. (See, e.g. 987.9-16RT 2 (December 17, 1990) 987.9-20RT 1-2.)

with a capital C" would want to be in the position of interjecting himself into the attorney-client relationship. (1RT 47, 49.) Again on May 7, Judge Gill stated his "consistently held position" that he would not address questions of "cooperation" by advisory counsel. (*Id.* at 65.) Even so, Gill hinted that appellant was in the wrong; Gill commented that it was an "awful, terrible mistake" for appellant to try to represent himself, and admonished him that it was "absolutely essential that he cooperate with his advisory counsel and that they work together as a team." (*Id.* at 69.)

Even in granting appellant's request to substitute Chambers for Sanchez as advisory counsel on July 9, 1990, Gill reiterated that although he had known there was "disharmony" on the defense team, he purposefully had not "interjected" himself into appellant's relationship with advisory counsel. (1RT 153, 158.) Again Gill could not refrain from taking digs against appellant, commenting to Chambers that he would find appellant "very difficult to work with," and ignoring appellant's reply that he was easy to work with, except when assistants wanted to "command the case" instead of working for him. (*Id.* at 172.)

Gill's refusal to give guidance continued after the Judge-Edwards-ordered hiatus. On December 13, 1990, appellant complained to Gill that advisory counsel was not as available to give him assistance as he wished; when Rosenfeld said otherwise, Gill said he was "not disposed" to enter an order on the subject. (7RT 446-447.) On January 7, 1991, appellant asked Gill to order Chambers to desist from submitting 987.9 motions without appellant's signature or permission. (8RT 471.) Gill's only response was to say that he was "sure" that advisory counsel understood the "applicable law," and that appellant should bring an "appropriate" motion if necessary. (*Id.* at 471-472.)

Again on February 1, 1991, appellant complained of Chambers' submission of 987.9 funding motions "behind [appellant's] back" and over his objection, citing *McKaskle v. Wiggins* (1984) 465 U.S. 168 and *People v. Doane* (1988) 200 Cal.App.3d. 832 (8RT 473-475), and asked Gill to terminate and replace Chambers and restrain Rosenfeld from filing motions or speaking in court without appellant's permission. (8RT 477-478.) Gill said he did not believe that either advisory counsel had done anything improper, and thought that appellant was going to be unable to work with any advisory counsel because what he wanted was not advisory counsel but, rather, a "slave." (8RT 478.) Gill repeated his credo that it was inappropriate for him to get involved in such matters (which he deemed "987.9 matters") and that appellant would have to take up the issue with appellant's "friends on the court of appeal." (*Ibid.*)[140]

In Judge Gill's chambers on February 15, 1991, appellant objected to the presence of Chambers and Atwell and asked that they be excluded because they no longer were his investigator and advisory counsel, Gill's only response was to say that they still held that capacity, although appellant could use them "as much or as little" as appellant desired. (9RT 576.) When Rosenfeld complained that it was hard to advise appellant because he was "keeping things from her," Gill commented that appellant was "using

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[140]The ping pong game continued, with Gill sending appellant to another judge to discuss his grievances. Appellant asked Gill for an order that Atwell not engage in investigative tasks without appellant's permission; Gill said he would not get involved in advisory counsel matters, and suggested that appellant take those issues to Judge Revak. (8RT 495.) Judge Revak soon ordered relief by terminating Chambers and Atwell and placing restraints on the scope of Rosenfeld's actions, but days later reversed his orders on the theory that appellant had "forum-shopped" his complaints by bringing them before Revak at all. (9-1RT 502-514, 515-553; 9-2RT 554-564.)

resources in a foolish way" but otherwise said nothing to mediate the dispute. (9-3RT 615-616.)

The trial court handled the situation very differently in *Stansbury*, and this Court found that significant in upholding the judgment. Therein, the trial court at the defendant's request initially appointed an attorney, Daugherty, as "cocounsel" to work in partnership with the self-represented defendant. (*Stansbury*, *supra*, 4 Cal.4th 1017, 1035.) Later, based on its own observations, the court became concerned about conflict over "substance and strategy of the defense," and expressed doubts that the arrangement would be workable once trial started. (*Id.* at p. 1036.) Thus, it removed Daugherty as cocounsel and reappointed him as "advisory counsel," and explained that the defendant acting pro per held complete control of decision making for the defense. (*Ibid.*) The trial court thereafter continued to fulfill its duty to monitor the role of advisory counsel and provide clarification where needed. (*Id.* at p. 1037 ["At numerous points thereafter the court reaffirmed defendant's sole right to control the content and presentation of the defense, [counsel] acknowledged that defendant had that right, and both the court and [counsel] observed that defendant was in fact exercising that right."].)

Guided by the trial court's comments, Daugherty checked his prerogative and assumed the proper, subsidiary role and the conflict eased as a result:

> Thus with some six weeks remaining before trial the court reminded Daugherty and Robusto that "each of you who are assisting him must realize that the decisions that are made in this case are his decisions to make." Robusto acknowledged that defendant "has now acquired all control over this particular case." And Daugherty reviewed the history of his relationship with defendant as follows: when he and defendant were cocounsel it "was a very difficult role because we were pulling against each other. I admit I was trying to direct the

> lawsuit in what I felt was Mr. Stansbury's best interest. And sometimes we had some conflicts. But since there's been a clarification that Mr. Stansbury is in propria persona and he is definitely running this case and I am assisting him, I think he would agree there has been cooperation on my part, and I have directed Mr. Slaick [a defense investigator] for instance, that he does not listen to me. He's directly taking orders from Mr. Stansbury. He's employed by Mr. Stansbury. So is Mr. Benart. So am I."

(*Stansbury, supra*, 4 Cal.4th 1017, 1040.) In rejecting the defendant's *McKaskle* claim on appeal, this Court in *Stansbury* could find no instance in which it could fairly be said that the trial court "resolved adversely a conflict between [the defendant] and his counsel when the matter was 'one that would normally be left to the discretion of counsel.'" (*Stansbury, supra,* at p. 1040.) It stated: "To the contrary, the record shows that after the court made defendant solely responsible for the defense and reduced Daugherty's role to that of his assistant, all parties clearly understood and observed their respective rights and duties." (*Ibid.*)

3. Chambers Eventually Became Standby Counsel Instead of Advisory Counsel

Although some courts (including the trial court here, through Judge Boyle) have used the terms standby and advisory counsel interchangeably and/or blur the distinction between the two, it has come to be recognized in the case law that the two roles are entirely different and each involves its own responsibilities, duties, and alliances. Appointed advisory counsel assists and advises the defendant and at times performs tasks, including speaking in court, at the defendant's behest and in accordance with tactical choices made by the pro per defendant. Standby counsel, on the other hand, is appointed to assist *the court*, especially in the event that pro per privileges are revoked and an attorney is needed to step in and continue trying the case.

In California, it is beyond cavil that advisory counsel is one thing and standby counsel is something completely different:

> "Standby counsel" is an attorney appointed for the benefit of the court whose responsibility is to step in and represent the defendant if that should become necessary because, for example, the defendant's in propria persona status is revoked. (*People v. Clark* (1992) 3 Cal.4th 41, 149, 10 Cal.Rptr.2d 554, 833 P.2d 561; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1164, fn. 14, 259 Cal.Rptr. 701, 774 P.2d 730.) "Advisory counsel," in contrast, is appointed to assist the self-represented defendant if and when the defendant requests help. [Citations.]

Some courts appoint standby counsel "for the benefit of the court", for example, to be prepared to step in should pro se status be revoked. (*People v. Clark* (1992) 3 Cal.4th 41, 150; *Blair*, *supra*, 36 Cal.4th 686, 725; see also *Hamilton, supra,* 48 Cal.3d 1142, 1164, fn. 4.) In this case, Chambers over time carried out both of these functions for the trial court – it is clear that what he did not do, however, was fulfill his duty to appellant as advisory counsel to carry out tasks as appellant desired and provide him advice on topics as to which he requested it.

Starting in late 1990, the 987.9 panel started to grant Chambers' funding requests over appellant's objection, and it soon became apparent that the court was funding Chambers as its de facto standby counsel. Judge Greer set the stage on October 23, 1990, directing Chambers to review Russell's file with Atwell and report directly to the court what investigation needed to be done. (987.9-14RT 8.) In short order, judges at 987.9 hearings were granting Chambers' personally-submitted funding requests, viz.: for "his" investigator Atwell (987.9-16RT 13); for fire and arson experts (987.9-16RT 1 (Dec. 4, 1990) & 987.9 26RT 1-2); for Dr. Hubbard (987.9-17RT 21-24); for Atwell's travel to Oklahoma (*Ibid.* & 987.9-24RT 16-17);

for penalty phase witnesses (987.9-17RT 46); and for a fingerprint expert (987.9-17RT 50-51).

Milliken used Chambers as standby counsel to "assist the court" on several occasions when it solicited his view on whether appellant's own funding requests were "reasonable," "necessary," or had "merit." (987.9-16RT 19 (Dec. 4, 1990); 987.9-16RT 8-9 (Dec. 17, 1990); 987.9-17RT 48-49.)

It soon became apparent that Milliken as 987.9 judge also was employing Chambers as its standby counsel to prepare a shadow defense. Milliken started to tip his hand on January 22, 1991, when he said that Chambers and Rosenfeld were appointed by the court and "expressly" had the court's permission to be present. (987.9-17RT 39.) A week later, Milliken went further, stating that advisory counsel were "employees of the court" and were "going to get the *appropriate* witnesses necessary to defend this case. (*Id.* at 51-52, emphasis added.) On February 20, 1991, Milliken confirmed with Chambers that he was continuing to get ready for trial as "standby counsel, or whatever it is that you are at this time." (987.9-19RT 5.) On February 26, Milliken dismissed appellant's objections that the court had taken away his advisory counsel and replaced it with standby counsel as "nonsensical," while simultaneously declaring that he was granting the funding request Chambers submitted in his capacity as standby counsel. (987.9-19ART 6-10.) On March 12, Milliken explained he was granting Chambers' request for investigative funding so the attorney could be "'prepared in the event' the court needed to call upon his services as standby counsel." (987.9-19BRT 3-4.)

Judge Gill, as trial judge, also embraced Chambers' adapted role, which he deemed sometimes as "standby counsel" and other times as "potential standby" counsel. So, on February 15, 1991, in response to

appellant's request that Chambers and his investigator Atwell be terminated from further involvement, Gill worried about all the time and effort Chambers and Atwell had put into the case. Gill said that he did not want Chambers's work to be lost, and that "if it [came] down to it" he would order Chambers to serve as standby counsel, which he could do without appellant's consent. (9-3RT 615-617.) Chambers would step in if appellant changed his mind about being pro per, or manipulated the system so much that Gill revoked pro per status, which Gill felt was likely. (*Ibid.*) Appellant complained that under *Doane* he could bring a claim of ineffective assistance of advisory counsel if their advice prevented him from bringing a meritorious defense – Gill countered that he did not see anything of a meritorious defense. (9-3RT 621.)

In court before Judge Gill on March 28, 1991, appellant continued to complain about Chambers, reiterating his desire that Chambers be terminated. (11RT 733.) A month later on April 29, 1991, appellant objected to Gill referring to Rosenfeld and Chambers as "standby counsel"; Gill retorted that he regarded the lawyers as "potential" standbys. (25CT 5622.) During jury selection on May 23, 1991, Judge Gill told appellant that Rosenfeld and Chambers would be present throughout the trial, in the capacity of "standby counsel" available to "step in and represent" appellant should the court terminate his pro per status. (17RT 1903.) In court on July 2, 1991, Chambers announced that Sotille, defendant's fire expert, was present in court; appellant objected to the notion that Sotille was a "defense expert" (33RT 5384.)

Thus, it is clear that by 1991 Chambers served as appellant's standby counsel.[141] It is equally clear that from December 1990 on, he did nothing

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[141]The Court of Appeal condoned Chambers' role as standby counsel (continued...)

for appellant in the role of advisory counsel. Advisory counsel respects the pro se defendant's control of the case and provides the assistance that the defendant "desires," helping him if and only if requested to do so and honoring the defendant's strategic choices regarding investigation, preparation, and presentation of his chosen defense. Chambers consistently breached these duties as advisory counsel, attending 987.9 hearings and submitting motions over appellant's objection, and meeting with the court outside appellant's presence (987.9-16RT 1-2, 2-4 (Dec. 4, 1990); 987.9-16RT 2 (Dec. 17, 1990); 987.9-16RT 1, 4 (Dec. 24, 1990); 987.9-17RT 16-19, 24; 987.9-18-RT 2-3; 987.9-19RT 1.) The funding court's insistence on holding 987.9 hearings with Chambers and/or Rosenfeld present over appellant's objection violated appellant's confidentiality under 987.9[142] and undermined the notion that advisory counsel should render assistance only as requested. (987.9-17RT 4 [appellant complained that Chambers' presence violated his confidentiality].)

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[141](...continued)
over appellant's objection, stating that the arrangement would not interfere with appellant's *Faretta* rights so long as the trial court ensured that its funding Chambers would not interfere with its funding of appellant's chosen defense. (80CT 17248.)

[142]This Court addressed the confidentiality requirements of 987.9 in *People v. Anderson* (1987) 43 Cal.3d 1104, holding that they were breached where, in considering application for funds for psychiatric and psychological examinations, hearing judge sought advice of other judges of court and communicated, at the very least, the fact that an application had been made and had discussed the matter with the trial judge, in violation of clear implication of this section that disclosure should not be made to the trial judge. Where Chambers served as standby counsel to assist the 987.9 panel and Judge Gill, it violated statutory confidentiality guarantees for judges to make him privy to appellant's funding requests and its treatment of them.

Theoretically Chambers could have worn both hats simultaneously, serving as standby counsel *a*nd advisory counsel, but Chambers' role in advising the court whether *appellant's own* funding requests had merit shows that he was standby counsel only. (987.9-16RT 19 (Dec. 4, 1990); 987.9-16RT 8-9 (Dec. 17, 1990); 987.9-17RT 48-49.) An attorney who devalues the pro se defendant's efforts to the trial court and urges the court to deny his requests cannot, under any stretch of the imagination, be characterized as advisory counsel. If appellant had requested Chambers' advice on whether to submit the requests, and appellant had then chosen not to follow that advice and submitted the requests anyway, while Chambers stayed silent – *that* would have been acting in the role of advisory counsel.

Appellant continually objected to Chambers' involvement, and the trial court continually ignored the objections and chided him for not using the defense Chambers was preparing (in other words, for pursuing his own chosen defense). (987.9-16RT 24 (Dec. 11, 1990) [Greer commented that the court wanted to help appellant prepare for trial, but not to "commit suicide"]; 987.9-16RT 2 (Dec. 17, 1990) [appellant said "he objected to Chambers being here and the court allowing him to represent me" and that he would stop submitting requests if the court was going to allow Chambers to be present at 987.9 hearings]; 987.9-16RT 5-6 [appellant said there would be no further communication between himself and Chambers and that he did not want done any investigation that was not under his own direction]; 987.9-17RT 11-12 [appellant complained that his time spent trying to terminate Chambers was cutting into his time for trial preparation]; 80CT 17110-17127 [appellant's petition for writ of mandate filed in the court of appeal seeking to get rid of Chambers].)

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4. Rosenfeld Eventually Settled into the Role of Advisory Counsel, but at the Penalty Phase the Court Refused to Replace her When she Withdrew due to Illness in Violation of *People v. Bigelow*

Meanwhile Rosenfeld, who for the most part observed proper bounds in the role of advisory counsel, participated very little in the 987.9 funding process. Appellant in February of 1991 obtained an order from Judge Revak directing Rosenfeld not to submit any motions, or speak in court, without appellant's permission, and even after Revak subsequently vacated that order Rosenfeld for the most part followed that proscription. Appellant did permit Rosenfeld to examine a few witnesses and advise him on questions to include in examinations he conducted; she handled jury instruction motions and discussions; she arranged for an eyewitness identification expert to testify for the defense and conducted his examination; she later in trial sat next to appellant at counsel table, who sought her advice in dealing with Judge Gill. (54RT 10433.) On October 23, 1991, Rosenfeld moved for a mistrial based on bailiff misconduct and also noted that Chambers' facial expressions relating his views of appellant's in-court efforts had been a problem contributing to prejudicing the jury against appellant. (65-1RT 13093-13130.) In court on November 4, 1991, appellant gave his approval for Rosenfeld to address the court regarding jury instructions, subject to appellant's right to make an "occasional objection." (68RT 13844.) On a few occasions during the guilt trial, Rosenfeld was absent due to illness and Judge Gill denied a continuance and pressured appellant to turn instead to Chambers for "assistance." For example, when court convened on July 17, 1991, Rosenfeld and Agha were absent due to illness and Gill refused to continue the trial, he pointedly reminded appellant that Chambers was present and ready to assist. (37RT 6409-6415.) In court the next day, Rosenfeld was

present at first, but left mid-session due to illness. Again Gill refused appellant's requested continuance, continuing to pressure appellant to work with Chambers and Atwell. (38RT 6692-6714.)

When court convened for the penalty phase on November 21, 1991, Gill announced to the parties that Rosenfeld, who was absent, was unable to continue in the role of advisory counsel for appellant for medical reasons, although she might be able to assist in the penalty phase if it were continued six weeks. (72RT 14824-14826.) Gill denied appellant's request for a continuance and said that Chambers, who had taken "primary responsibility" for preparing the penalty phase, remained available as advisory counsel for appellant. (*Id.* at 14828-14829.) Appellant objected and moved to exclude Chambers from the courtroom, which Gill denied. (*Id.* 14829-14830.) Gill denied appellant's motion for the appointment of new advisory counsel to replace Rosenfeld, indicating that Chambers would stay on as "advisory counsel" and appellant could use his assistance if he chose to do so. (*Ibid.*) Chambers said that he had done a lot of work to prepare for a penalty defense, that he had "worked up" the case and gotten it ready. (*Id.* at 14856.) In an in camera hearing that same day, Gill discussed with appellant and Chambers what Chambers had done to prepare the penalty phase and whether the progress of that work had been communicated to appellant through Rosenfeld. (72RT 14859-14864.) Chambers informed the court that he had kept Rosenfeld apprized of his progress. (*Id.* at 14589.)

In court on the following day, Gill told the jury that Rosenfeld was unable to continue to help appellant due to illness, that appellant's objection to proceeding without her had been overruled, and that appellant had available the services of advisory counsel Chambers, if he chose to "utilize" them. (72RT 14866.)

On November 25, 1991, appellant's legal assistant Faulder filed a declaration from Nancy Rosenfeld indicating that she would be available by December 15, 1991, to assist appellant in the penalty phase. (19CT 4372; 72RT 14593.) Again Gill denied appellant's motion for a continuance. (72RT 14593.) On November 26, 1991, appellant's legal assistant Agha cross-examined a prosecution penalty phase witness. (73RT 15111.) On December 2, 1991, appellant's request for a delay so that Agha could prepare to cross-examine prosecution witnesses, was denied. (73RT 15189.)

At no time during the penalty phase did appellant take Gill's advice and "utilize" Chambers' "services." Rather, appellant continued to object to Chambers' presence and complained when the prosecutor or court used Chambers as a middle-man to himself. (See, e.g., 72RT 14946, 14984, 14993.) For example, in court on December 5, 1991, appellant complained that he did not have a copy of the CALJIC penalty instruction; Chambers offered him a copy of the instruction but appellant refused it. (74RT 15446.)

5. The Trial Court Violated Appellant's *Faretta* Rights Under the United States Supreme Court's Precedent in *McKaskle v. Wiggins*

The trial court, and the excessive and inappropriate involvement it permitted by Chambers, interfered with appellant's right to self-representation under the United States Supreme Court's precedent in *McKaskle v. Wiggins*.

As stated therein, the right to self-representation under *Faretta* "encompasses certain specific rights to have his voice heard," and to "control the organization and content of his own defense." (*McKaskle, supra*, 465 U.S. 168, 174.) Chambers' actions in the role of standby counsel, paired with his abdication of his duties as advisory counsel and the

trial court's insistence that appellant nonetheless turn to him for support, violated appellant's right to have his voice heard and to control the organization and content of his defense. Appellant's right to "have his voice heard" operated during pretrial proceedings as well as trial (*id.* at 179), which includes the 987.9 hearings which determined what funds would be made available for investigation and preparation of the defense. Chambers' "participation" in those 987.9 hearings, "over [appellant's] objection effectively allow[ed] counsel" to "substantially interfere" with "significant tactical decisions" and to "speak instead of defendant" on matters of importance, that is, the investigation and preparation of the defense to be presented to the jury. (*Id.* at p. 178.)

Where a defendant is represented by counsel, inadequate investigation under this section in connection with a tactical decision can amount to deficient representation for purposes of an ineffective assistance claim. For example, such claims may exist where the attorney did not seek pretrial investigative funds as permitted by statute, did not retain services of a licensed investigator, and made only minimal use of the investigator who was working on behalf of the client's codefendant. (*In re Jones* (1996) 13 Cal.4th 552, 566-567.) Thus, in the case of a represented defendant, it is counsel who controls the tactical choices concerning the scope and direction of investigation for preparing the defense. (See *Wiggins v. Smith* (2003) 539 U.S. 510, 521 [*Strickland* guarantees effective assistance of counsel who have made a reasonable investigation into the case].)

Since self-representation gives a defendant "control over tactical decisions that usually would be made exclusively by primary counsel" (*People v. Moore* (1988) 47 Cal.3d 63, 77), it also gives the defendant control over the tactical investigation of the case. Investigation and preparation of the case is a matter normally left "to the discretion of

counsel." Here, when the 987.9 court chose to grant "advisory" counsel Chambers' fund requests to prepare a shadow defense, it violated appellant's rights as stated by the United States Supreme Court in *McKaskle*: appellant's *Faretta* rights were not "adequately vindicated" because "disagreements between counsel and the pro se defendant" concerning matters that "normally would be left to the discretion of counsel" were not "resolved in the defendant's favor." (*McKaskle, supra,* 465 U.S. 168, 179.) To the extent that Chambers' funding requests were granted in Chambers' role as standby counsel, it was error to grant them to the detriment of appellant's requests.

The trial court made clear that funds for the defense were limited, and that it favored Chambers over appellant in the awarding of those funds. That this was so is shown, first, by the court designating Chambers as its consultant on what investigation and trial preparation was worthwhile. (See 987.9-17RT 11 [987.9 court had a "fiduciary obligation" to fund only those requests that had "potential merit" as related to the question of whether "the work done is reasonable necessary and related to the defense of the case"]; (987.9-16RT 19 (Dec. 4, 1990) [court solicited Chambers' view on whether appellant's own funding requests were "reasonable," "necessary," or had "merit"] 987.9-16RT 8-9 (Dec. 17, 1990) [same]; 987.9-17RT 48-49 [same].)

The trial court's concern about wasted money was apparent. On December 4, 1990, Judge Greer complained about the "dollar bills and dollar bills and dollar bills" the court had pumped into the "front end of the case," saying that he would not continue to "pour money [into] the front end [of the case] for people to carry [appellant's] briefcase around." (987.9-16RT 5 (Dec. 4, 1990).) He wanted to see something, *other than* what he perceived to be the un-efficacious work of appellant's law clerks Agha and

Bekele, to come out the back end "towards the benefit of defending Mr. Waldon." (*Ibid.*) Greer said that given the imminent trial date he would authorize "whatever [was] necessary" that *Chambers* endorsed as reasonable for investigation and/or experts. (*Id.* at 4.)

Some of the services for which the court granted Chambers' funding requests were inherently "zero-sum." Thus, when Milliken granted funds for Chambers to hire Dr. Hubbard as a psychiatric expert, it was a given that appellant would be unable to hire a psychiatric expert of his own choosing. (987.9-17RT 24-25.) To get funds for an investigator to help build appellant's chosen defense, Milliken said appellant would have to show such services were needed "over and above" the work authorized by Atwell to support Chambers' shadow defense. (*Id.* at 26-27.) On October 28, 1991, it was only with great reluctance that Milliken granted Rosenfeld funds to pay investigator Cotton for a few hours or work she had done to support the presentation of witnesses as authorized by appellant; Rosenfeld reminded Milliken that previously-expended funds for investigation by Atwell were *not* at appellant's request and did *not* further appellant's chosen defense. (987.9-31RT 5-13.) Milliken admitted that there had been and were "a number of people working at cross purposes" in the case. (*Id.* at 5.)

During the same time the court was granting nearly all of Chambers' funding requests and pressuring appellant to rely on Chambers and Rosenfeld to prepare him for trial, it was cutting the hours approved for appellant's law clerk and paralegal, Agha and Bekele (i.e., those Judge Greer deemed appellant's "briefcase carriers"), to assist him. (987.9-17RT 28-29 [court approved funding fewer hours for work by Agha and Bekele than appellant requested]; 987.9-17RT 39 [court funded fewer hours for work by Agha and Bekele than appellant said he needed, stating his confidence that appellant's needed "tasks [could] get accomplished on the

authorizations he [had] made" since appellant could use advisory counsel as a resource]; 987.9-17RT 53 [court approved fewer hours for work by Agha and Bekele than appellant requested]; 987.9-17RT 54-55 [same]; 987.9-18RT 4-6 [same]; 987.9-19RT 2 [same]; 987.9-19RT 11-12 [same].)

On July 9, 1991, Milliken denied appellant's request for funding to hire Jeffrey Frederick as a paralegal, commenting that the case was of a type where appellant needed tactical planning and execution – viz. "the assistance of counsel – not the assistance of more law clerks." (987.9-25RT 3, 8.) Milliken complained that "a tremendous waste of funds" had occurred in the case (*id.* at 6) and admonished Frederick that if in the future he were authorized to work on the case, such work could not include "the typing of Esperanto materials," under "penalty of contempt of court," or any tasks other than the *"legitimate preparation of the defense."* (*Id.* at 6-7, emphasis added.)

Appellant explained to Milliken why it was *his* defense that he was entitled to present, even if the court considered Chambers' shadow defense to be more "legitimate":

> [T]he work [Frederick previously had done to prepare an Esperanto expert appellant wished to call was] part of my theory of defense, and, as a result, I have a constitutional right to present that . . . [and] the right to present evidence of my theory of defense. And, you know, it's one thing to stand up and say, "well you were engaged in this or that activity," which the twelve members of the jury have no idea what it was . . . but when you put an expert witness on the stand who testifies to what it is and then the jury themselves sees it in manuscript form, then they're able to understand what it is and then they're able to understand my theory of defense. So, you know, it wasn't just penalty phase preparation. It was also case in chief preparation.

(987.9-25RT 9-10.) However, Milliken was not swayed by appellant's logic.

The 987.9 court, as a result of its preference for Chambers and advisory counsel and the shadow defense he was preparing, denied appellant's requests for other funds as well. (987.9-17RT 45 [approving only $200 of the funds appellant requested for use in organizing file materials]; 987.9-21RT 1-7 [denying appellant's request for funds for a typist]; 987.9-25RT 13-14 [denying request for $500 for telephone calls]; *Id.* at 15-17 [taking appellant's mid-trial request for costs for telephone calls, while simultaneously granting Chambers funding request]; 987.9-27RT 2-10 [denying appellant's request for funding to have a model of a crime scene made].)

Appellant's repeated complaints, although they fell on deaf ears and apparently irritated Judges Milliken and Gill to no end, were important to protecting his right to self-representation. For example, on December 24, 1990, appellant complained to Judge Greer that Chambers was "not" his advisory counsel," there would be no "further communication" between Chambers and appellant, and appellant "did not want . . . an investigation done that [Chambers] had recommended or in any way authorized." (987.9-16RT 6 (Dec. 24, 1991.) On January 3, 1991, Judge Milliken asked appellant what he wanted Chambers to do to advise him and appellant said "there will be absolutely no communication between Mr. Chambers" and himself "at any time in the future," because Mr. Chambers was "not [his] advisory counsel." (987.9-17RT 12.) Appellant complained on January 8, 1991, that Chambers would use funds for Hubbard to undermine appellant's guilt and penalty defense. (987.9-17RT 24-25.) On February 1, 1991, appellant complained to Judge Gill about Chambers having submitted motions behind appellant's back, asking that Chambers be terminated. (8RT 477-478.) On February 15, 1991, appellant stated that Chambers and Atwell

no longer were his investigator and advisory counsel and asked Judge Gill to exclude them. (9RT 576.)

The decisions in *McKaskle* and *Stansbury* make clear that a pro se defendant who permits advisory counsel's direct involvement in the case can be deemed to have waived his objection to, or even to have invited, participation by the attorney. This Court stated in *Stansbury*,

> Once a pro se defendant invites advisory counsel to assist him, his standing to complain that counsel interfered with his presentation of a defense sharply diminishes. (*McKaskle, supra,* 465 U.S. at p. 182, 104 S.Ct. At p. 953.) The court retains authority to exercise its judgment regarding the extent to which such advisory counsel may participate against defendant's wishes. (*Id.* at p. 178, fn. 8, 104 S.Ct at p. 951, fn. 8; *People v. Clark*, *supra*, 3 Cal.4th at p. 115, 10 Cal.Rptr. 554, 833 P.2d 561.)

(4 Cal.4th 1017, 1044.) In the words of the United States Supreme Court, "a defendant does not have a constitutional right to choreograph special appearances by counsel. Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence." (*McKaskle, supra*, 465 U.S. 168, 183.)

Thus, when appellant before and during trial adamantly refused to cooperate with Chambers in any way (even going so far as to refuse to take papers handed to him by Chambers in the courtroom) (74RT 15446), he acted to make sure that he never could be said to have "acquiesced" in Chambers' involvement or in the trial court's characterization of Chambers as appellant's "advisory counsel."

This case is not like *Doane*, where the defendant claimed his right to effective assistance of advisory counsel was violated by advisory counsel's *failure to do* something at trial or otherwise provide needed legal assistance.

(*Doane, supra*, 200 Cal.App.3d 852, 859.)[143] Rather, appellant contends that his *Faretta* rights were substantially interfered with by the role the trial court assigned to Chambers as standby counsel coupled with its insistence that appellant use him as "advisory counsel" together with the always-implied threat that the court would revoke appellant's pro se status and give full strategic control over the trial defense to the attorney.

E. Reversal is Required

For reasons explained above, the conviction and sentence must be reversed without any consideration of prejudice.

Under *McKaskle v. Wiggins*' test for whether advisory counsel's interference in the pro se case violated the Sixth Amendment, a rule of per se reversal should be employed.[144]

In *Wiggins v. Estelle* (5th Cir. 1982) 681 F.2d 266, the court stated the test as follows:

> [T]he rule that we establish today is that court-appointed [advisory] counsel is "to be seen, but not heard." By this we mean that he is not to compete with the defendant or supersede his defense. Rather, his presence is there for advisory purposes only, to be used or not used as the defendant sees fit.

(681 F.2d at p. 273.) The court stated that because the *rule was so stringent* and would lead to *findings of error for even the most minor infractions*,

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[143]Indeed, appellant may well seek relief on the ground that he received ineffective assistance from Sanchez or Rosenfeld as advisory counsel, with respect to specific legal tasks or areas as to which appellant had requested direct participation (viz., Rosenfeld's preparation for and examination of the eyewitness identification expert). Such claims, however, will be raised in habeas rather than herein. (*People v. Doane, supra*, at 864-865 & fn. 9.)

[144]Because no violation was found by the Supreme Court to have occurred under that test, the Court did not address whether per se reversal or harmless error would apply. (465 U.S. 168, 188.)

courts should apply harmless-error review under the *Chapman* standard. (*Id.* at p. 274.)

However, in reversing the Fifth Circuit the United States Supreme Court imposed a less stringent rule, declining to impose a "categorical bar on participation by [advisory] counsel in the presence of the jury." (*McKaskle v. Wiggins, supra*, 465 U.S. 168, 182.) Instead, the Court set forth numerous factors to consider, such as whether the defendant invited the lawyer to participate in the trial, whether advisory counsel's efforts furthered the tasks and objectives the defendant had "clearly shown he wishes to complete," whether there was "significant" interference with the defendant's actual presentation of his defense, and whether counsel's participation destroyed the jury's impression that the defendant was acting pro se. (*Id.* at pp. 182-185 ["In our judgment counsel's unsolicited involvement was held within reasonable limits."].) Under the new rule, a finding of error will be made only in the case of significant infractions, and the rationale for imposing a standard of harmless-error review does not apply. In the few and extreme cases that meet the *McKaskle* test for a constitutional violation, like this one, reversal without consideration of prejudice is the appropriate remedy to vindicate the constitutional right.

Just as harmless-error review is inappropriate for cases involving complete deprivation of the defendant's right to self-representation, so too it cannot apply to cases where advisory counsel's participation "significantly" interfered with appellant's pro se chosen defense.

> The nature of the right to defend pro se renders the traditional harmless error doctrine particularly inapposite. Unlike other constitutional rights, the right to represent onself is not 'result-oriented.' The normal operation of the harmless error doctrine is in cases where the challenged error concerns a right accorded the defendant to facilitate his defense or to insulate him from suspect evidence . . . . By contrast, we recognize the

> defendant's right to defend pro se not primarily out of the belief that he thereby stands a better chance of winning his case, but rather out of deference to the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law. A defendant has the moral right to stand alone in his hour of trial and to embrace the consequences of that course of action.

(*Chapman v. U. S.* (5th Cir. 1977) 553 F.2d 886, 891.)

For the same reasons, the interference that occurred in this case, though stopping short of a complete and explicit denial of appellant's Sixth Amendment rights, warrants reversal without consideration of prejudice. As Justice White explained, application of the "result-oriented harmless-error standard" to cases like this one, where appellant "was allowed to proceed *pro se* but the conduct of his appointed [advisory] counsel inhibited his ability to do so, would result in a denigration of the right." (*McKaskle v. Wiggins*, *supra*, 465 U.S. 168, 198 [dis. opn. of White, J.]

Here, the uninvited and interfering participation of Chambers was far beyond "reasonable limits" and caused "significant" interference with appellant's ability to obtain funds, and his actual investigation, preparation, and presentation of his chosen defense. Appellant had a right under the Sixth Amendment to be the captain of his own ship and pursue his own defense – irrespective of whether the choice to do so was a wise or foolish one. Applying harmless-error review would result in a denigration of that right, and a rule of per se reversal must apply for the reasons stated by the United States Supreme Court in *Faretta* itself.

Per se reversal also applies in this case under the principles stated in *People v. Bigelow*. As a factually complex capital trial with a pro se defendant having no prior experience in the criminal justice system, it would have been an abuse of discretion for the trial court to have denied appellant's request for appointment of advisory counsel. The trial court

here appointed two advisory counsel to advise and assist appellant, but then took one away when it re-designated Chambers as standby counsel for the assistance of the court, not appellant. As for Rosenfeld, her hands were tied regarding the ability to actively assist in appellant's investigation and preparation of his chosen defense, because the trial court gave priority to funding Chambers' expert preparation and investigation through Atwell and refused to "double fund" the case. Rosenfeld's scope was so circumscribed that appellant in effect had the assistance of no advisory counsel, which mandates reversal under *People v. Bigelow*, *supra*, 37 Cal.3d 731, 743.

During the penalty phase Rosenfeld was absent altogether and appellant was unsupported by advisory counsel. Although Judge Gill took the position that Chambers was present and ready and willing to serve as advisory counsel, appellant's relationship with Chambers was, by that time, beyond repair and any notion that Chambers would assist appellant in presenting a mitigation case of appellant's strategic choosing was out of the question. Further, as argued above, appellant's "acquiescence" to Chambers' participation could have been taken as waiving his previous objection to the role Chambers was playing in the case. Thus, the penalty judgment must be reversed because appellant was deprived of advisory counsel at the penalty phase.

Reversal also is required because the court's errors in connection with the role of advisory counsel and its failure to vindicate appellant's control of *his* defense nullified the validity of any knowing, intelligent, and voluntary waiver he made of his right to counsel. As demonstrated above, the trial court repeatedly erred in the way it defined and described the proper role of counsel, and blurred relevant distinctions when granting *Faretta* status while promising appellant the assistance of "co-counsel," "advisory counsel," or "standby counsel." Combined with that, the court's subsequent

errors and due process violations in making Chambers its standby counsel while pressuring appellant to cede control of the case to Chambers vitiated appellant's knowing, intelligent and voluntary decision to choose self-representation and forego representation by counsel.

That the trial court's errors concerning advisory counsel violated due process and mandate reversal in *this* case makes particular sense, considering appellant's mental condition and his difficulties in trusting others and sharing control. As stated in *Faretta*, "[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him." (422 U.S. at p. 834.) The problems with appointed advisory counsel and the trial court's refusal to address or correct them inevitably were a factor in appellant's belief that "the law contriv[ed] against him," viz, that he was a victim of a cointelpro conspiracy that grew to include attorneys and court staff. Assuming that appellant *was* competent to stand trial and to represent himself, due process is offended where the trial court, on full notice of appellant's obsession concerning conspiracies and control of the defense, appointed advisory counsel bent on preparing a shadow defense irrespective of appellant's desires, and continually pushed appellant to present that defense in lieu of his chosen one.

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XVII.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO PRESENT A DEFENSE UNDER THE SIXTH AMENDMENT OF THE FEDERAL CONSTITUTION BY EXCLUDING THE TESTIMONY OF WESLEY SWEARINGEN AS AN EXPERT WITNESS IN SUPPORT OF THE COINTELPRO DEFENSE

A. Introduction

Judge Gill made it clear at trial that he was not going to let appellant present his cointelpro defense. Consistent with that ruling, Gill blocked appellant from making argument and introducing evidence that would have built the floor for the defense (for example, that appellant was Cherokee; that Cherokee people had lost their autonomy; that appellant was involved in movements and had founded organizations having certain objectives including American Indian autonomy; that appellant, his witnesses, and others had been targeted by cointelpro plots). Then, Gill refused to let appellant call former FBI Agent Wesley Swearingen as an expert to explain to the jury what a cointelpro is and the "symptoms" that accompany one. Gill ruled Swearingen's testimony inadmissible due to lack of relevance, based on his view that appellant had introduced nothing to support it. In doing so, Gill violated appellant's right to have "'a meaningful opportunity to present a complete defense" under the federal constitution and reversal is required. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690, quoting *California v. Trombetta* (1984) 467 U.S. 479, 485; *Holmes v. South Carolina* (2006) 547 U.S. 319.) Gill's rulings implicated appellant's rights to due process, to present a defense and call witnesses in his own defense, to testify, and to a reliable capital verdict (U.S. Const. V, VI, VIII and XIV Amends) and were error requiring reversal of the guilt and penalty verdicts.)

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B. Legal Background

In *Holmes, supra*, 547 U.S. 319, 324, the United States Supreme Court explained the interplay between a defendant's rights under the federal constitution to present a defense and a state's interest in making rules governing the admission of evidence, as follows:

> [S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *U.S. v. Scheffer* (1997), 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998); see also *Crane v. Kentucky*, 476 U.S. 683, 689–690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); *Marshall v. Lonberger* (1983) 459 U.S. 422, 438, n. 6, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 302–303, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Spencer v. Texas*, 385 U.S. 554, 564, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane, supra*, at 690, 106 S.Ct. 2142 (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); citations omitted). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer, supra*, at 308, 118 S.Ct. 1261 (quoting *Rock v. Arkansas*, 483 U.S. 44, 58, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)).

Addressing sections of this state's Evidence Code, this Court explained in *People v. Hall* (1986) 41 Cal.3d 826, 834, that trial courts should be careful when considering whether a defendant's exculpatory evidence should be excluded at trial, saying:

> [I]f relevant[, evidence] is admissible (§ 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion (§ 352). We recognize that an inquiry into the admissibility of such evidence and the balancing required under section 352 will always turn on the

> facts of the case. Yet courts must weigh those facts carefully. They should avoid a hasty conclusion [that the evidence offered by the defendant is] "incredible." Such a determination is properly the province of the jury. [Fn. omitted.] Furthermore, courts must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice, or confusion. As Wigmore observed, "if the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt." (1A Wigmore, Evidence (Tillers rev. ed. 1980) § 139, p. 1724.)
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> As stated in *People v. Reeder* (1978) 82 Cal.App.3d 543, 552: "[I]n criminal cases, any evidence that tends to support or rebut the presumption of innocence is relevant." (*People v. Whitney* (1978) 76 Cal.App.3d 863, 869. This same principle was set forth in persuasive language in *People v. Mizer* (1961) 195 Cal.App.2d 261, 269 [15 Cal.Rptr. 272]: "[I]t is fundamental in our system of jurisprudence that all of a defendant's pertinent evidence should be considered by the trier of fact."

Moreover, under federal constitutional principles, "a defendant's due process right to a fair trial requires that evidence, the probative value of which is stronger than the slight-relevancy category and which tends to establish a defendant's innocence, cannot be excluded on the theory that such evidence is prejudicial to the prosecution." (*Ibid.*)

Regarding trial judges' discretion to exclude relevant defense evidence, the Court in *Holmes* said:

> While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. See, e.g., Fed. Rule

> Evid. 403; Uniform Rule of Evid. 45 (1953); ALI, Model Code of Evidence Rule 303 (1942); 3 J. Wigmore, Evidence §§ 1863, 1904 (1904). Plainly referring to rules of this type, we have stated that the Constitution permits judges "to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Crane*, [*supra*], 476 U.S., at 689-690, 106 S.Ct. 2142 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); ellipsis and brackets in original). See also *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (plurality opinion) (terming such rules "familiar and unquestionably constitutional").

(*Holmes*, *supra*, 547 U.S. 319, 326.)

This Court has held that to meet the threshold for a due process violation a defendant must show the trial court excluded "relevant evidence of significant probative value." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.)

C. Factual Background

Appellant sought to introduce in support of his defense the testimony of Wesley Swearingen, a former FBI agent to testify as an expert on COINTELPRO, and Judge Gill addressed the issue several times and gave varying grounds for excluding the evidence. (See e.g. 62RT 12360 et seq. [October 9, 1991, proceeding wherein Gill ruled the evidence would not come in]; 62RT 12515-12527 [October 10, 1991, proceeding wherein Gill agreed to reconsider the question]; 63RT 12619 [October 15, 1991, proceeding wherein Gill denies reconsideration, stating that the evidence was irrelevant and whatever slight probative value it might have was grossly, manifestly outweighed by the dangers of confusing and misleading the jury, putting the FBI on trial, raising all sorts of irrelevant issues, and some consumption of time].) On October 28, Judge Gill returned to the issue, acknowledging that he needed to guard against substituting his

judgment for that of the jurors, and that it might be appropriate to conduct an admissibility hearing under Evidence Code section 402. (66RT 13355.) Gill held the section 402 hearing the next day. (*Id.* at 13480.)

Upon questioning by the prosecutor, Wesley Swearingen testified that he was a retired FBI agent, retired since 1977. (66RT 13483.) Swearingen had testified in January of 1985 in the case of Elmer Pratt, the former Black Panther Leader. (*Id.* at 13485.) Swearingen said that under the direction of J. Edgar Hoover, the FBI often investigated those in political movements linked to ethnic identity, for example, Pratt as well as Dennis Banks and Russell Means, who were "gaining a following in the Indian movement," and make them the targets of counterintelligence, viz., aggressive investigation, to keep them from organizing (COINTELPRO). (*Id.* at 13486, 13490-13491.) Targets also could include religious organizations such as the Nation of Islam. (*Id.* at 13492.) As an FBI agent for 17 years, Swearingen had participated in COINTELPRO efforts under order of the agency, although he did not really understand why the FBI wanted to break up political organizations. (*Ibid.*) Since leaving the service in 1977, Swearingen had stayed informed by reading media reports and by reviewing his own files that he had obtained from the FBI through Freedom of Information Act requests. (*Id.* at 13486-13487.)

The likelihood that a claimed victim in fact was a target of a COINTELPRO plot could be established by the presence of certain "symptoms." (66RT 13493.) One such "symptom" was the individual's involvement in a group engaged in a political movement, typical of those the FBI was likely to target. (*Id.* at 13492.) Another symptom was when an individual charged with a crime claimed to be innocent; although not all who claimed to be innocent were victims of COINTELPRO, some who actually were innocent, like Elmer Pratt, had been targets of COINTELPRO

and been convicted. (*Id.* at 13494.) Swearingen testified about another individual who was charged with a crime and claimed to be innocent, but was convicted. This individual, Mr. Moore, was a leader in New York and the target of a COINTELPRO and his conviction was later set aside. (*Ibid.*) Swearingen said he did not mean to say that the FBI would murder "innocent bystanders" and then frame a COINTELPRO target to pin the murder on him. (*Id.* at 13495-13496.)

Another symptom was that the claimed victim lacked a criminal history. (66RT 13496.) Another symptom addressed whether the complaining victim had a following within the group or the potential of acquiring one. (*Id.* at 13497.) Swearingen used as an example people in organizations like the Communist Party or Socialist Workers Party who were in leadership positions or were "rising messiahs," upon whom FBI agents would try to "bring up dirt" in order to "neutralize" them. (*Id.* at 13496-13497.) Another symptom was that the claimed COINTELPRO victim recently had been befriended by a stranger (who typically would be an FBI informant). (*Ibid.*) Under the next symptom, FBI agents would manipulate the news media by feeding it disinformation or false stories about the target to discredit someone the FBI "wanted neutralized." (*Id.* at 13498.)

Another symptom involved whether the victim had suffered from obstructive actions such as searches by law enforcement agencies; Swearingen testified that FBI agents carrying out COINTELPRO plots took steps to disrupt "the activities of the individual and the group," employing methods "limited [only] by the imagination" of the particular agent to "make life miserable" for the target. (66RT 13499.) Another symptom was that the victim, prior to being accused or charged, was under surveillance by, or often in the company of, one or more federal agents. (*Id.* at

13500-13501.)[145] The final symptom was that formerly close friends of the target would become cautious or fearful in their association with the complaining COINTELPRO victim. (*Id.* at 13502.) Swearingen cited the example of Elmer Pratt; FBI associates falsely had convinced Pratt's friends that he had committed the murder with which he was charged, resulting in their refusal to testify in his behalf. (*Ibid.*)

Appellant also questioned Swearingen. (66RT 13504.) Swearingen said he was aware that Russell Means had been a defendant in multiple trials, in some he had been found "not guilty," and there was "no doubt" Means had been the target of a COINTELPRO. (*Id.* at 13505-13506.) Similarly, false evidence was presented against Elmer Pratt in his trial, leading the jury to find him guilty. (*Id.* at p. 13510.) Swearingen said if the complaining COINTELPRO victim were an Indian autonomy activist who had founded an international organization in Europe to recruit non-Indians to support the movement, some of the symptoms of COINTELPRO would be met. (*Id.* at 13510.) Swearingen said that since leaving the FBI and into the present, he had read books and reports about COINTELPRO, including publications from United States Congressional hearings. (*Id.* at 13511.)

On further cross-examination by the prosecutor, Swearingen said that regarding CIA activities related to COINTELPRO, he had only one personal contact in the CIA, whose work had involved foreign counterintelligence. (66RT at 13512.) Swearingen said that typically agents conducting COINTELPRO would try to keep their target from knowing their identity as federal agents (*ibid.*), but on redirect he stated that he knew of at least one instance where the target had become aware of being targeted when the

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[145]Swearingen said he was aware of instances where a group of federal officers might wear shirts or jackets marked "federal agents" on the back. (*Ibid.*)

COINTELPRO still was in process. (*Id.* at 13513.) Appellant argued that the defense contended a cointelpro was conducted while the prosecutor said none was, which made Swearingen "the most relevant witness of the entire case." (66RT 13514.) The prosecutor countered that the testimony was offered to bolster appellant's alibi evidence, that Swearingen lacked current knowledge because he testified the cointelpro program had been discontinued, and therefore was not a qualified expert because there was no nexus between his testimony and appellant allegedly being a target by the government. (*Id.* at 13515.) Appellant argued that whether he was the target of a cointelpro plot was disputed and highly material. (*Ibid.*) Appellant argued that his testimony, in addition to that of his witnesses Brigitta Sequoayah, Eliza Kehlet, Spruth, Dr. Wells, his ex-wife Keiko, his sister Kay as an alibi for the December 7 crime, and other witnesses made Swearingen's testimony relevant, and that the jury should decide the weight of the evidence. (*Id.* at 13518-13519.)

Gill stated his ruling and the reasons for it. He considered the basic inquiry to be one of relevance, as defined in section 210 of the Evidence Code, and believed that section Evidence Code 352 of the code also was important. (66RT 13519.) Gill thought that Swearingen would be asked to give an opinion related to this case, and there was doubt about the basis for his opinion because he had not been in the FBI for years and could not confirm current FBI activity. (*Id.* at 13520.) Gill noted that appellant's definition of COINTELPRO was from the 1970s. (*Id.* at 13521.) Gill rejected the idea that whether the alleged COINTELPRO target claimed to be innocent was important. (*Id.* at 13522.) As to the symptom of being in a "leadership position" or a "rising messiah" in the target group or organization, Gill was convinced that no one in the American Indian Congress considered appellant to be a leader. (*Id.* at 13523-13524.) While

appellant might be a leader of Esperantists in Europe, there was no reason to think the FBI or CIA would have any interest in conducting a cointelpro against them. (*Ibid.*) There was no evidence of media disinformation, and no evidence of being deprived due process in the legal system (another symptom of COINTELPRO). (*Id.* at 13525.) There was no evidence that law enforcement agents had made appellant's life miserable, nor was there evidence that appellant had been under surveillance or been in the company of federal agents and informants. (*Ibid.*) As to whether formerly close friends had become cautious or fearful in their association with appellant, Gill had observed the contrary, in that the court had received hundreds of letters and petitions in support of appellant. (*Ibid.*)

Gill thought that Swearingen's testimony had no relevance to appellant's alibi defense for certain crimes. (66RT 13626.) As to the Meredith robbery, appellant appeared to be claiming that the FBI actually committed the crime and framed him by putting the purse in the car – but Swearingen had said the FBI would not actually go out and commit crimes against innocent persons as part of a cointelpro. (*Id.* at 13527.) Gill could not see any relevance of Swearingen's testimony to appellant's theory that the FBI planted in appellant's car evidence from crimes that someone else had committed. (*Ibid.*) To the extent that the evidence had any "very tenuous, slight arguable probative value," such value was "manifestly and compellingly outweighed by the 352 considerations of unduly consuming time, confusing or misleading the jury." (*Ibid.*) Admitting the evidence would require relitigating the Elmer Pratt trial and other instances of COINTELPRO that had, in Gill's view, "absolutely nothing to do with . . . this case." (*Ibid.*) Although Swearingen was "credible" there was no basis of relevance to get him involved in the case. (*Id.* at 13528.) Appellant's showing did not "establish the necessary nexus or link or connection" of

Swearingen's testimony to the case. (*Id.* at 13529.) Gill told appellant he still could argue that he was framed, but the jury would have to resolve that issue without Swearingen's testimony, which was not relevant. (*Id.* at 13533.)

Appellant summed up his position as follows:

> Your Honor, may I respectfully and humbly object to the court preventing me from presenting evidence that these symptoms, for example, exist. I tried to elicit testimony concerning my organizations and their international membership and you prevented that. Now you say that because there was no evidence on the record, not testimony on that, that you can't now let me have a cointelpro witness expert. There was no testimony because you deliberately prevented that.

(66RT 13533.) Gill countered that there was no evidence that the FBI even knew that appellant, or his organizations, or Poliespo existed, or that it would have the slightest interest in appellant or his organizations if it knew about them. (*Id.* at 13533-13534.)

D. Exclusion of Swearingen's Testimony was Error Under State law and Violated Appellant's Federal Constitutional Right to Present a Complete Defense

Judge Gill's ruling turned on the questions of relevance and how the probative value of the evidence measured up against the danger that introducing it would waste time, prejudice the prosecution, or confuse and/or mislead the jury.

Evidence Code section 350 provides that only relevant evidence is admissible, and section 210 defines "relevant evidence" as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence Code section 352 gives a trial court the discretion to exclude evidence, however, "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create

substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

1. Judge Gill Prejudged Appellant's Defense and Blocked him From Laying the Factual Predicate for Swearingen's Testimony

Appellant's entire defense was that he was innocent of the charged crimes and that he was "framed" for the charges because he was the victim of a cointelpro plot due to his role as a leader in movements for Esperanto and Poliespo language and American Indian autonomy. In order to present this defense, and no other, appellant claimed his right to self-representation and waived the assistance of counsel, because experience in this case told him that no attorney appointed to represent him would present his chosen defense.

However, Judge Gill was equally determined to bar appellant from presenting this defense. From the time voir dire for the purposes of death qualifying the jury opened, Gill expressed his disbelief that appellant was a Cherokee Indian, saying that he had agreed to call appellant by an Indian name in court only to get the trial started: "I don't think for a minute that you're a Cherokee Indian. I do that 'cause I'll call you whatever name you want to be called to get this on with, get this trial on with." (20RT 2635.) Later Gill admonished appellant that he did not "see any defense that is going to be based on whether" appellant was or was not "an Indian" or part of any "movement." (29RT 4612.)

Gill made his position even more explicit: he would not permit a "defense" involving any movement because there was "zero relevancy to any issues which will be before this jury." (29RT 4633.) Thus, Gill would not permit appellant to question prospective jurors on their views about the "goals" of Esperanto, deeming it irrelevant because there was not "one shred of evidence" that such goals had caused appellant "to be accused of

crimes." (31RT 4874.) Still later during voir dire, Gill explained that the "substance of the Indian autonomy movement" had "little, if any relevance" to the defense, except perhaps to establish how witnesses appellant might call knew him, what they knew of him, and what interests they shared with him. (31RT 5059-5060.)

Later during trial, Gill said that there was no reason, related to the trial, for appellant to copy material to send to individuals in the Esperanto movement, stating that appellant's desire to contact them was "irrelevant" and had no "relationship to this trial." (47-1RT 8931.)

Appellant said in his opening statement that he had founded four humanitarian organizations in 1984 related to Esperanto and the autonomy of native people, and as a result he was targeted in a "cointelpro" conducted by the FBI and/or the CIA. (54RT 10311-10336.) Gill sustained his own relevance objection when appellant said he would put on evidence of the history of cointelpro tactics by federal law enforcement (*id.* at 10343), and repeatedly ruled that appellant's offered evidence to support his cointelpro theory was irrelevant. Gill said that he would not permit appellant to talk to the jury about cointelpro, because it was "irrelevant" (*id.* at 10361), and directed appellant not to discuss his hope to have the authors of the *Cointelpro Papers* testify until the admissibility of such testimony had been determined. (*Id.* at 10375.)

Edwin Spruth testified that he had first met appellant in early December of 1985 and that appellant was riding a unique bike. (55RT 10633.) Gill would not permit Spruth to demonstrate how the bike was unique, notwithstanding appellant's assertion that the bike's function was one reason the FBI and CIA launched a cointelpro against him and framed him for crimes he did not commit, expressing doubt that appellant would offer cointelpro evidence. (55RT 10635-10636.) Spruth continued with his

testimony telling the jury that on December 14 at 10:00 p.m. he met appellant at a Denny's restaurant at Clairemont, where they stayed together for about two and a half hours. (*Id.* at 10638.) Appellant drove up to the Denny's in a blue Honda Accord, and Spruth looked in the cargo area of the car and it was 80% clear; Spruth saw no computer monitor nor suitcases in the car. (*Id.* at 10640-10641.) Spruth testified that a caller identifying himself as Mark Williams called Spruth on December 14, 1985 (*id.* at 10668-10669), but Gill sustained hearsay and relevancy objections to Spruth's testimony about what Williams had told him (*id.* at 10669-10671), and relevancy objections to appellant's questions to Spruth on the subject of cointelpro. (*Id.* at 10673-10676.)

Gill said he would sustain relevancy objections to similar questions, if they were directed to appellant's next witness, Eliza Kehlet. (55RT 10693.) Gill allowed appellant to ask Kehlet a few questions about Esperanto to establish Kehlet's connection with appellant, but sustained a relevance objection on the question of whether Kehlet could communicate as well in Esperanto as in German or Danish. (*Id.* at 10708-10712.) Appellant asked Kehlet what his reputation was in the Esperanto community; Gill sustained a relevance objection and told appellant he could not ask such questions until he first showed that he was accused of crimes because he was an Esperantist. (*Id.* at 10727.) Gill also sustained relevance objections to appellant's questions about Kehlet's opinion of the goals of the organizations appellant had founded and about the qualities of Poliespo. (*Id.* at 10729-10730.)

Gill said that he would not allow Ward Churchill, an expert on cointelpro that appellant wished to call, to testify until appellant first presented competent evidence of cointelpro. (55RT-1 10796-10797.) Later, Gill said that if appellant did not testify Gill would not allow any evidence

of cointelpro to come within "a hundred yards" of the trial. (56RT 10918.) Gill allowed another defense witness, Bernice Garrett, to testify that she had become acquainted with appellant through Esperanto activities (*id.* at 11027-11032), but sustained the prosecutor's relevance objection when he asked Garett about appellant's book *The Fundamentals of Poliespo*, saying that questions about the nature of Poliespo were irrelevant and invited speculation. (*Id.* at 11041-11042.) Garrett testified that she knew about the goals of the United Nations of Autonomous Peoples, but Gill sustained a relevance objection barring her from stating what those goals were. (*Id.* at 11050-11051.) Appellant said the goals of the organization were related to why he was charged with crimes he did not commit, and Gill said "the goals of these organizations ha[ve] absolutely nothing to do with why you were charged." (*Id.* at 11051.)

Later, when appellant asked another defense witness, Mr. Wells, whether he thought that Poliespo had good qualities, the prosecutor's relevancy objection was sustained. (57RT 11120.) Similarly, Gill sustained a relevancy objection to appellant asking another defense witness, Sidney Culbert, whether he thought appellant's intent in creating Poliespo was a "humanitarian" one. (58RT 11377.)

Appellant's wife Birgitta Sequoyah testified that she had been with appellant from early in the afternoon of December 19, 1985, until after midnight. (58RT 11490-11503.) On December 20, 1985, she was with him in Imperial Beach from around 2:00 p.m. (*id.* at 11465), and after she returned from getting cigarettes she saw him walking with Mark Williams and another man. (58RT 11470-11473.) Several men with the words "Federal Agent" on their sweatshirts, wearing ski masks, were also there. (*Id.* at 11474-11475.) One of the men kicked appellant and said that it was for his Cherokee autonomy and Poliespo horseshit. (*Id.* at 11476.) She ran

back toward appellant's car, and saw Mark Williams drive away in appellant's car. (*Id.* at 11476-11477.)

Gill ruled irrelevant and inadmissible Birgitta's testimony about appellant's reputation as the creator of Poliespo and about her knowledge of Native American opinion regarding Poliespo. (59RT 11551.) The court sustained the prosecutor's objection to questions about the goals of the organizations appellant founded, whether Birgitta had assisted Indians and tribes who were the victims of cointelpro, and whether she was a victim of cointelpro. (*Id.* at 11559.) Her answer to the question about appellant being a victim of cointelpro was stricken and Gill told appellant to stop asking questions about cointelpro. (*Id.* at 11561.) Gill would not permit Birgitta Sequoyah to testify of her knowledge as to whether the CIA recruited an army of Native Americans and sent them to Nicaragua. (*Id.* at 11620-11621.)

Birgitta testified that when she was in appellant's car on December 20, 1985, she did not see there any computer components, suitcases, purses, switchblades, ski masks, or guns. (59RT 11715-11718.) Later appellant asked Birgitta Sequoyah about another witness, Dietrich Wiedmann, and whether that witness was planning to publish a book, *NI Sequoyah versus the CIA*. (*Id.* at 11736.) A relevance objection was sustained; Gill told appellant to stop asking questions about this or he would hold him in contempt. (*Ibid.*)

The court similarly sustained the prosecutor's relevance objections to appellant's questions to defense witness Sharon Colligan regarding Poliespo and the United Nations of Autonomous Peoples. (59RT 11766.) A relevance objection to appellant's question about the World Poliespo Organization was sustained. (*Id.* at 11771.)

When Keiko Sequoyah, appellant's former wife, testified for the defense, Gill sustained all of the prosecutor's relevance objections to appellant's questions about whether she had helped distribute *The Fundamentals of Poliespo* to Esperantists in Japan, whether appellant was the creator of Poliespo, and whether he was the founder of four organizations in Switzerland in 1984. (60RT 11920.)

When appellant's aunt and sister-by-adoption Vivian Reimer testified, the court sustained the prosecutor's relevance objections to questions about whether the Cherokee had been autonomous for thousands of years (60RT 11966) and whether appellant was a religious person. (*Id.* at 11976-11977.) Gill also ruled that the answers to a series of appellant's questions about the meaning and significance of his Cherokee name were irrelevant. (*Id.* at 11982-11984.)

When appellant took the stand to testify, Gill would not allow him to testify that Cherokee identity was not based on race, agreeing with the prosecutor's argument that appellant first would have to show that he was discriminated against because of something he had done. (61RT 12261-12262.) Gill sustained objections to appellant's testimony that members of his family were Cherokee. (*Id.* at 12269.) Appellant testified that he was the leader of an Esperanto youth delegation which traveled to Augsberg, and that Mark Williams and William Dickerman also were there. (62RT 12417-12418.) Appellant had asked Dickerman whether he was a CIA agent, and Dickerman said he was not, but that he formerly had been one. (62RT 12420.) Appellant thought Dickerman was watching him and was at appellant's United Nations of Autonomous Peoples meetings. (*Id.* at 124121.) Later he testified that Mark Williams was there on the day he was arrested and that he and other men in ski masks kidnaped him. (*Id.* at

12476-12478.) He testified that he was forced into a Mustang by Williams. (*Id.* at 12533.)

Appellant testified about his and Birgitta Sequoyah's activities in San Diego on December 19 and 20, but Gill sustained relevancy objections when appellant asked himself whether he had shown Birgitta Sequoyah a map of ancient Cherokee territory and a map of the trail of tears. (63RT 12645.) Gill sustained relevancy objections to appellant testifying about whether a quarter of Cherokees died on the trial of tears (*id.* at 12646); about why appellant had created Poliespo, whether Poliespo was a lifetime project, whether the language brought the Cherokees any benefit, and whether appellant's motivation in creating the language was to benefit mankind (*id.* at 12657-12658); about appellant's work on *The Fundamentals of Poliespo*, and about whether Poliespo had spread (*id.* at 12660-12661); and about his reasons for writing a new constitution for the Exiled Government of the Cherokee Nation and whether there a movement to change the Cherokee constitution. (*Id.* at 12801-12802.)

Gill sustained hearsay and relevancy objections to appellant's testimony about his conversations with Mark Williams about the organizations appellant had founded. (64RT 12896-12903.) Gill sustained relevancy objections to testimony about whether Russell Means had been cointelproed and had been through 12 different trials, and whether Means had taken a group called the United States Indian Army to Nicaragua to support the Misquito and Suma Indians' attempts to fight Sandinistas, and whether those actions were a "CIA organized" event. (*Id.* at 12906-12907.) The court sustained many of the prosecution's relevancy objections to appellant testifying about his activities with Esperanto groups and the Cherokee language (*id.* at 12936-12948); about the Esperanto societies with which appellant was involved (*id.* at 12952-12957); about his friendship

with Nerida Spreitzer and whether she had become fearful of him and hostile to him after he was arrested (*id.* at 13571-13574); and that he was subject to a strip search by authorities when he was traveling in Germany. (67RT 13607-13609.) Appellant later tried to testify about whether Mary Barksdale, a Native American activist appellant said had helped him found his organizations, died under suspicious circumstances, but here again Gill sustained relevancy objections. (*Id.* at 13626-13636.)

2. Judge Gill Deemed Swearingen's Testimony to Have Little Probative Value Based on the Absence of the Very Evidence that Gill had Excluded

When appellant challenged Gill's ruling that Swearingen's testimony would not be admitted, appellant focused on the unfairness of the court's ruling, where appellant had tried to "elicit testimony concerning" his "organizations and their international membership" but the court had prevented him from doing so. (66RT 13533.) Gill countered that there was no evidence that the FBI would have the slightest interest in appellant's organizations if it new about them. (*Id.* at 13533-13534.)

Thus, Gill's relevancy analysis turned on his conclusion that appellant was not a leader in any kind of movement which the FBI or CIA would want to suppress. As appellant pointed out, this is precisely the evidence that Gill would not let appellant develop: evidence concerning the objectives of the organizations he had founded, including their connection to the American Indian autonomy movement, and whether individual witnesses shared those objectives and supported his organizations (that is "followed" appellant) because of those objectives. After stating point blank that he would not permit appellant to present his defense (29RT 4612; 31RT 4874, 5059-5060; 54RT 10311-10366, 10361), Gill proceeded to exclude any testimony offered to develop proof that appellant had founded, and was a leader in, organizations that shared the objectives of furthering the

American Indian autonomy movement. (55RT 10635-10636, 10667-10669, 10673-10676 [limiting the testimony of Edwin Spruth on relevancy grounds]; 55RT 10693, 10708-10712, 10727, 10729-10730 [sustaining relevancy objections to questions to Eliza Kehlet]; 56RT 11027-11032, 11041-11042, 11050-11051 [limiting the testimony of Bernice Garrett on relevancy grounds]; 57RT 11120 [sustaining relevancy objections to Mr. Wells' testimony]; 58RT 11377 [sustaining relevancy objections to Sidney Culbert's testimony]; 59RT 11551, 11559-11561, 11620-621 [sustaining relevancy objections to Birgitta Sequoyah's testimony]; 59RT 11766, 11771 [sustaining relevancy objections to Sharon Colligan's testimony]; 60RT 11966, 11976-11977, 11982-11984 [sustaining relevancy objections to Vivian Reimer's testimony].) Gill also sustained relevancy objections to large portions of appellant's own testimony. (See e.g. 61RT 12261-12262, 12269; 63RT 12645-12646, 12657-12658, 12660-12661, 12801-12802; 64RT 12896-12903, 12906-12907, 12936-12948, 12952-12957; 66RT 13571-13574; 67RT 13607-13609, 13626-13636.)

By excluding evidence of the "kind of movement" appellant was leading and its objectives, Gill made it impossible for appellant to establish why he would be targeted through a cointelpro as a leader of that movement. Further, by preventing witnesses from testifying about the objectives and principles behind the organizations, Gill prevented appellant from establishing that the Esperanto and Poliespo movements shared the same objectives of the American Indian autonomy movement -- the humanitarian objective of furthering autonomy of all subjugated peoples by helping them to resist the lingual hegemony of English and by uniting people all over the world through communication using Esperanto.

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3. Gill's Reasoning in Excluding Swearingen's Testimony was Flawed in Other Respects as Well

In addition to ignoring the fact that the deficiencies in the record resulted from his own prophylactic rulings, Judge Gill employed other flawed reasoning in ruling that Swearingen's testimony could not be admitted.

For example, Gill said there was no evidence that the FBI even knew that appellant, his organizations, or Poliespo existed. (66RT 13534.) To the contrary, appellant and Birgitta's testimony about the presence and actions of Mark Williams, an admitted federal agent, and others adorned with clothing designating them as "Federal Agents" on December 20, and the comment that appellant was being punished for his Cherokee and Poliespo "horseshit," established the link in the chain that the FBI knew about appellant and his organizations. (57RT 11476.) Gill said Swearingen's knowledge predated his retirement and was remote in time – ignoring the witness' testimony that he had stayed current in the field since leaving the service. (66RT 13511.) Gill said there was no evidence that members of the American Indian Congress considered appellant to be a leader (66RT 13523-13524) – disregarding Swearingen's statement that appellant's leadership in recruiting Europeans to support the cause of American Indian autonomy would suffice to establish the "rising Messiah" and organizational type prerequisites. (*Id.* at 13510.)

Gill said there was no evidence appellant was deprived due process in the legal system (66RT 13525), but in fact it was Gill who blocked appellant from telling the jury about how it took years before the court granted him the right to represent himself. (62RT 12386-12387; see also 67RT 13737-13745, 13770-13771 [Gill refused to let appellant call court staff or attorneys to prove appellant was obstructed from representing

himself or treated unfairly in court proceedings].) Gill said there was no evidence that organizational associates were becoming fearful or cautious in their association with appellant (66RT 13525), but it was Gill who had blocked appellant from testifying about how his friendship with Nerida Spreitzer had become strained after the cointelpro targeting commenced. (66RT 13571-13574.) Gill said appellant's theory was that federal agents themselves had committed the crimes, which was something Swearingen said would not happen under a COINTELPRO – however, appellant said that was *not* his theory and Gill himself earlier admitted that appellant's theory was *not* that federal agents committed the crimes. (62RT 12375, 12395.)

4. The Weight of Factors Against Admitting the Testimony was Insubstantial

Turning to the factors for excluding evidence under Evidence Code section 352, the probative value of Swearingen's testimony was not "substantially outweighed by the probability that its admission [would] (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"Undue" consumption of time should be assessed in the context of the length of the trial en toto – it had been in progress nearly four months at the time Gill entered his ruling on October 29. Slightly prolonging the defense case to permit the testimony of Swearingen would not have extended it unduly. Swearingen's testimony in the 402 hearing together with the parties' arguments thereon and Judge Gill's statement of his ruling and the reasons for it took less than three hours. (66RT 13480, 13513, 13535.)

The prosecutor did not establish a "substantial danger" of undue prejudice; there was nothing inflammatory or likely to evoke an emotional bias.

> The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to [the other side's case] that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to [dis]prove [the adversary's case] is prejudicial or damaging. . . The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the [party or witness] as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]

(*People v. Karis* (1988) 46 Cal.3d 612, 638.)

As to whether "confusing the issues" or "misleading the jury," Wigmore's words provide a benchmark: "if the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt." (1A Wigmore, Evidence (Tillers rev. ed. 1980) § 139, p. 1724.)

5. Swearingen's Testimony had Significant Probative Value for Appellant's Defense

A disputed fact of consequence in appellant's trial was whether he was responsible for, or had any connection to, the evidence that was found in his car. Extremely important to the prosecution's case was the evidence found in the blue Honda when it was searched on December 21, 1985, after being impounded when its driver abandoned it on the street and fled on the evening of December 20, 1985. This evidence included a computer monitor and suitcases from the Ellerman home, a jewelry box, bracelet, and other items from Erin Lab's apartment; a purse with papers inside it belonging to Julia Meredith; a purse with identification in it in the name of Diane Thomas; and a box of cartridges that a ballistics expert testified were

consistent with the bullets and casings found in connection with the Dawn Ellerman and Gordon Wells murders. In addition to direct alibi testimony for some of the crimes, the defense offered that appellant had been attacked and targeted by specific individuals who appeared to be federal agents (as testified to by Birgitta and appellant), and appellant sought to introduce Swearingen's testimony regarding cointelpros targeting movement leaders, especially those in movements promoting American Indian autonomy, as circumstantial corroboration of defense testimony and to strengthen the inference that someone other than appellant committed the crimes and federal agents planted the evidence in appellant's car.

Swearingen's testimony would have been far more that a "link in an incomplete chain of speculative inferences" (*Babbitt*, *supra*, 45 Cal.3d 660, 683), given appellant's testimony of his innocence, his alibi evidence for some of the crimes, and the evidence that Mark Williams and his cohorts were federal agents bent on harming and punishing appellant for his Cherokee and Poliespo "horseshit." This case is not like *Babbitt*. Therein, the defendant did not dispute that he committed the charged offenses, and did not testify. (*Id.* at pp. 676, 678.) The defense sought to introduce evidence regarding the program schedule on a specific television station, to support the inference that the defendant, a Vietnam veteran, was walking by the victim's apartment and he heard violent programming involving explosive experts, revolutionary leaders, and concentration camp survivors, which triggered a PTSD flashback and led him to enter the apartment and beat, stab, smother and rape the victim. (*Id.* at pp. 679-681.) This Court noted that there was no evidence that the television set was turned on before the defendant cut open the victim's screen door, entered her apartment, or attacked her – in fact, the only evidence was to the contrary. (*Id.* at p. 682 [victim's apartment neighbor said he heard the television go on *after* he was

awakened by hearing a bump or a thud in the neighboring apartment].) This Court held that excluding the evidence was not an abuse of discretion because at most the program schedule would have provided "a link in an incomplete chain of speculative inferences." (*Id.* at p. 683.)

Here, in contrast, the excluded evidence was of "significant probative value" to the defense and it violated appellant's due process and fair trial rights to exclude it. (See *Babbitt*, *supra*, 45 Cal.3d 660, 684, citing *Chambers*, *supra*, 410 U.S. 284 *and Reeder*, *supra*, 82 Cal.App.3d 543.) Appellant took the stand and testified that he was entirely innocent of the charged crimes, he did not put the evidence in his car, and the evidence had not been in the car when it was taken from him hours before its driver abandoned it on the street, causing it to be impounded. There was testimony that Mark Williams was a federal agent, worked with others to attack appellant due to his lingual and Indian autonomy endeavors, and took appellant's car, which was empty of incriminating evidence, hours before the December 20 series of crimes commenced. Swearingen's testimony that FBI and/or CIA agents had a pattern of carrying out cointelpro plots against Indian activists would have had significant probative value and provided a link in the chain of inference that was far from speculative.

The holding in *Reeder*, *supra*, 82 Cal.App.3d 543, is instructive. Therein, the defendant proferred evidence of the co-defendant's prior misdeeds toward him and his family members, to show that he disliked the co-defendant and would not have enaged in narcotics dealing with him. (*Id.* at p. 550.) The trial court excluded the evidence on hearsay and lack of relevancy grounds. (*Ibid.*) The Court of Appeal reversed, holding that the statements were offered not for their truth to show state of mind, but to support the inference that the defendant acted in conformance with that state of mind, and lend credibility to his testimony. (*Id.* at pp. 550-551, citing

People v. Roberson (1959) 167 Cal.App.2d 429, 432 and *People v. Duran* (1976) 16 Cal.3d 282.)

Similarly, Swearingen's testimony in this case would have borne on the state of mind of Mark Williams and other federal agents, and would have lent credibility to appellant's testimony that they attacked him on the afternoon of December 20 because of his Cherokee and Poliespo activities.

6. Judge Gill's Ruling Rested on Impermissible Credibility Findings

In actuality, Judge Gill failed to give significance to the testimony of Spruth, Birgitta Sequoyah, and appellant about Mark Williams, an admitted federal agent, and his knowledge of and interest in appellant's organizations because Gill found that testimony not to be credible.

Gill said outright that he found Birgitta Sequoyah's testimony about being on the board of appellant's organizations "incredible." (62RT 12364-12365.) He also found it "incredible" that the FBI or CIA had come upon a series of crimes and put evidence from them all together to "frame appellant." (62RT 12376.) Although Gill himself said he had to guard against substituting his view of credibility of witnesses for that of the jury (66RT 13355), in the next breath Gill reiterated his belief that the jury would find it "incredible" that federal agent shenanigans such as Watergate and the Iran Contra scandal would have anything to do with appellant. (*Id.* at 13357.)

Credibility is a question for the jury, not the trial court judge. (*Jackson v. Denno* (1964) 378 U.S. 368.) Judge Gill did not "avoid a hasty conclusion" that the defendant's evidence was "incredible," as this Court proscribed in *Hall*, *supra*, 41 Cal.3d 826, 834 – rather, he embraced that "hasty conclusion" and held it fast. Gill utterly disregarded the maxim that "if the evidence is really of no appreciable value no harm is done in

admitting it," while simultaneously ignoring the rule that the court should not "attempt to decide for the jury that [the] doubt raised by the evidence is purely speculative and fantastic." (*Ibid.*, quotation omitted.)

Inevitably, Judge Gill's view of appellant's credibility was predetermined by his oft-stated opinion that the defense was based on delusion, as shown by Gill's comments both before and during trial. (See e.g. 11RT 877-878 [appellant's defense was a "manifestation of mental illness]; 31RT 4874 [appellant's assertion that he was targeted as a Native American activiest was a "fantasy"]; 62RT 12382 [allegations about the FBI were only in appellant's "mind"]; 62RT 12398 [appellant's theories were "fantasy" and "imaginery"]; 62RT 13275 [appellant's theory about the FBI was "incredible"]; 66RT 13529-13530 [appellant's perception there was a connection between his organizational activity and an FBI cointelpro was a "defense mechanism" or a "manifestation of mental illness" or of appellant's "disabilities"].)

E. The Exclusion of Swearingen's Testimony and the Cointelpro Testimony That Would Have Supported it Violated Appellant's Right to a Fair Trial, to Due Process, to Testify, to Present a Defense, and to a Reliable Capital Verdict Under the Federal Constitution

As stated by the United States Supreme Court in *Chambers*, *supra*, 410 U.S. 284, 302:

> "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense. [Citations]." An "essential component of procedural fairness is an opportunity to be heard." (*Crane v. Kentucky* (9186) 476 U.S. 683, citing *In re Oliver* (1948) 333 U.S. 257, 273 and *Grannis v. Ordean* (1914) 234 U.S. 385, 394.)

The constitutional violation is subject to harmless-error review under *Chapman*:

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the . . . case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. *Cf. Harrington*, 395 U.S., at 254, 89 S.Ct., at 1728; *Schneble v. Florida*, 405 U.S., at 432, 92 S.Ct., at 1059.

(*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

Here, the excluded evidence was of critical importance of appellant's case and was not cumulative. Gill did not permit appellant to provide evidence in support of the cointelpro in any other form, and when he barred Swearingen from testifying it was a death blow to the defense. The key to appellant's conviction was a showing of *modus operandi* with appellant at the heart of a one-man crime spree. Precluding appellant from presenting Swearingen's testimony left this prosecution evidence untested, given appellant's defense that the government has been know to target individuals by whom it was threatened. It cannot be said beyond a reasonable doubt that, had Swearingen's testimony been presented, the jury still would have found appellant guilty of all charged crimes beyond a reasonable doubt and sentenced him to death. Therefore, the verdict and sentence must be reversed.

* * * * *

XVIII.

THE ATMOSPHERE IN AND AROUND THE COURTROOM AND JUDGE GILL'S RULINGS AND POLICIES ON SECURITY ISSUES AND COMPLAINTS CONCERNING BAILIFF DEMEANOR AND IMPROPER VERBAL AND NONVERBAL COMMUNICATION BETWEEN BAILIFFS AND JURORS WERE INHERENTLY PREJUDICIAL AND VIOLATED APPELLANT'S DUE PROCESS AND FAIR TRIAL RIGHTS UNDER THE FEDERAL CONSTITUTION

A. Introduction

The trial court's practices and comments during trial, especially with respect to misconduct by bailiff Tremble and other bailiffs in their interactions with the jury and their attitudes toward appellant, presented an unacceptable risk of impermissible factors coming into play, in violation of appellant's right to due process, a fair trial, and a reliable guilt and penalty verdict under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*Estelle v. Williams* (1976) 425 U.S. 501; *Holbrook v. Flynn* (1986) 475 U.S. 560; *Irvin v. Dowd* (1961) 366 U.S. 717; see *People v. Sanders* (1988) 203 Cal.App.3d 1510, 1514, quoting *Gordon v. Justice Court* (1974) 12 Cal.3d 323, 329 [reversal required if a 'reasonable *probability* of prejudice' is shown].)

B. Legal Background

The United States Supreme Court often has noted that the right to a fair trial is a fundamental liberty guaranteed under the Fourteenth Amendment and the presumption of innocence is a "basic component of a fair trial under our system of criminal justice." (*Williams*, *supra*, 425 U.S. 501, 503, citing *Drope v. Missouri* (1975) 420 U.S. 162, 172.)

The Court in *Williams* continued:

> Long ago this Court stated: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. U. S.*, (1895) 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481, 491 (1895). ¶ To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed. 2d 368, 375 (1970). ¶ The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed. 2d 543 (1965); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.

(*Williams, supra*, 425 U.S. 501, 503-504.)

The fair trial right under the Sixth and Fourteenth Amendments guarantees that the guilt of the accused shall be determined "'solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" (*Flynn, supra,* 475 U.S. 560, 567, quoting *Taylor v. Kentucky* (1978) 436 U.S. 478, 485.) This guarantee is fundamental: "'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.'" (*Estes, supra*, 381 U.S. 532, 551, quoting *Patterson v. People of State of Colorado, ex rel. Attorney General* (1907) 205 U.S. 454, 462.)

Even when posed against another fundamental right – for example, freedom of the press under the First Amendment – the right to be convicted based solely on the evidence is essential and cannot be gainsaid:

> One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him.

(*Dowd, supra*, 366 U.S. 717, 729.)

Some courtroom procedures or outside media influences so compromise the presumption of innocence that they may be deemed "inherently prejudicial," relieving the defendant of any burden to establish actual prejudice to his right to a fair trial:

> If "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process," *Estes v. Texas*, 381 U.S. 532, 542-543, 85 S.Ct. 1628, 1632-1633, 14 L.Ed.2d 543 (1965), little stock need be placed in jurors' claims to the contrary. See *Sheppard v. Maxwell*, 384 U.S. 333, 351-352, 86 S.Ct. 1502, 1516-1517, 16 L.Ed.2d 600 (1966); *Irvin v. Dowd*, [*supra*, at p. 728.] Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. . . . Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play," *Williams*, 425 U.S., at 505, 96 S.Ct. at 1693.

(*Flynn, supra*, 475 U.S. 560, 570.)

This state's jurisprudence also recognizes the guarantee that the jury's verdict be based upon the evidence adduced at trial, "uninfluenced by

extrajudicial evidence or communications," as implicit in the right to trial by an impartial jury under the Sixth Amendment, and the right to due process under the Fourteenth Amendment. (See, e.g., *Sanders, supra*, 203 Cal.App.3d 1510, 1513-1514, citing, inter alia, *Duncan v. Louisiana* (1968) 391 U.S. 145, 149, *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473, *Dowd, supra*, 366 U.S. 717, 722, *People v. Tidwell* (1970) 3 Cal.3d 62, 74; *People v. Gainer* (1977) 19 Cal.3d 835, 847-848.) Prejudice need not be established: "A defendant attempting to establish that he has been deprived of due process of law during the course of his or her trial need not show actual prejudice in order to obtain relief; it is sufficient if the defendant demonstrates a 'reasonable *probability* of prejudice.'" (*Id.* at p. 1514, quoting *Gordon, supra*, 12 Cal.3d 323, 329, citations omitted, emphasis in original.)

Many of the cases illustrating these principles claim inherent prejudice related to pretrial media publicity, especially of a confession by the defendant. (See *Marshall v. U. S.* (1959) 360 U.S. 310 [reversed under Court's supervisory powers, holding that some jurors' exposure to news that the defendant had practiced medicine without a license was unduly prejudicial, notwithstanding jurors' statements they were not influenced]; *Dowd, supra*, 366 U.S. 717 [pretrial publicity of defendant's confession required reversal on habeas, notwithstanding jurors' promise they could be fair and impartial]; *Rideau v. State of Louisiana* (1963) 373 U.S. 723, 729 [filmed confession televised two months before trial required reversal]; *Estes, supra*, 381 U.S. 532 [massive pretrial publicity, including televised pretrial proceedings, created such notoriety as to be deemed inherently prejudicial, requiring reversal]; *Sheppard, supra*, 384 U.S. 333 [inflammatory negative publicity before and during trial was inherently prejudicial, requiring reversal on habeas]; *Patton v. Yount* (1984) 467 U.S.

1025 [reversal not required based on pretrial publicity of confession to murder, given that four years passed between the time of the publicity and the trial at issue]; compare *Murphy v. Florida* (1975) 421 U.S. 794 [habeas relief denied on due process claim based on pretrial publicity of the defendant's prior convictions, where the publicity and trial atmosphere was not inflammatory and none of the jurors who had been exposed to the publicity betrayed any belief in the relevance of petitioner's past to the present case].

A separate category of cases under this doctrine involves claims of inherent prejudice in violation of due process from state-sponsored practices within the courtroom itself that pose a risk of swaying the jury against the defendant. (*Williams, supra*, 425 U.S. 501, 512 [due process protections prohibit the state from compelling an accused to face jury trial dressed in prison garb]; *Flynn, supra,* 475 U.S.560, 568 [certain practices pose such a threat to the fairness of the fact-finding process that they must be subjected to close judicial scrutiny, and may be inherently prejudicial requiring reversal if there was an unacceptable risk of impermissible factors coming into play, but the presence of armed troopers seated near the defendant during trial was not inherently prejudicial warranting relief under this test]; see *Carey v. Musladin* (2006) 549 U.S. 70, 75-76 [reiterating clearly established United States Supreme Court law regarding inherently prejudicial state-sponsored courtroom practices].)

In *Turner,* the United States Supreme Court held that due to the stature of bailiffs in a courtroom and jurors' invariable respect for bailiffs, it was inherently prejudicial in violation of due process, and reversal was required where deputy sheriffs, who also testified for the prosecution in the case, served in the bailiff role and shepherded the jury in and out of the courtroom during trial. (*Turner, supra*, 379 U.S. 466, 473-474; see also

Parker v. Gladden (1966) 385 U.S. 363, 365 ["this official character of the bailiff – as an officer of the court as well as the State – beyond question carries great weight with a jury"]; *Gonzales v. Beto* (1972) 405 U.S. 1052 [summarily reversing conviction where sheriff, who served as bailiff of the jury, also testified as a prosecution witness].)

As stated by the Court of Appeal in *People v. Santamaria* (1991) 229 Cal.App.3d 269, 280:

> . . . the United States Supreme Court has consistently recognized that at times a procedure used by the state is so inherently suspect that a showing of actual prejudice is not a prerequisite to reversal. (See, e.g., *Estes v. Texas* (1965) 381 U.S. 532, 543-544, 85 S.Ct. 1628, 1633-1634, 14 L.Ed.2d 543 [televising of trial required reversal even if defendant "cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced"]; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 351-352, 86 S.Ct. 1507, 1516-1517, 16 L.Ed.2d 600 [pretrial publicity]; *Turner v. Louisiana* (1965) 379 U.S. 466, 473, 85 S.Ct. 546, 550, 13 L.Ed. 2d 424 [same deputies used as jury custodians and prosecution witnesses].) The California Supreme Court has also acknowledged this fundamental principle, stating that "the very character of certain procedures [makes] it impractical to establish the degrees of prejudice which [have] resulted therefrom. [Citation.] In these circumstances the defendant need not show that he was actually prejudiced during his trial in order to establish a denial of due process of law; it is enough if he can show there was a reasonable probability of prejudice. [Citations.]" (*Gordon v. Justice Court* (1974) 12 Cal.3d 323, 329, 115 Cal.Rptr. 632, 525 P.2d 72.)

C. Factual Background

During jury selection on June 13, 1991, appellant entered an objection to the bailiffs "jumping up" every time appellant stood to speak, which he claimed gave the prospective jurors the impression that he was an "outrageous danger." (27RT 4062.) Judge Gill said he and the bailiffs

would try to avoid "creating the impression" to which appellant had alluded. (*Id.* at 4064.) The prosecutor said he would be introducing evidence of an escape attempt, that appellant recently had asked someone about the "best way to escape," and that it seemed appellant, when standing, was moving ever-closer to the exit. (*Ibid.*) Appellant denied the prosecutor's accusations, requested leave to walk around the courtroom, as the prosecutor did, and explained that the walking path available to him made it inevitable that there would be moments when he was walking toward the exit. (*Id.* at 4066-6068.)

The prosecutor asked to be heard, and Judge Gill asked him what standing he had to be heard. (27RT 4068.) The prosecutor replied:

> My life, I think. The fact that if he comes close to me, I view that as a threat on me. I view it as a threat on everybody in this courtroom including yourself and the clerk and the court reporter. He's – the evidence indicates very, very clearly – I don't how much you can consider this on this particular issue – but the evidence indicates very, very clearly that he's a murderer. I recognize the fact that he's pro per. He has the right to be pro per. But that doesn't mean he has the right to have free reign of the world, let alone this courtroom, and I view it as a threat to me if he walks behind me. I value my life very, very highly. And I thought that the court was informed and aware of the Marshal's report from May the 15th, 1991 wherein Mr. Waldon was overheard by numerous individuals asking the best way to escape and was told that the best way to escape is from the courtroom.

(*Id.* at 4068-4069.) The prosecutor compared the case to that of Ted Bundy, who also had represented himself, and said appellant was "at least a[s] great a risk as Mr. Bundy". (*Id.* at 4070.)

Judge Gill said he had not seen any such Marshal's report, that having appellant move about the courtroom would require two or three bailiffs also to move about for security reasons, and that if appellant moved around the judge would have to permit the prosecutor to move away any

time appellant moved in his direction. (27RT 4071.) Thus, Gill said the better solution would be for appellant not to move about the courtroom, but instead to question prospective jurors from his normal location. (*Ibid.*) The prosecutor stated that, based on the report he had seen, he had assumed that the court had decided appellant was "a dangerous individual" and an escape risk, and could not move from his chair to question prospective jurors. (*Id.* at 4072.) The prosecutor said that he had, through "eye contact" and "body language" with the bailiffs, "remarked" about how appellant seemed to be moving ever closer to the exit. (*Ibid.*) Judge Gill authorized the prosecutor to "make an investigation" of the Marshal's report and make a recommendation to the court as to what should be done. (*Id.* at 4073.)

On June 20, 1991, appellant stated on the record that prospective jurors had seen him in chains during the break, because that day his constraint chains were placed outside of his coat rather than underneath it. (29RT 4530.) Appellant asked that bailiff Tremble be sworn and questioned on the issue. (*Id.* at 4532.) Gill refused to swear and question Tremble, said he would discuss the matter with the bailiffs, and declined to enter any orders regarding the manner in which appellant was to be chained. (*Id.* at 4533.)

On July 15, 1991, Judge Gill took up the prosecutor's request to discuss concerns about courtroom security. (35RT 6111.) Gill reviewed nine Inmate Status Reports submitted by the prosecutor, dated between October of 1986 and May of 1991. (*Id.* at 6116-6117.) The prosecutor argued appellant was an escape risk, alluding to appellant's use of aliases and that bail had been set in 1986 in the amount of $2,000,000, and requested that there be more security, viz., more bailiffs, in the courtroom. (*Id.* at 6118-6119.) Appellant objected to the trial judge being prejudiced by exposure to uncharged allegations of any attempted escape, and Gill said it

was proper for him to consider such matters as related to courtroom security. (*Id.* at 6120-6121.) The prosecutor recounted what he had heard about appellant being interested in the topic of escape when it was discussed among inmates, and said that appellant had made unauthorized phone calls to people in Switzerland, which seemed suspicious. (*Id.* at 6122-6124.) The prosecutor said appellant's decision to represent himself had created issues concerning courtroom security, and that although he would not ask that appellant be shackled in the courtroom he believed that four bailiffs were needed in the courtroom for adequate security. (*Id.* at 6125-6126.) Judge Gill said that through "eye contact" and "nonverbal communication" he had had with jurors, he believed they were "concerned" when appellant got too close to them. (*Id.* at 6126-6127.)

The prosecutor said he was concerned when he saw appellant approach two seated female jurors with a ballpoint pen in his hand, that jurors' duty did not include that they "risk their lives," and that he thought that the "mindless lengthy cross examination" appellant made of witnesses was meant to "lull" the prosecutor and judge to sleep on issues of courtroom security. (35RT 6127.) The prosecutor said indeed he believed appellant was a "vicious animal," and the evidence would so show it. (*Id.* at 6129.) Judge Gill did not rule on the issue of security concerns at that time.

On July 24, 1991, appellant stated his opinion that while ostensibly continuing the prosecutor's motion for additional courtroom security to give appellant a chance to be heard, it appeared that the court had "surreptitiously" granted the motion by placing additional bailiffs in the courtroom. (40RT 6949-6950.) Judge Gill admitted having added a bailiff, so that there were at that time three in the courtroom, and had done so within his "discretion" and that he had not been influenced by the prosecutor's submissions in connection with his motion. (*Id.* at 6955.)

Regarding restriction of movement within the courtroom, Gill said that the record made clear that the bailiffs, rather than counsel, recently had been handling the exhibits and appellant's movements were no more restricted than the prosecutor's. (*Id.* at 6956.)

On July 29, 1991, appellant complained to Judge Gill that in spite of a court order that he be kept separate from other inmates, the bailiff had that day placed him in a holding cell with other inmates while appellant "dressed out." (41RT 7363.) The bailiff said appellant was growing increasingly "paranoid." (*Ibid.*) Gill said he had not been aware of such order, that he appreciated appellant telling him of it and that Gill would discuss it with the bailiff. (*Id.* at 7365-7366.)

In court on August 1, 1991, the prosecutor said one of the jurors who had beent in the hallway was upset with two trial spectators from Switzerland. (43RT 7905.) The prosecutor wanted Gill to bring the two spectators into court and admonish them. (*Id.* at 7906.) The prosecutor said he had learned of the incident from the bailiff. (*Id.* at 7907.) The bailiff said he had spoken to one juror and one alternate juror about two spectators who were staring at them, and that one of the spectators had something about Esperanto on his bag. (*Id.* at 7908.) The bailiff said he had advised the jurors not to talk to the spectators. (*Ibid.*) The prosecutor said he had observed such spectators staring at the jury, and that he thought it might be bothering the jurors. (*Ibid.*) The bailiff said he had asked the juror and alternate juror in question whether anyone was staring at them that afternoon, and they had said no one was "bothering" them. (*Id.* at 7908-7909.) Appellant asked Judge Gill to question the jurors, positing that it was the spectators who were being harassed by the bailiff's accusation that they were staring at jurors. (*Id.* at 7909-7910.) Appellant became upset during the exchange and the bailiff told him to calm down, or he would be

taken out in handcuffs. (*Id.* at 7910.) Appellant said his supporters and family continually were being harassed by the prosecution; Gill said there was no evidence of that. (*Id.* at 7911-7912.)

On August 12, 1991, the prosecutor complained again that spectators were harassing jurors and witnesses by staring. (44RT 7917-7918, 7923-7926.) Judge Gill denied the prosecutor's request to question the two identified spectators, because they were not present at the time, and denied appellant's request to question two jurors to see whether they had been harassed. (*Id.* at 7926.) In court on August 14, 1991, appellant requested that he be permitted the same freedom of movement in the courtroom as that afforded to the prosecutor; Gill denied the request and directed appellant not to bring a pen in his hand when approaching for a sidebar conference. (45RT 8221-8224.)

On October 2, 1991, the prosecutor complained to Judge Gill that appellant's witnesses and family should distance themselves from the jury during breaks and in the morning, asking that the court order a fourth bailiff be placed in the hallway to make sure the jury was not "tampered with," that the situation in the hallway was "extremely dangerous," and that should one of appellant's supporters – viz. "fanatics" – get to "just one" of the jurors, the trial would be tainted. (60RT 11849-11850.) Appellant countered that the three bailiffs, the prosecutor, and prosecution witnesses had been staring at and intimidating his wife. (*Id.* at 11853-11855.)

On October 23, 1991, Rosenfeld met with Judge Gill and the prosecutor in camera and moved for a mistrial based on bailiff misconduct, viz, verbal and nonverbal communication with jurors showing the bailiffs' disdain for appellant and his defense. (65-1RT 13093-13096.) Rosenfeld cited instances where bailiff Tremble had laughed out loud at testimony from defense witnesses that he disbelieved, and had commented loudly that

appellant should be required to testify. (*Id.* at 13095, 13097.) Rosenfeld further complained that the demeanor and in-court behavior of the bailiffs, especially Tremble, both ridiculed appellant and sent the jury a message that appellant was dangerous. (*Id.* at 13095, 13097, 13103.) Rosenfeld said Tremble was overly familiar with one juror and was flirting with her. (*Id.* at 13094, 13100.) She also complained that Tremble unnecessarily and inappropriately kept handling his gun holster and removing the clip (*id.* at 13103); the prosecutor said "every time" he had seen Tremble "playing with" the gun or holster, it had been clear to him that Tremble was "joking." (*Id.* at 13118.) Rosenfeld said she had received information leading her to believe that bailiffs had related to a witness something that Rosenfeld had said to appellant at counsel table. (*Id.* at 13106.) The prosecutor denied that the events related by Rosenfeld had taken place, and said that her allegations were based on hearsay and he could "knock down" all of them. (*Id.* at 13107.)

Rosenfeld cited *Turner*, *supra*, 379 U.S. 466, *Sanders*, *supra*, 203 Cal.App.3d 1510, and *People v. Hedgcock* (1990) 51 Cal.3d 395. (65-1RT 13110-13111.) Rosenfeld argued that Tremble's facial expressions and behavior in the courtroom were being taken by the jury as evidence. (*Id.* at 13112.) She also put on the record her view that the facial expressions of advisory/standby counsel Chambers were inappropriate and problematic as well. (*Id.* at 13126.) Without holding a hearing, Judge Gill denied the motion for mistrial, denied Rosenfeld's request to remove and replace the bailiffs, and said that he did not believe the jury had been influenced by non-verbal communication. (*Id.* at 13121, 13129-13130.)

On November 25, 1991, appellant complained to Judge Gill that the bailiff had been discourteous when handing appellant a police report, and had threatened appellant and hurt appellant's wrist. (72RT 14982.)

On December 3, 1991, appellant complained to Judge Gill that bailiff Tremble had called him a "nut," saying that was the reason appellant was convicted of murder; appellant also complained that he had received no medical attention for his wrist, which Tremble had injured. (74RT 15239-15240.)

D. The Courtroom Atmosphere, Replete with Nonverbal and Verbal Communication and Conduct of the Bailiffs Expressing Disdain for the Defense and its Witnesses, Sent a Message That Appellant was a Constant Danger to all Present, and Amounted to an Inherently Prejudicial State-Sponsored Courtroom Practice That Violated Appellant's Right to Due Process and a Fair Trial

It is the clearly established law of the United States Supreme Court and this Court that, in some instances, courtroom practices, including security measures, can pose such a threat to the fairness of the fact finding process that they must be subjected to close judicial scrutiny, and may be inherently prejudicial requiring reversal if there was an unacceptable risk of impermissible factors coming into play in the defendant's trial. (*Flynn, supra*, 475 U.S. 560, 570; *Santamaria, supra*, 229 Cal.App.3d 269, 280; *Gordon, supra*, 12 Cal.3d 323, 329.) Further, numerous courts have reversed judgments of conviction, without consideration of prejudice, where the bailiff who shepherds the jury during a trial also testifies as a witness. (See e.g. *Turner, supra*, 379 U.S. 466; *Gladden, supra*, 385 U.S. 363, 365; *Beto, supra*, 405 U.S. 1052 [summary reversal]; see also *Sanders, supra*, 203 Cal.App.3d 1510, 1513-1514 [trial court's error of admitting the testimony of an individual who was sworn as a juror and excused prior to testifying violated due process and was reversible without a showing of prejudice].)

Here, the atmosphere in the courtroom that developed over the months of trial, especially as related to the conduct, movement, expressions, nonverbal, and even verbal communication between the bailiffs and jurors, and Judge Gill's errors in failing to control or modify the situation when the defense complained about it, amounted to an inherently prejudicial courtroom practice that violated due process and appellant's right to a fair trial. There is more than a "reasonable *probability*" that appellant was prejudiced by the courtroom atmosphere. (*Gordon*, *supra*, 12 Cal.3d 323, 329.) While it is not a case where the bailiff was called as a witness, it is a case where courtroom practices and the security atmosphere therein were inherently prejudicial; the "bailiff witness" cases state precedent that a bailiff "beyond question carries great weight with a jury." (*Parker*, *supra*, 385 U.S. 363, 365.)

As early as June 13, 1991, appellant complained about the bailiffs "jumping up" every time he stood to speak (27 RT 4062), and the prosecutor replied that movement by appellant around the courtroom endangered the prosecutor's very life. (27RT 4068-4069.) Apparently swayed by the prosecutor's dramatic declarations comparing appellant's dangerousness to that of Ted Bundy, the judge ordered appellant to keep his seat during proceedings. (27RT 4071.) A week later, appellant complained that bailiff Tremble had shackled him in such a way that the jury would see him transported in chains; Judge Gill refused to question Tremble about the issue or enter any orders regarding the manner in which appellant should be chained. (29RT 4530-4533.) In July, Judge Gill increased the number of bailiffs in the courtroom to three, saying that he did so under his discretion rather than in response to the prosecutor's submitted motion for increased courtroom security. (40RT 6955.)

When issues concerning spectators, some of whom were witnesses, "staring at" or harassing jurors, or vice versa, came up in August, a bailiff admitted that he had discussed with a juror or alternate whether anyone was "staring at" or "bothering" them. (43RT 7908-7909.) By the time October arrived, Rosenfeld related to the court many instances she had observed of inappropriate facial expressions by the bailiffs (65-1RT 13093-13096), nonverbal communication and flirting between bailiffs and jurors (*id.* at 13094, 13095, 13097, 13100, 13103), Tremble's laughing out loud at defense witness testimony and stating loudly that appellant should be required to testify (*id.* at 13095, 13097), and Tremble's inappropriately and repeatedly handling and touching his gun and holster. (*Id.* at 13102.)

Some of the instances of improper contact between bailiffs and the jury were uncontroverted. (65-1RT 13118 [prosecutor said Tremble's playing with the gun or holster was intended as a "joke"].) As for others, the prosecutor said he could "knock" them down but he did not do so – instead he suggested that appellant made proceedings unbearably difficult for everyone in the courtroom (*id.* at 13109) and the jurors were expressing frustration or mirth because of appellant's conduct, not in response to anything done by the bailiffs (*id.* at 13110). He admitted there was nonverbal communication between Tremble and the jurors, but said the message conveyed frustration with the length of and delays in proceedings, not an opinion as to appellant's guilt. (*Id.* at 13113-13114.) To the extent that Gill, by concluding that he did not "think" the jurors had been influenced by non-verbal communication, made implicit factual findings, those findings deserve no deference because Gill failed to take evidence on controverted issues and denied Rosenfeld's request for new bailiffs or a mistrial, while saying in a conclusory fashion that he did not want to put the trial "at risk" by changing bailiffs, nor did he believe that a mistrial was the

"appropriate" remedy. (*Id.* at 13128-13129.) However, no remedy was forthcoming and the misconduct continued.

Rosenfeld's allegations about intense eye contact between Juror 3 and bailiff Tremble suggested that the juror was looking toward Tremble for information and guidance. Rosenfeld said she had itemized numerous instances in her notes where this type of unspoken communication, including flirting, occurred between Juror 3 and bailiffs Tremble and Reed. (65-1RT 13099.) She said it was her impression that Tremble was communicating to the jury that the trial was merely a formality, and that Tremble's facial expressions were so numerous and pronounced that they were becoming evidence. (*Id.* at 13112.) Gill seemed to acknowledge that Tremble's "looks and sighs" had occurred, but said that Tremble's job was a tough one as the court's "primary interface" with the jury and that his attitude conveyed only that there was "nothing [he] could do" about the frustrating and lengthy trial. (*Id.* at 13114.) Even accepting Gill's rendition, in which he attempts to minimize Tremble's misconduct, Tremble's looks and sighs were improper and left uncorrected. Moreover, Gill did nothing to develop the record as to whether contacts between Tremble and Juror 3 might rise to the level of improper contact imperiling the impartiality of the jury; similarly he did nothing to get to the bottom of whether harassment between spectators (some of whom were witnesses), attorneys, and jurors was taking place in the hallway. (See *People v. Hedgecock* (1990) 51 Cal.3d 395 [trial court had discretion to test allegations of juror misconduct and take juror testimony not bearing on the content of juror deliberations and abused its discretion by failing to do so in the case before it].)

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E. Reversal is Required

The numerous instances of bailiff-juror communication, both nonverbal and in some cases verbal, and the other inappropriate bailiff conduct described by Rosenfeld in her October 21, 1991, motion, taken together with the many prior and subsequent instances where courtroom security and appellant's contacts with court staff were brought to Gill's attention, establish that pervasive problems with the atmosphere in and around the courtroom presented an unacceptable risk of impermissible factors coming into play, in violation of appellant's right to due process, a fair trial, and a reliable penalty verdict under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*Williams, supra*, 425 U.S. 501; *Flynn, supra*, 475 U.S. 560; *Dowd, supra*, 366 U.S. 717; see *Sanders, supra*, 203 Cal.App.3d 1510, 1514.) There is more than a "reasonable *probability*" of prejudice (*Gordon, supra*, 12 Cal.3d 323, 329), and reversal therefore is required. Even should this court conclude there was no "reasonable probability" of prejudice in the guilt phase, there is an "unacceptable risk" that the "impermissible factors" caused by the bailiffs actions and demeanor colored the jury's impression of appellant at penalty and affected the decision to sentence him to death rather than life imprisonment.

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XIX.

REPEATED CHANGES OF THE JUDGES PRESIDING OVER APPELLANT'S CASE VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS

A. Introduction

Many different judges ruled on appellant's case during the proceedings.[146] Several of those judges were removed from appellant's case for no discernable reason. Some of the judges substituted into the case admitted they knew nothing about the case and, yet, made significant decisions that affected appellant's rights, decisions which other judges were unwilling to reconsider. Often new judges came onto the case when there appeared to be others available who had more knowledge of the facts and proceedings. This shifting roster of superior court judges in a case of this complexity denied appellant his Sixth and Fourteenth Amendment rights to a jury trial and to a fair trial. It also violated his state law right to trial by a judge with the information necessary to properly exercise legal discretion. The error requires reversal and a new trial.

B. The Proceedings in Appellant's Case Were Ruled on by Twenty-Three Trial Court Judges

Three judges presided over appellant's case when it was still in municipal court. Judge Lisa Guy-Shall and Judge A. Y. Cowett presided over the initial proceedings in municipal court. (1ART, 2ART, 3ART,

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[146]As will be explained below, these judges were: 1) Lisa Guy-Schall, 2) A. Y. Cowett, 3) William D. Mudd, 4) J. Richard Haden, 5) James A. Malkus, 6) Elizabeth Zumwalt, 7) J. Perry Langford, 8) Wayne Peterson, 9) Laura Palmer Hammes, 10) Arthur Jones, 11) Jack R. Levitt, 12) Herbert H. Exarhos, 13) Judith McConnell, 14) Andrew J. Wagner, 15) Michael Greer, 16) William H. Kennedy, 17) Michael D. Wellington, 18) Jesus Rodriguez, 19) Raymond Edwards, 20) David Gill, 21) Bernard Revak, 22) Richard Huffman, and 23) Louis Boyle. Additional judges presided over the 987.9 proceedings.

4ART.) Judge William D. Mudd presided over some preliminary proceedings and over the preliminary hearing. (5ART 1; PX2RT 1.)

Following the transfer of the case to superior court, on October 20, 1986, Judge Richard Huffman presided over the arraignment and set dates for future proceedings, including deadlines for pretrial motions. (70CT 15442-15443; 9ART 1.)[147] Without explanation, appellant's case was then transferred from Judge Huffman to Judge Richard Haden who, on November 14, 1986, presided over several trial related motions, including a discovery motion and a motion to continue. (8ART 1, 9ART 1.) Judge Haden was also the first judge who considered appellant's initial motion for self-representation on March 13, 1987. (9A-1RT 5.) Because Judge Haden ruled on motions in connection with the self-representation issue, it appeared as though matters were set for Judge Haden to rule on the motion itself. On March 31, 1987, he appointed advisory counsel (Alex Landon) for appellant (10ART 18) and later ruled on Russell's motion to exclude the press from the hearing on the self-representation motion. (11ART 21.) However, Judge Haden did not hear the motion, but rather reassigned it to Judge Zumwalt.

The record is confusing about which judge was assigned to preside over appellant's case after appellant made his first self-representation motion. The record is also unclear about why the reassignment from Hayden to Zumualt was necessary. Although the case was initially assigned to Judge James Malkus, Judge Haden ultimately assigned Judge Zumwalt to preside over appellant's self- representation motion – but not over his

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[147]The proceedings before Judge Huffman were not transcribed. The record was settled to state that appellant was arraigned, pled not guilty, and denied the special allegations before Judge Huffman. (70CT 15442-15443.) Later, in front of Judge Haden the parties refer to Judge Huffman having previously set deadlines for pretrial motions. (9ART 1.)

criminal trial.[148] There is nothing in the record showing why Judge Haden did not assign Judge Zumwalt for all purposes. Haden did not assign the underlying criminal case when he assigned a judge for the motion. Eventually, the criminal case was assigned for trial to Judge Jack Levitt, but not until September 30, 1987. (34ART 8.) Prior to assignment of the criminal case to Judge Levitt, Judge Haden ruled on several trial related motions. (See, e.g., 3CT 523; 15ART 1.)

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[148]On March 27, 1987, Judge Haden assigned appellant's case to Judge Malkus, stating on the record that it was "for all purposes," specifically noting that Judge Malkus was to rule on whether appellant should be assigned advisory counsel. (9A-2RT 13, 15.) However, when the parties appeared before Judge Malkus, there was some confusion over whether the case was assigned to the judge for the purposes of the motion only or for the purposes of the motion and of the criminal trial. (67CT 15084-15085.) Because of the confusion, Judge Malkus told the parties to return to Judge Haden. (67CT 15085.) They did so that same day. (9A-2RT 16.) However, the issue of Malkus' role in the case was not discussed in the hearing before Judge Haden that day (March 27). Rather, on April 2, there was another appearance before Judge Haden who said that the case would be reassigned away from Judge Malkus, without stating why. Judge Haden did not state whether he wanted all of appellant's case to be ruled upon by another judge, or simply wanted the self-representation motion transferred. (10ART 24.) However, at an April 7 hearing before Judge Haden it became apparent that Haden did not want Judge Malkus to sit on any of the case, as Haden asserted that he had not decided whether the case assignment to Judge Zumwalt would be for the motion only or for "all purposes," suggesting that it was clear that none of the case would be heard by Malkus. (11A-1RT 27.) Judge Haden mentioned nothing about previously having assigned the case to Malkus and said nothing about why the case had to be reassigned.

These proceedings and the confusion relating to the record became a focus of appellant's agitation about his trial counsel. He asserted numerous times that the case had clearly been assigned to Judge Malkus "for all purposes" and that it had been taken away from him and assigned to Judge Zumwalt only through the actions of Russell, who wanted the case assigned to that judge because she was engaging in "clandestine influence peddling" to deprive him of his right to self-representation. (See, e.g., 48A2RT 15-17, 52CT 11025.293-11025.295.)

Judge Zumwalt began consideration of appellant's motions for self-representation and for substitute counsel, but stopped on May 22, 1987, when she declared a doubt about appellant's competence to proceed under Penal Code section 1368. (20ART 36.) Judge Zumwalt did not state why she did not preside herself over the section 1368 trial. On the record, she stated that she had to send the case to Judge Perry Langford, but did not state why she thought this was so. (See *id.* at 38.) After transfer of the 1368 case to Judge Langford, on May 22, 1987, the judge was successfully challenged for cause by defense counsel. (*Id.* at 37; MH-1RT 1.)

On May 29, 1987, the section 1368 case was sent to Judge Wayne Peterson for reassignment.[149] Peterson stated that he was considering sending the case back to Judge Zumwalt, solely on the issue of whether appellant should have special advisory counsel appointed. (1RTMH 11.) It is unclear why Judge Peterson did not send the whole 1368 case back to Zumwalt since he stated that he believed she was the right person to handle the motions in connection with the hearing. (*Id.* at 5.) Judge Peterson declined to rule on motions related to the section 1368 proceedings, remarking that without knowledge of what had gone on before, his ruling on the requests was like him paddling "half-way across the river." (*Id.* at 11.)

However, Judge Peterson never reassigned the section 1368 case. Instead, on June 5, 1987, the parties appeared before Judge Laura Palmer Hammes for assignment. (2RTMH 1-6.) There is no reason on the record as to why Judge Hammes and not Judge Peterson (or Judge Haden for that matter) was given the task of assigning the judge for the 1368 trial. Judge

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[149]Following the challenge, there was a brief appearance before Judge Langford, who directed the parties to go to Department 9. (70CT 15443.) There is no transcript for this hearing. Rather, it was settled by the parties on appeal. There is no reason on the record about why the case did not go back to Judge Haden for reassignment.

Hammes assigned Judge Zumwalt for the trial. On June 5,1987, Deputy District Attorney Patrick then exercised a peremptory challenge of Judge Zumwalt. (*Id.* at 1-3; 7CT 1403.) Hammes then assigned appellant's entire case, both the criminal matter and the 1368 matter, to Judge Arthur W. Jones. (2RTMH 6; 7CT 1403.)

However, Judge Jones did not hear the case. Instead, the next appearance was before Judge Haden, who asserted that Jones already had a serious case and that appellant's case was therefore being assigned to Jones' department only for purposes of the 1368 motion, not for all purposes. (22ART 1-2.) However, Jones did not sit on the 1368 case. Rather, the case was entirely removed from Jones when Judge Haden reassigned the case to Judge Jack Levitt. (24CT 5378). The record does not reflect a reason for Jones' removal.[150]

Judge Levitt presided over the section 1368 trial through to the jury verdict on September 21, 1987. (31ART 1193.) However, although the criminal case was assigned to him on September 30, 1987 (34ART 8), he did not preside over the criminal trial or over any of the motions relating to appellant's motion for self-representation. Instead, following the verdict in the section 1368 case, Russell's peremptory challenge of Levitt under Code of Civil Procedure section 170.6 was granted.[151] (35A-1RT 1.)

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[150]There were proceedings before Judge Jones on July 10, 1987, but there is no record of such proceedings. There is no reporter's transcript for the proceeding before Judge Haden when Judge Levitt was assigned and thus no explanation for why Jones could not preside. There is also no explanation for why Judge Haden rather than Judge Hammes made the new assignment. The trial court denied a requested settled statement regarding these transactions. (70CT 15444.)

[151]Russell initially attempted to have Judge Levitt removed for cause. (See 5CT 980-988; 6CT 989-1223 [Levitt's denial of cause challenge]; 8CT

(continued...)

On February 11, 1988, Judge Peterson returned to the case in order to reassign it. (There is no explanation about why neither Judge Hammes nor Judge Haden returned to the case.) He assigned the case to Judge Zumwalt solely on the issue of appellant's self-representation motion. (36ART 3.) However, although he had just assigned the self-representation motion to Zumwalt, rather than let that judge consider requests in relation to that motion, Peterson himself decided that he would determine who should be appointed as appellant's advisory counsel. On February 16, 1988, he appointed Chuck Sevilla for that task. (37ART 1-2.) Peterson did not consider the fact – or even appear to know – that Haden had previously appointed Alex Landon advisory counsel (1CT 169; 10ART 17), but appellant had rejected his advice and asked that he be removed. (14ART 3.) After appellant refused to see Sevilla, Peterson refused appellant's request to appoint additional advisory counsel, observing that this was pointless, given appellant's refusal to meet with Sevilla. (38ART 3.) Peterson did not consider the issue of who should preside over appellant's criminal trial.

Judge Zumwalt considered the issue of appellant's motion for self-representation and motion to relieve counsel. On February 25, 1988, Zumwalt appointed advisory counsel for appellant, Benjamin Sanchez,

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[151](...continued)
1465; [Denial of D006907, Russell's petition for writ of mandate relating to Levitt's denial of the challenge].) On October 2, 1987, Russell then exercised a peremptory challenge against Levitt for the criminal trial. There is no transcript of the proceeding. However, according to Russell in a later pleading, Levitt ruled that since the defense had already used a peremptory in the 1368 case, it could not exercise a second in the criminal case. (64CT 14392.) Defense counsel challenged this ruling with a writ to the Court of Appeal, D006915. (64CT 14356.) The Court of Appeal ruled that for the purposes of a section 170.6 challenge a section 1368 proceeding is a different proceeding than the underlying criminal action. (8CT 1482-1490.)

independently deciding that appellant should have the advisory counsel he desired. (39ART 30.) She did not take into consideration the decision of Peterson not to appoint advisory counsel given appellant's record of failing to cooperate with previously appointed counsel (Sevilla). (See 38ART 3.) Zumwalt then held a lengthy hearing on appellant's motions and, on March 16, 1988, denied both appellant's motion to be represent himself and his motion to remove counsel. (8CT 1572-1575.)

On March 24, 1988, Judge Michael Greer, reassigned appellant's criminal trial to Judge Malkus, not to Judge Zumwalt. (47ART 1-3; 24CT 5406.) There was no explanation as to why it was Judge Greer rather than Judge Haden, Judge Hammes, or Judge Peterson who took charge of reassigning the case. It is also not clear why Judge Malkus was assigned. Recall that Malkus had previously been assigned to appellant's case by Judge Haden (see 9A-2RT 13, 15), but was removed in favor of Judge Zumwalt. There is no record explanation about why Greer did not assign the criminal case to Judge Zumwalt.[152] After the assignment of the criminal case to Malkus, Zumwalt presided over one more motion, i.e., Russell's motion to be relieved as trial counsel, denying the motion on March 30, 1988. (48ART 530.) It is not clear why Judge Zumwalt did not wait and have Judge Malkus rule on this motion. This was the last that Zumwalt dealt with appellant's case. From March 24, 1988 to February 10, 1989, Judge Malkus presided over appellant's case. (63ART 1, 67ART 1.)

Meanwhile, the Court of Appeal ruled that Russell should be relieved and new counsel appointed. (10CT 1928-1930.) On January 17, 1989, Judge Exarhos considered the issue of appointment of counsel for

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[152]Recall that the prosecution had previously exercised a peremptory challenge against Judge Zumwalt. (2RTMH 1-3; 7CT 1403.) However, this was in connection with the competency trial, not the criminal trial.

appellant.[153] However, on January 17, 1989, Judge Exarhos excused himself, when he was challenged for cause by the prosecution following the prosecutor's assertion that Exarhos had improperly discussed the case with defense counsel. (60ART 3-13.) On January 17, 1989, Judge McConnell then assigned the case to another judge. (61ART 1.) There is no explanation for why Judge McConnell did not handle the case herself. There is nothing in the record about why none of the judges who had previously taken responsibility for reassigning appellant's case did so this time. There was also no explanation for why Judge Malkus (who had the criminal case) did not also handle the issue of appointment of counsel.

Although there is no order appointing him in the record, it appears Judge McConnell gave the case to Judge Wagner. (62ART 1.) On January 20, 1989, Judge Wagner appointed John Cotsirillos as advisory counsel, but Cotsirillos was not available to take the appointment. (*Id.* at 3.) Later, on January 27, the judge refused to appoint Alan Bloom to represent appellant solely on the issue of self-representation. (*Id.* at 9-10.)[154] Judge Wagner never got another chance to appoint counsel because the case was then given to Judge Revak (on January 31, 1989). (64ART 1.) Judge Revak had never previously presided over the case. There is no reason apparent from the record as to why a new judge was assigned the case, rather than keeping

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[153]There is nothing in the record about why neither Judge Peterson, Judge Hammes, Judge Haden, nor Judge Greer were reassigned the case.

[154]Judge Wagner stated as follows: "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.)

it with Judge Wagner or reassigning it to one of the judges who had ruled on the case before. There is no order appointing Judge Revak on the record. The judge never explained why he was appointed.

At this point, Russell had been relieved but no trial counsel had been appointed to replace her. It was Judge Revak who on February 2, 1989, determined that substitute trial counsel should not be identified and appointed until after appellant's self-representation motion was determined. (66ART 18.) It was also Judge Revak who appointed attorney Allan Bloom as counsel on the limited issue of appellant's self-representation motion. (*Id.* at 15.) Judge Revak did not appear to know that just a few days earlier (on January 20), Judge Wagner had refused to appoint Allan Bloom in that capacity because he believed that appellant needed counsel for all purposes. (See 62ART 9-10.)

It appeared that the stage was set for Judge Revak to rule on appellant's motion. However, the judge did not do so. Rather, there were more judge shifts. Later in February, 1989, Judge Greer determined that the underlying criminal case should be removed from Judge Malkus and reassigned to a new judge.[155] (68ART 1.) Judge Greer stated that his reason for removing the case from Judge Malkus was that Malkus was the presiding judge in the El Cajon division of the San Diego Superior Court.[156]

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[155]There is no indication in the record about why Judge Greer and not the more recent judge, i.e., Judge McConnell, took responsibility for reassigning the case.

[156]There was no indication that Judge Malkus had been appointed the presiding judge of the El Cajon courthouse after the date he was assigned appellant's case. Rather, in an earlier proceeding, Judge Malkus indicated that he might not remain judge on the case because of a change in "policy." (67ART 41; 10CT 2063.) This suggests that Judge Malkus was already the presiding judge, but the case was to be reassigned because of a new policy

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(*Id.* at 2.) Judge Greer reassigned the case to Judge Kennedy. (68ART 1.) Greer said nothing about the role Judge Revak was to play – although that judge had already made critical decisions about how appellant's counsel would be chosen. The parties made several appearances before Judge Kennedy. (70ART 1; 71ART 1; 72ART 1.) Kennedy then was challenged for cause by appellant. (72ART 2.) The case was sent to Judge Exarhos. (73ART 1.) The parties made two appearances before judges McConnell and Greer while the challenge as to Judge Kennedy was being decided. (75ART 1; 76ART 1.)

After the cause challenge was denied on May 24, 1989 (11CT 2364; 77ART 1), the case should have gone back to Judge Kennedy. However, Judge Kennedy removed himself from the case without any explanation. (79A-1RT 1.) On June 22, 1989, the parties appeared in Judge Kennedy's courtroom, but the judge refused to come out of his chambers to meet with them on the record, and sent them a message, through staff, to go before Judge Exarhos. (79ART 3.) Judge Exarhos, who had previously recused himself from hearing a single issue (viz., who should be appointed to replace Russell) (60ART 3-13), recharacterized the previous recusal as being for all purposes and sent the parties back to Judge Greer. (79ART 3-4.) Judge Greer stated that he had no idea why Judge Kennedy had removed himself from the case, but that he intended to assign the case to Judge Langford for the purpose of motions. (*Id.* at 2.) Judge Greer did not consider keeping Revak on the case, but rather reassigned the new self-representation motion to Judge Langford without explanation, and without any apparent understanding that Judge Revak had made significant rulings in relation to the self-representation motion. Judge Lewis Boyle was

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[156](...continued)
that presiding judges should not handle cases like appellant's.

assigned by Greer to appellant's criminal trial.[157] (79A2RT 1-2; 24CT 5487.)

On June 22, 1989, the same day as he was assigned, Judge Langford considered some of the issues related to representation. However, he refused to reconsider Judge Revak's decision that the issue of appellant's self-representation should be decided before the issue of new counsel to replace Russell. (78ART 13.) Judge Langford ruled on part of appellant's motion, holding that appellant was not entitled to counsel who would "obey" him. (*Id.* at 34-35.) It appeared that Judge Langford would rule on the remainder of the motion, since he ruled as an interim matter that he wanted appellant to present his case by way of affidavit. (*Id.* at 42; 79A3RT 6.) However, Langford did not rule on the remaining issues in the motion. Instead, on June 26, 1989, Judge Greer assigned Judge Boyle to resolve them. (See 79A2RT 1-2.) There is no explanation on the record as to why Judge Langford did not decide the remainder of the motion. There is also no explanation about why the motion was not sent back to Judge Zumwalt, who had already ruled on the issue of appellant representing himself.

Judge Boyle did not reconsider the rulings Judge Langford had made relating to the motion. After several appearances, on November 3, 1989, Judge Boyle ruled on appellant's motion – holding that appellant could represent himself and had made a knowing and intelligent waiver of counsel (84ART 64), and ruling that appellant should have two "second chair" counsel on his team. (*Id.* at 66-68.) Judge Boyle then left the case. On January 16, 1990, the case was briefly assigned to Judge Wellington. (88ART 1.) The record is unclear as to why Judge Wellington was assigned

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[157] Recall that Judge Langford had been briefly assigned to appellant's competency case, but Russell exercised a peremptory challenge against him. (20ART 37, MH-1RT 1.)

to the case. According to representations made later by Deputy District Attorney Carpenter, following Judge Boyle's ruling on appellant's case, Boyle retired from the bench to return to the District Attorney's Office, so that the case had to be reassigned.[158] On January 18, 1990, Judge Greer then assigned the criminal case to Judge Gill. (89ART 2; 13CT 2741.) Although the writ relating to the appeal of appellant's competency trial was still pending in the district court of appeal, neither Judge Greer, Judge Gill, nor any other judge assigned an attorney on appellant's behalf in the competency writ.

Judge Gill was the trial judge in appellant's criminal trial. However, other judges continued to be involved in the case. Judge Revak presided over several proceedings related to issues around appellant's advisory counsel. On May 2, 1990, appellant appeared before Judge Revak on a motion to relieve advisory counsel, Benjamin Sanchez. Judge Gill asked that appellant appear before Judge Revak because he did not feel it was appropriate for the trail judge to handle issues regarding appellant's relationship with advisory counsel. (1RT 65.) Judge Revak declined to relieve Sanchez, but ordered that Sanchez and appellant's other advisory counsel be required to sign a list which contained the things appellant wanted them to do. (96ART 34.)

On February 4 and 5, 1991, Judge Revak considered another of appellant's motions claiming the ineffective assistance of advisory counsel. Appellant attempted to bring a motion to relieve Mark Chambers and the

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[158]Carpenter also stated that the parties were supposed to appear before Judge Exarhos, but Exarhos recused himself. Carpenter related that they were then supposed to appear before Judge McConnell, who would assign another judge. (88ART 2-3.) However, there is no proceeding with Judge McConnell assigning the case to Judge Wellington. There is also no transcript of a proceeding where the case was assigned to someone other than Judge Wellington.

investigator John Atwell before Judge Gill. However, Judge Gill stated that issues regarding advisory counsel and investigative services were to be brought before Revak. (8RT 495.) On February 5, when in front of Revak, appellant asked to have Chambers removed, asserting that Chambers was not doing what he asked, that he had failed to provide weekly reports as ordered to by Greer, and that Chambers was really only on the case because he wanted to buy a new Mercedes. (9-1RT 534.) Revak stated that he did not credit appellant's statements about Chambers, but reasoned that appellant was representing himself and did not have to have an advisory counsel he did not want foisted upon him. (*Id.* at 531.) Revak relieved Chambers. (*Id.* at 534.)[159]

The prosecution was not present at the February 5 hearing. Having informally learned of the order relieving Chambers, the prosecution filed a motion for reconsideration of Judge Revak's order in front of Judge Gill. (9RT 563-564.)[160] Judge Revak, apparently learning of the motion for reconsideration, set another hearing, this time in the presence of the prosecution. He told the prosecution that he did not appreciate the prosecution filing a motion for reconsideration of his order in front of a different judge (i.e. Gill). (*Ibid.*) He then accused appellant of forum shopping and bringing a motion before him when Judge Gill had denied the same request. (*Ibid.*) Appellant pointed out that Judge Gill had denied the request only because Gill wanted the issue brought before Judge Revak. (*Id.* at 573.) Revak nevertheless vacated all orders relieving advisory

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[159]On February 1, 1991, Judge Revak granted appellant's motion to relieve the investigator John Atwell, who appellant asserted had worked for Chambers, not him, in violation of Atwell's promise. (9-1RT 501-507.)

[160]This motion for reconsideration is not in the appellate record. The prosecution alluded to it in the hearing before Revak.

counsel Chambers and investigator Atwell, stating as he did so that he was "wash[ing] his hands of the case." (*Id.* at 575.) He did not sit on appellant's case again.

Judge Edwards was also involved in appellant's case during the period in which Judge Gill was the assigned trial judge, after self-representation was granted. Judge Jesus Rodriquez (apparently another presiding judge) assigned Judge Edwards the issue of how to enforce Judge Greer's previous order that former counsel Russell turn over her files in appellant's case. (25CT 5563.) There is no explanation about why it was Judge Rodriquez rather than any of the judges who previously had made assignments that decided who would preside over the issue. Judge Rodriguez did not explain what prompted the transfer of the issue to Judge Edwards, rather than having it returned to Judge Greer, to decide how to enforce or reconsider his own order that Russell turn over the files.[161] Judge Edwards ultimately determined that he had doubts about appellant's mental competence to represent himself. However, he was reversed by the Court of Appeal. (15CT 3182-3190.)

As the case cycled through this parade of judges assigned to resolve one piecemeal issue after another, the lines between the 987.9 panel and the superior court also began to blur. Throughout the trial there were irregular

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[161]In briefing relating to a writ taken on the issue, Judge Gill explained that the transfer of the issue to Judge Edwards was prompted by his concern that in ruling on the files issue he might be exposed to confidential defense material which could compromise his neutrality. (74CT 16033.) Nevertheless, this does not explain why Judge Edwards, and not Judge Greer, took over the issue. Apparently, the issue was assigned to Judge Edwards by Judge Rodriguez because Judge Greer was involved with the 987.9 panel in appellant's case. (See 1RT 218-221.) However, Judge Greer issued the order when he was on the committee (see 24CT 5555), so it does not make sense that he could not hear any motions relating to the order simply because he was on the committee.

contacts between the 987.9 panel and the superior court. For instance, Glen Niemy, a research attorney for the superior court (49RT 7461), often appeared at appellant's 987.9 hearings, over the objection of appellant.[162] (See, e.g., 987.9-16RT 1, 987.9-19RT 1, 987.9-19RT 6, 987.9-25RT 4, 987.9-25RT 12, 987.9-26RT 1.) In at least one 987.9 proceeding, Judge Gill's bailiff, Glenn Tremble, was also present. (987.9-7BRT 4.) Gill stated that he had also contacted the committee, and had discussions during which appellant was not present, proceedings which were not transcribed for the record. (See, e.g., 1RT 145-146; 14RT 1249-1250.)

C. The Exercise of Discretion Requires a Judge With a Grasp of the Facts

A court's exercise of legal discretion "must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the matter at issue." (*People v. Russel* (1968) 69 Cal.2d 187, 195, superseded by statute on another ground as noted in *People v. Anderson* (2001) 25 Cal.4th 543, 575.) If a trial court is unaware of the legal basis for its discretion, it cannot be said that the court properly exercised its discretion under the law. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn.8) Similarly, it cannot be said that a judge who is ignorant of the facts about which he is asked to exercise his discretion has properly done so under the

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[162]Niemy served in many capacities for the superior court. Niemy was often present in court during appellant's trial before Gill. He was permitted to remain during confidential proceedings. (2RT 251.) He also assisted the 987.9 panel. For example, on April 30, 1990, Judge Greer authorizes him to have access to all the sealed material in appellant's 987.9 file: "The Court authorized Glen Niemy (research attorney for 987.9 panel) access to all sealed record [in appellant's case]; these records may be opened, and released to Glen Niemy, for purposes (confidential) of the court and PC 987.0 proceedings now pending before the Court." (24CT 5530.) He also penned the superior court's spirited response in the writ proceedings in D012975, the prosecution's petition asserting that Judge Edwards erroneously suspended trial proceedings. (74CT 15982-15997.)

law: "'To exercise the power of judicial discretion all the material facts . . . must be both known and considered.'" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, citing and quoting *People v. Surplice* (1962) 203 Cal.App.2d 784, 791.) "Judicial discretion must be informed, so that its exercise does not amount to a shot in the dark." (*Estate of Herrera* (1992) 10 Cal.App.4th 630, 637; see also *Schlumpf v. Superior Court* (1978) 79 Cal.App.3d 892, 901 ["A failure of the trial court to consider all the evidence is a failure to exercise discretion and requires reversal of the determination."]; *Johnson v. U. S.* (D.C. App. 1979) 398 A.2d. 354, 365 ["An informed choice among the alternatives requires that the trial court's determination be based upon and drawn from a firm factual foundation."]; *In re Marriage of Kern* (1978) 87 Cal.App.3d 402, 411 [the refusal of the trial court to consider all the evidence is tantamount to a failure to exercise discretion and calls for reversal of the ensuing court order or decree].)

It follows that one judge who has substituted for another in the proceedings cannot properly exercise his discretion unless he or she has become familiar with the record, at least as it relates to the decisions the substitute judge must make. So, for example, in *People v. Cowan* (2010) 50 Cal.4th 401, 461, this Court held that it was not error to substitute a trial judge into the proceedings where the second judge "was familiar enough with the pertinent portions of the record to exercise his discretion in an informed manner." In *People v. Espinoza* (1992) 3 Cal.4th 806, 829-839, this Court relied on the fact that the trial judge had informed himself about the relevant proceedings, in denying the appellant's claim that the substitution of a trial judge required reversal of the verdict.[163]

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[163]Once trial starts, many jurisdictions require that any substitute judge certify that he or she is familiar with prior proceedings. (See, e.g., Fed. Rules Crim. Proc., rule 25(a), 18 U.S.C.; Iowa Ct. Rules, Crim. Proc., (continued...)

A judge's failure to exercise discretion where required to do so is a denial of due process. "Failure to exercise discretion where legally required constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal." (*People v. Downey* (2000) 82 Cal.App.4th 899, 912, citing *People v. Penoli* (1996) 46 Cal.App.4th 298, 306.) "[A] ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law. [Citations.]" (*Penoli, supra*, 46 Cal.App.4th 298, 302.) Since familiarity with the relevant facts is necessary for the exercise of discretion, it follows that a hearing where a substitute trial court judge acted without knowledge of the relevant facts denies due process and a fair trial.

Federal due process requires a judge with sufficient familiarity with the facts of the case to exercise discretion. So, a ruling by a judge without complete understanding of the case amounts to arbitrary guessing in violation of due process, where it leads to a fundamentally unfair trial. (See *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098 [violation of due process for second trial judge to overrule decision of prior judge in ignorance of prior judge's ruling].)

The substitution of a judge requires reversal if substantial prejudice results. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1211-1212; *People v. Truman* (1992) 6 Cal.App.4th 1816,1828 [any error in substituting judge

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[163](...continued)
rule 2.19(7)(b)(1); Md. Rules, rule 4–361(b).) The object of such certification procedures is to assure that "the judge has a sufficient grasp of the prior testimony and proceedings to be able to fairly and effectively exercise his or her discretion with respect to rulings thereafter required . . . " (*Hood v. State* (1994) 334 Md. 52, 58.) It is equally important that judges who are substituted prior to trial learn the facts necessary to a fair exercise of his or her discretion.

harmless because the record did not show prejudice].) Under federal law, reversal is required if the substitution of judges resulted in a fundamentally unfair trial. (*Bradley*, *supra*, 315 F.3d 1091, 1098.) If due process was denied, the prosecution must show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

D. The Serial Substitution of Judges Resulted in Substantial Prejudice and a Fundamentally Unfair Trial

The rotating roster of judges denied appellant a fair trial because no one of the judges had a full picture of appellant's mental disabilities. So, for instance, on the issue of counsel, appellant never got proper legal assistance in part because so many different judges acted on the issue. Nine different judges appointed advisory counsel and /or counsel for appellant. Judge Haden appointed Alex Landon as advisory counsel. (1CT 169.) Judge Zumwalt initially refused to appoint Benjamin Sanchez as advisory counsel. (See 20A-1RT 17-18.) Judge Peterson appointed Chuck Sevilla (8CT 1530) and then refused to appoint Benjamin Sanchez on the grounds that appellant had refused to cooperate with Sevilla.[164] (38ART 3.) Judge Zumwalt later reconsidered the issue of advisory counsel. She was concerned whether this was wise since, as she pointed out, appellant had been provided advisory counsel twice before. (39ART 20.) However, at the urging of the prosecution and appellant (and over the objection of Russell who pointed out that Sanchez did not have the qualification to work on a capital case and

[164]Judge Peterson asked appellant why he had refused to see Sevilla, who Peterson described as one of the best regarded defense attorneys in the county. Appellant asserted that he believed that Sevilla did not have time to devote to the case, whereas his proposed advisory counsel (Benjamin Sanchez) had time immediately. Peterson stated that he thought appellant's assertion that Sevilla did not have time for the case was unfounded and that appellant had acted capriciously to impede the case. (38ART 3.) Sevilla suggested that appellant be given what he asked for, i.e., appointment of Benjamin Sanchez. (*Id.* at 1.)

urged that appellant's desire for Sanchez was part of his irrationality about the case [*Id.* at 25-26]), Zumwalt appointed Benjamin Sanchez, largely on the grounds that appellant stated he could work with Sanchez. (*Id.* at 30-31.)

Judge Wagner appointed John Cotsirillos as counsel and refused to appoint Alan Bloom as advisory counsel (on the issue of self-representation). (62ART 3, 9-10.) However, Judge Revak turned around and did something completely different from Judge Wagner. He did not appoint counsel, but instead appointed Alan Bloom as advisory counsel (while at the same time retaining Benjamin Sanchez – whom by this time appellant stated that he did not want as counsel [66ART 15]). Judge Gill appointed Nancy Rosenfeld (1RT 26), and at first allowed Sanchez to remain, but then relieved Sanchez and appointed Mark Chambers. (1RT 171.) Judge Revak relieved and then "un-relieved" Mark Chambers. (9-1RT 537; 9RT 575.) Judge Edwards appointed attorneys Hodge Crabtree and Beverly Barrett. (14CT 3033.)

It is apparent that the judges who appointed the various counsel believed that they were advancing the resolution of the case by giving appellant the assistance they believed he needed. What no one fully realized, because no judge had a clear view of appellant's history with counsel, was that appellant was so disturbed that he was not likely to be able to work with any counsel. So, for example, Judge Peterson believed that appellant would not use advisory counsel in a proper manner and refused to reappoint one after appellant refused the services of a very competent attorney (Chuck Sevilla). (38ART 3.) The next judge (Judge Zumwalt) thought there had to be advisory counsel to assure that there was a fair hearing on self-representation and appointed the very person Peterson thought should not be appointed, i.e., Sanchez. (39ART 30.) Judge

Peterson proved to be right because later Sanchez was removed by Judge Gill, who finally realized that appellant could not properly use Sanchez' services. (1RT 171.) But, in the mean time, another judge had acted (Judge Boyle) who ordered that there had to be two counsel to assist appellant (84ART 66-68) and Judge Gill, apparently thinking that he had to give some deference to Judge Boyle's decision, appointed Mark Chambers to join previously-appointed advisory counsel Nancy Rosenfeld. (1RT 26, 171.) Appellant was no more able to work with these two lawyers than he was able to work with Sanchez: appellant within months "fired" Chambers and ordered Rosenfeld to follow severe limitations while working with him. The upshot of this scenario in the trial court was that no judge fully realized that the situation with advisory counsel was an important signal that it was necessary to look closer at appellant's mental capacity as related to the court's decision to give him pro se status. Had one judge had a complete overview of appellant's behavior as related to his inability to work with advisory counsel, he or she would have recognized it as a symptom of his mental illness that called into question both appellant's competency to stand trial and the propriety of his continued pro se status. Nor did any judge fully realize that the appointment of advisory counsel would do nothing to assure that trial proceedings would be fair. Appellant's relationship with such counsel was so disturbed that when counsel made the slightest "misstep," in appellant's book, appellant refused to continue working with the person. Nor could any of the advisory counsel offer realistic advice about how the case should be put together. As such, these lawyers could not assure that appellant's case was fairly presented. The individual judges clearly believed that advisory counsel could make up for appellant's deficiencies, but seen as a whole the proceedings show that advisory counsel could not

ever assure a fair presentation. Because no single judge had responsibility for the case, the trial court failed to grasp this.

The rotating judge situation also led the trial court erroneously to grant appellant's motion for self-representation while appellant did not have the full assistance of counsel. As appellant has shown, Alan Bloom did not represent appellant for all purposes, only for the purpose of presenting the *Faretta* motion. This situation came to pass because Judge Revak did the opposite of what Judge Wagner had done a few days earlier, i.e., grant rather than deny appointment of counsel solely for the purposes of the self-representation motion. (62ART 9-10; 66ART 15-16.) Even the prosecution thought that appellant needed to be assigned counsel for all purposes and the prosecution suggested to the previous judge before Judge Wagner (i.e. Judge Malkus) that the case be sent to Judge Zumwalt for appointment of counsel. (59ART 2.) Judge Malkus, himself, who observed appellant shout and lose his temper while at the same time asserting that Russell had just tried to kill him (see 55ART 1-4), seemed bent on assigning appellant counsel for all purposes.[165] However, because Judge Malkus did not sit on the case, he was not given the opportunity to do so.

Sending the case back to Judge Zumwalt would have assured that the case got a judge who had at least heard evidence related to the counsel question and had a better understanding of appellant's ability to work with counsel. However, that is not what happened – it was sent to Judge Exarhos with instructions that the issue was the appointment of counsel (not limited counsel) (59ART 5), but Judge Exarhos then recused himself. (60ART 15.) Then the case went to Judge Wagner, who thought that appellant needed counsel for all purposes immediately – something with which the

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[165]So, Judge Malkus discussed the possibility of assigning the case to a different judge so that counsel could be appointed. (59ART 3; 63ART 1.)

prosecution concurred. (62ART 9-10.) However, the case then went to Judge Revak – who knew little or nothing about what had happened, but who, nevertheless, took the case off in an entirely different direction by appointing counsel with a limited role (Bloom) (66ART 15-16), and letting the case go forward on the issue of self-representation while there was still an open question about competency to stand trial pending on appeal.

Those judges who next sat on the case, Judges Langford and Boyle, refused to reconsider Judge Revak's decision that self-representation should be taken up before counsel was appointed to replace Russell, even though Langford appeared to believe that appellant needed an attorney for all purposes. (78ART 12.) Had there been a single judge presiding over all aspects of the proceedings, that individual would have seen several instances of behavior by appellant that raised a serious concern about his ability to represent himself, and showed a pressing need for an attorney to represent appellant on both the self-representation question and the pending competency writ. A judge who was better acquainted with all the facts would have known about the difficulties appellant's behavior presented. As it was, those judges who had concerns about appellant's abilities did not preside on the case long enough to take action to ensure that appellant was mentally capable of going forward. So, for example, Judge Kennedy suggested that a psychiatrist be appointed in connection with the *Faretta* motion. (70ART 8-9.) However, he left the case before he could assure that occurred. Judge Zumwalt, of course, had previously ruled that appellant could not knowingly and intelligently waive his rights (8CT 1574-1575), so had she been reassigned to hear the new self-representation motion, she could have done so with a full understanding of the relevant issues. However, she was not put back on the case.

Judge Exarhos also had some knowledge of the difficulties appellant's case presented, having been informed by Russell about Zumwalt's order that appellant could not represent himself. (See 38CT 8225.) However, Judge Exarhos took himself off the case at the urging of the prosecution – who had objected to Exharos meeting with Russell at the time of her removal to discuss who should be appointed to replace her. (60ART 13.) Judge Edwards got a better picture of appellant's problems, when appellant appeared before him and was more concerned about his name than about his death penalty case and after he reviewed Russell's files containing some of the previous competency proceedings. Judge Edwards also came to understand how little Judge Boyle had known about the mental health issues when that judge granted appellant pro se status. Judge Edwards appointed counsel (14CT 3033) and was about to hold full-blown hearings on the self-representation issue – but did not do so because the Court of Appeal reversed his decisions to halt the proceedings, appoint counsel, and appoint psychiatrists to examine appellant. (15CT 3187-3190.)

The lack of continuity in judges also explains how appellant came to be granted self-representation by Judge Boyle. Recall that Judge Boyle permitted appellant himself to determine what kind of evidence would be offered to support his motion for self-representation – acceding to appellant's request that the court not look at psychiatric evidence from the court's own experts, information already in record. (80ART 15-16.) Had any of several other judges ruled on the motion, appellant would have had a judge who was not ignorant of the pertinent facts. As a result of letting appellant put on the case for self-representation, Judge Boyle had before him only the declarations of psychiatrists whom appellant himself had screened. Had any of Judges Zumwalt, Levitt, Kennedy, or others, heard the self-representation motion, that judge would have known the difficulties

previous psychiatrists encountered when interviewing appellant and would have known that the declarations of appellant's hand-picked psychiatrists were of little or no probative value.

The upshot of all the judge-personnel changes was that many judges saw appellant's behavior, and some judges knew that mental health professionals had been involved in the case, but not knowing the whole picture, no judge treated appellant's problems with the seriousness to which they were due. Appellant was entitled to a forum where the judge knew all the facts necessary to assess his mental health issues based on a fair understanding of the evidence in the record. Instead, lacking that information individual judges treated appellant as having strange or quirky desires, but not mental health issues that required any action by the court. So, for example, given the rotating judge situation, Judge Gill could have sincerely believed (as he seems to have) that by changing advisory counsel from Benjamin Sanchez (who appellant said was giving him ineffective assistance of counsel) to Mark Chambers (who appellant insisted was the only possible person to be appointed) Judge Gill could help assure that the case got properly prepared. If, instead, Judge Gill had sat as a single judge through all the previous iterations where appellant insisted that he needed someone but then turned out to find that person impossible to work with, Gill would have had no illusions that changing lawyers would help. Rather, had Judge Gill possessed the accumulated knowledge of all the pretrial proceedings, in addition to his own experience with appellant, he would have seen the course of appellant's behavior with a series of appointed advisory counsel, and taken it into consideration as related to appellant's competency to stand trial and the propriety of his continued pro se status.

On May 7, 1990, Judge Gill stated that he was ignorant of what had been said about advisory counsel in front of Judge Revak on May 2 because

the proceedings had been sealed. (1RT 65.) Had Judge Gill reviewed these proceedings, he would have known that appellant believed that Sanchez was a liar and was trying to censor him (96ART 27), and wanted Sanchez to sign declarations under penalty of perjury that he would take actions only as ordered by appellant. (*Id.* at 11.) Judge Gill would also have known that appellant wanted an order that Sanchez and Rosenfeld be barred from communicating with one another without appellant's written permission. (*Id.* at 43.) Had Judge Gill realized that appellant was already having difficulty working with Rosenfeld and had to have complete control of the most minute aspect of advisory counsel's work, he would have been under no illusion that substituting Chambers for Sanchez as advisory counsel would assure appellant a fair trial.

To take another example, had Judge Gill known what Dr. Kalish had said about appellant's inability to reason, he would have understood that appellant had no ability to understand that he was making himself a laughing stock in front of the jury by presenting evidence of cointelpro, an outlandish story for which appellant had no credible evidence. Kalish had explained that appellant had no ability to see the forest for the trees, meaning that he did not have the ability to change his behavior to achieve his stated goal. (14ART 16.) As such, appellant would put on the cointelpro evidence because he thought it was important, without any ability to understand that it was making his defense ludicrous and without any ability to change his behavior, even had he understood its effect on the jury. To put it another way, had Judge Gill known the complete story of appellant's mental problems it is likely that Judge Gill would have ultimately realized that the cointelpro story was simply not a peculiar story from an eccentric person, which the judge had to tolerate because of his supposed obligation to honor appellant's right to represent himself. Instead,

the judge would have realized that he had before him a seriously disturbed man. Throughout the trial, Judge Gill often told appellant that there was no evidence of cointelpro and attempted to limit the questions he asked witnesses about it, but appellant unrelentingly continued to pursue the story. Had Judge Gill been exposed to appellant's behavior from the beginning of the proceedings or familiarized himself with the records (as he should have done), and, therefore, had an understanding of what Kalish said about appellant, Gill would surely have realized that this behavior was a product of mental illness, stopped the trial, and made the necessary inquiry into appellant's mental condition. Morever, Gill had ample notice that appellant's mental health problems needed further investigation. As appellant has shown above, Gill stated repeatedly on the record that he was concerned about appellant's competency. (See, e.g. 11RT 877-878, 66RT 13529-13530.)

Indeed, even appellant's requests for funding were ping-ponged between courts – despite the impropriety of the trial court being involved with the defense requests for funding – further demonstrating that the courts before which appellant appeared did not know the whole situation with regard to appellant or the resources he was requesting or receiving to prepare his defense. For example, on May 14, 1991, appellant requested that Judge Gill order Elliot Lande, the administrator for the funding court, to "find two investigators which I can interview and hire." Appellant asserted that he needed these two investigators to present his section 1538.5 motion. (14RT 1249-1250.) Judge Gill stated that the request was not properly before him, and that appellant should bring a motion for an investigator to the funding judges. Appellant asserted that he had been told by Judge Greer, one of the 987.9 judges, that he had to have investigators appointed by the trial court. (*Id.* at 1249.) Gill responded "[w]ell, I am led to believe

that you have never requested from the 987 judge any investigative fees. Until you do, until the 987 judge says 'I'm ready to grant some fees but I want you to appoint Sam Spade as his investigator,' fine, I'll do that, if the 987 judge asks me to to that." (*Ibid.*) Appellant objected to Gill's contact with the panel and asked who had talked to him. (*Id.* at 1250.) Gill admitted that he had occasionally talked to the 987.9 judge because he thought appellant had been untruthful, asserting that he and the 987.9 judge had not talked about the substance of his request. (*Ibid.*) Gill denied appellant's request that he "delineate, please, what discussions took place and what information the court received, and what questions the court asked." (*Ibid.*)[166]

Appellant had indeed, as he told Gill, previously asked the 987.9 panel for an investigator. He had done so on January 8, 1991, and was told by Judge Milliken, another of the judges before whom appellant appeared for 987.9 funds, that no investigator was necessary unless appellant could show such person "would be needed over and above" what Milliken had authorized for investigator John Atwell. At that time, Atwell worked under advisory/standby counsel Chambers' direction. (987.9-17RT 26-27.) Whatever contacts Judge Gill had with the 987.9 panel, it is clear that he was not adequately informed about what had happened at the proceedings and could not fairly determine appellant's requests. Likewise, both judges Greer and Milliken were not fully apprized of the funding circumstances.

There were other problems with some proceedings being in front of one judge and some in front of another. As noted above on February 4, 1991, Judge Revak presided over appellant's motions claiming ineffective

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[166] Section 987.9 clearly provides that "[t]he fact that an application has been made *shall be confidential* and the contents of the application shall be confidential." Despite this clear directive, Judge Gill and his research attorney, Glen Niemy, repeatedly had contact with the 987.9 court.

assistance of advisory counsel. Appellant had tried to bring a motion to have Chambers and the investigator Atwell relieved before Judge Gill, but Judge Gill told him that he could not deal with that. (8RT 495.) Judge Revak relieved Chambers. (9-1RT 534.) Subsequently, Revak revoked this order accusing appellant of having tried and failed to get Chambers relieved by Judge Gill. (9RT 564.) This was not correct, as appellant tried to point out: Judge Gill only denied the request because he believed it was improper for him to hear the discussion and, therefore, it should be brought before Judge Revak. (9RT 573.) Revak obviously did not have a record of the Gill proceedings before him, but nevertheless he punished appellant and vacated all orders relieving advisory counsel Chambers. (9RT 575.)

As appellant has detailed above, as the trial progressed it is clear that Judge Gill became very frustrated with appellant's behavior and accused appellant of delaying and wasting time. Had Judge Gill presided from the beginning of the proceedings, or at least had the benefit of a complete picture of the proceedings by familiarizing himself with the record that preceded his assignment to the case, he would have known that appellant's behavior was an understandable, though off-putting, consequence of his mental disturbances. Instead of trying to patch up the trial with ineffectual rulings, Judge Gill would surely have stopped the trial, ordered further psychiatric consultation as needed, and turned back to questions concerning appellant's competency to stand trial and mental capacity as related to self-representation – taking the steps that were needed to assure appellant received a fair capital trial.

The deference accorded a trial court's discretion is a manifestation of "the principle that greater deference is warranted whenever the trial judge's 'nether position' in the judicial pyramid makes him a presumptively more capable decision maker [citation omitted] because of 'his observation of the

witnesses, [and] his superior opportunity to get "the feel of the case."'" (*Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1024-1025, citing *Noonan v. Cunard S. S. Co.* (2d Cir. 1967) 375 F.2d 69, 71, disapproved on other grounds in *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479, fn. 4.) However, in this case, there is no deference due by this Court to the trial court's supposed ability to observe appellant or its supposed opportunity to understand the feel of the case. Because of the shifting roster of judges, there was no chance for the court, including Judge Gill, to observe what was necessary to exercise properly his or her discretion. Appellant did not have a judge who knew what was necessary to rule fairly, and there is no set of fair, reasonably informed, rulings to which this Court can defer.

In *People v. Halvorsen* (2007) 42 Cal.4th 379, 428, this Court held that any error in a substitution of a judge who was not knowledgeable of previous proceedings was harmless because that judge had not made any "evidentiary or instructional rulings that would have required familiarity with the particulars of the case." This case is utterly different. As appellant has demonstrated, numerous judges made numerous rulings that required familiarity with the case. In *Halvorsen*, this Court also declined to reverse, on the grounds that nothing the substitute judge did was erroneous. (*Ibid.*) In this case, appellant has identified myriad rulings, *ante*, that were in error because they were made without the required "familiarity with the particulars of the case." The multiple substitutions on the bench resulted in a fundamentally unfair trial and substantial prejudice. As such, appellant's conviction and sentence must be reversed and a new trial ordered.

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XX.

THE TRIAL COURT VIOLATED THE FEDERAL CONSTITUTION AND PENAL CODE SECTION 686.1 BY PERMITTING APPELLANT TO REPRESENT HIMSELF AT HIS CAPITAL TRIAL

A. Introduction

In *Indian v. Edwards* (2008) 554 U.S. 164 the Supreme Court recognized that where the defendant has a mental impairment which robs him or her of the mental ability that would assure that the trial comports with due process, states may place limits on the right to self-representation and require counsel for mentally ill defendants who are competent to stand trial, but incapable of mounting a coherent defense. In *Johnson*, *supra*, 53 Cal.4th 519, this Court held that under the principles set forth in *Edwards,* taken together with California precedent, trial courts may deny self-representation rights based on defendants' incapacity to represent themselves at trial. Neither *Edwards* nor *Johnson* held that the federal or state constitution mandates that trial courts must deny self-representation to some defendants. However, as appellant has shown above, *Edwards* reaffirmed the principle articulated in *Massey v. Moore* (1954) 348 U.S. 105 that: "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." (*Edwards*, *supra*, 554 U.S. 164, 177, citing *Massey*, *supra*, 348 U.S. 105, 108, emphasis added.).

Thus, for over 50 years *Massey* has stood for the principle that due process requires that, at least in some cases, a mentally impaired defendant must be represented. Appellant shows below that one of those instances is a capital trial. Appellant shows that the joint requirements of a fair trial under the Fifth and Fourteenth Amendments and the need for reliability and additional due process protections under the Eighth Amendment demand

that a mentally impaired *capital* defendant be represented. Appellant also shows that Penal Code section 686.1 requires that appellant be represented by counsel if he is mentally impaired; this Court's holding that enforcement of section 686.1 is barred by *Faretta* must be disavowed in light of the High Court's holding in *Edwards*.[167] Both the state and federal errors require reversal of the verdict and remand to the trial court to determine whether appellant had the mental capacity to represent himself at his capital trial.

B. Federal Due Process Requires that a Mentally Impaired Defendant be Represented at a Capital Trial

The Due Process Clause of the Fifth and Fourteenth Amendments guarantee every criminal defendant a fundamental, absolute, right to a fair trial in a fair tribunal. (*Spencer v. Texas* (1967) 385 U.S. 554, 562; *Malinski v. New York* (1945) 324 U.S. 401.) The right to a fair trial "is the most fundamental of all freedoms" essential to the preservation and enjoyment of all other rights. (*Estes v. Texas* (1965) 381 U.S. 532, 540.) The guarantee of a fair trial "lies at the base of all our civil and political institutions." (*Malinski, supra*, 324 U.S. 401, 414.) The right to a fair trial is an essential part of the architecture of American constitutional democracy -- "more than an instrument of justice and more than one wheel of the Constitution. It is the lamp that shows that freedom lives." (*Duncan v. Louisiana.* (1968) 391 U.S. 145, 156.)

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[167]Appellant also showed above that this Court in *People v. Taylor* (2009) 47 Cal.4th 850 read *Edwards* too narrowly in its holding that *Edwards* did not create a federal constitutional guarantee that mentally impaired defendants must be represented. (*Taylor, supra*, 47 Cal.4th 850, 878.) As noted above, while strictly correct that *Edwards* did not create such a right, this Court's opinion overlooks the reaffirmation in *Edwards* of *Massey's* holding that a right to a fair trial requires that mentally impaired defendants be represented.

On the other hand, "[d]ecisions interpreting the Sixth Amendment are always subject to reconsideration." (*Duncan*, *supra*, 391 U.S. 145, 158, fn. 30.) The Sixth Amendment cannot be read formalistically, for the clear intent of the amendments is that the specific rights set forth therein be enjoyed at a constitutional trial. (*Estes*, *supra*, 381 U.S. 532, 560 (conc. opn. of Warren, C.J.).) The provisions of the Sixth Amendment are best viewed as "institutional safeguards" for attaining the overarching objective of a fair trial. (*Id.* at p. 588 (conc. opn. of Harlan, J.).)

Moreover, the interest in a fair trial does not lay solely with a defendant. The public has a compelling interest in the fair administration of justice. (See, e.g., *Sell v. U.S.* (2003) 539 U.S. 166, 180 ["the Government has a . . . constitutionally essential interest in assuring that the defendant's trial is a fair one"]; *Gannett Co., Inc. v. DePasquale* (1979) 443 U.S. 368, 383 [stressing society's "definite and concrete interest in seeing that justice is fairly administered"]; *Jencks v. U.S.* (1957) 353 U.S.651, 671 ["the Government which prosecutes an accused also has the duty to see that justice is done"].) Society's substantial interest is achieved through meaningful, adversarial testing of the state's evidence against a criminal defendant. (*Herring v. New York* (1975) 422 U.S. 853, 862 [A properly functioning adversarial process serves "the ultimate objective that the guilty be convicted and the innocent go free."].) The United States Supreme Court has held this societal interest in reliable judicial proceedings to be so compelling as to justify the government in administering psychotropic drugs to defendants against their will during trial proceedings. (*Sell*, *supra*, 536 U.S. at p. 166.)

Finally, the courts themselves have an independent interest and a special role in the fair administration of justice. (See, e.g., *Wheat v. U.S.* (1988) 486 U.S. 153, 160 [there is "an institutional interest in the rendition

of just verdicts in criminal cases."].) The courts must ensure that "criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." (*Id.* at p. 160.) The Supreme Court has declared this interest sufficiently substantial as to justify denying a defendant's waiver of a conflict of interest. (*Id.* at p. 164) "It is essential to the proper administration of justice," furthermore, "that dignity, order, and decorum be the hallmarks of all court proceedings in our country." (*Illinois v. Allen* (1970) 397 U.S. 337, 343.) This interest has justified trial courts in removing defendants from the courtroom during the defendant's own trial if the defendant cannot conduct himself in an orderly, respectful manner. (*Ibid*; see also *U.S. v. Gonzalez-Lopez* (2006) 548 U.S. 140, 152 ["We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness. . . ."].)

The fundamental principle served by the Sixth Amendment right to self-representation is autonomy. (*Faretta v. California* (1975) 422 U.S. 806, 833-834; see *Martinez v. Court of Appeal of California, Fourth Appellate Dist.* (2000) 528 U.S. 152, 160 ["[T]he right to self-representation at trial [is] grounded in part in a respect for individual autonomy."]; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 176-177 ["The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense."].) A defendant who chooses to represent himself thereby waives the benefits of having counsel, taking the risk on himself that there will be a less favorable outcome to the proceeding. (*Faretta*, *supra*, 422 U.S. 806, 835.)

However, although the Sixth Amendment protects individual autonomy through the right of self-representation, the Supreme Court has repeatedly found that these autonomy interests may be limited in light of the

needs for a fair trial, including society's need for a proper outcome, and in light of the need for the proper administration of justice. (See *Faretta*, *supra*, 422 U.S. 806, 839 (dis. opn. of Burger, C.J.) [the quality of representation of a defendant at trial is not the interest solely of the defendant].) So in *Martinez*, *supra*, 528 U.S. 152, 162, the High Court found that "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." So too, the Court held that trial courts can appoint advisory or standby counsel to assist the defendant, even over the defendant's objection (*McKaskle*, *supra*, 465 U.S. 168, 184), and held that defendants representing themselves must follow the same evidentiary rules and courtroom rules of decorum as lawyers. (*Faretta*, *supra*, 422 U.S. 806, 835, fn. 46.) In addition, many courts, including this Court, have held that defendants waive their right of self-representation if they do not invoke the right prior to the start of the trial. (See, e.g., *People v. Windham* (1977) 19 Cal.3d 121, 128; *People v. Lynch* (2010) 50 Cal.4th 693, 721.) Other rights under the Sixth Amendment, such as the right to retain counsel of one's own choosing, can also be limited by the interests of justice. (*People v. Alexander* (2010) 49 Cal.4th 846, 871-872 ["[E]ven in cases involving the defendant's constitutional right to retain an attorney of his choosing, that right can be forced to yield if the court determines the appointment at issue will result "in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." (Citation omitted.)].)

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C. The Due Process and the Reliability Requirements of the Fourteenth and Eighth Amendments Demand the Limitation of Self- Representation When the Mental Incapacity of a Defendant Threatens the Right to a Fair Capital Trial

The High Court in *Edwards* held that states may constitutionally "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." (*Edwards*, *supra*, 554 U.S. 164, 178.) In so doing the Court outlined the ways in which mental impairments interfere with the due process right to a fair trial.

First, the *Edwards* court reiterated that criminal trials "must not only be fair, they must appear fair to all who observe them." (*Edwards, supra,* 554 U.S. 164, 176.) "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 hopeless and alone before the court." (*Ibid.,* citing *Massey*, *supra*, 348 U.S. 105, 108.) The Court added that allowing a mentally deficient defendant to represent himself increased the risk of improper conviction, undercutting "the most basic of the Constitution's criminal law objectives, providing a fair trial." (*Id.* at p. 177.)

The Court observed that competence, and, therefore, the standards for assessing competence are relevant to, but not dispositive of, a court's consideration of a mentally impaired defendant's assertion of his right to present a defense. The Court observed that prior decisions regarding mental competency had underscored the importance of a criminal defendant's ability to consult with and assist his attorney in preparing his defense. (*Edwards*, *supra*, 554 U.S. 164, 178, citing *Dusky*, *supra*, 362 U.S. 402, 402 and *Drope*, *supra*, 420 U.S. 162, 171.) This implied that the "instance in

which a defendant who would choose to forgo counsel at trial presents a very different set of circumstances, which in our view, *calls for a different standard.*" (*Id.* at pp. 175-176, emphasis added.) The necessity that a defendant without counsel be able to prepare his own defense "cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself." (*Ibid*; see *Godinez v. Moran* (1993) 509 U.S. 389, 413 (dis. opn. of Blackmun, J.) ["A person who is 'competent' to play basketball is not thereby 'competent' to play the violin. . . . A monolithic approach to competency is true to neither life nor the law. Competency for one purpose does not necessarily translate to competency for another purpose."].) The Court thus made it clear that the limits due process placed on the right of self-representation were dependent upon the demands such self-representation would place on the defendant who wishes to waive counsel.

The Court emphasized that the manner in which mental illness interfered in the defendant's ability to present a defense when *not* represented by counsel needed to be considered when assessing competence. Drawing upon a brief submitted by the American Psychiatric Association (APA) and a study on adjudicative competence, the Court stated that mental illness "interferes with an individual's functioning at different times and in different ways." (*Edwards*, *supra*, 554 U.S. 164, 165.) "In certain instances," the Court asserted, "an individual may . . . be able to satisfy *Dusky*'s competence standard . . ., 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." (*Id.* at pp. 175-176, citing N. Poythress, R. Bonnie, J. Monahan, R. Otto, & S. Hoge (2002) *Adjudicative Competence: The MacArthur Studies* p. 103 ["Within each domain of adjudicative

competence (competence to assist counsel; decisional competence) the data indicate that understanding, reasoning, and appreciation [of the charges against a defendant] are separable and somewhat independent aspects of functional legal ability"].) The Court referred directly to the section of the APA's brief which stated that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." (*Id.* at p. 176, citing Brief for APA et al Amici Curiae State of *Indiana v. Edwards*, 2008 WL 405546, *26 ["APA Brief"].) The Court thus marked the path for assessing the impact of mental illness and the many ways in which it interferes with a fair trial in analyzing the circumstances under which an individual's Sixth Amendment right of self-representation can be limited.

Finally, the Court stressed the importance of establishing competency in self-representation to ensure the dignity of the person who wished to represent himself – that is, the very dignity that *Faretta* was intended to protect. "A right of self-representation will not affirm the dignity of a defendant who lacks the mental capacity to conduct his [own] defense," the Court observed. (*Edwards*, *supra*, 554 U.S. 164, 176; see *Faretta*, *supra*, 422 U.S. 806, 839 (dis. opn. of Burger, C.J.) ["The integrity and public confidence in the system are undermined when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel."]; cf. *Faretta*, *supra*, 422 U.S. 806, 849 (dis. opn. of Blackmun, J.) ["I do not believe any amount of pro se pleading can cure the injury to *society* of an unjust result." (emphasis added)].) On the contrary, "the spectacle that could well result from his self-representation at trial is at least as likely to

prove humiliating as ennobling." (*Edwards*, *supra*, 554 U.S. 164, 176; cf. *Faretta*, *supra*, 422 U.S. 806, 840 (dis. opn. of Burger, C.J.) ["True freedom of choice and society's interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel and insist that the accused be tried according to the Constitution."].) The Court thus held that dignity, or lack of it, could be a factor for limiting the right to self-representation where the defendant lacks mental capacity to conduct a defense.

Edwards thus delineated factors to be considered when evaluating when the due process demands of a fair trial require limitations on the right of a mentally impaired defendant to self-representation. Limitations on the right to self-representation are acceptable when permitting a defendant suffering from a mental impairment to represent himself so undermines the dignity, integrity, accuracy, and fairness – both real and perceived – of the criminal justice system that the Fifth and Fourteenth Amendment guarantee of a fair trial is violated.

As noted, *Edwards* made it clear that drawing the limitations on the right of self-representation required an understanding of the demands upon a self-represented defendant at trial. Appellant has shown above that even competency to stand trial makes significant cognitive demands upon a defendant. To be competent to stand trial, a defendant must have the capacity to decide whether to waive certain rights: the right to trial (*Godinez*, *supra*, 509 U.S. 389, 391); the right not to testify (*Rock v. Arkansas* (1987) 483 U.S. 44, 52-53); and the right to a jury (*Adams v. U.S. ex rel. McCann* (1942) 317 U.S. 269, 275), *Cooper v. Oklahoma* (1996) 517 U.S. 348, 364.) A defendant competent to stand trial also needs the capacity, "in consultation with counsel," to decide "whether to waive his 'right to confront [his] accusers.'" (*Cooper, supra*, 517 U.S. 348, 364; see

ibid. ["With the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense."].) Obviously, some cognitive and communicative abilities are directly required by the basic *Dusky* demand for competence to assist counsel. (See Dillard, *Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court's Competency Doctrine as Applied in Capital Cases* (2012) 79 Tenn. L. Rev. 461, 494, citing Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope* (1993) 47 U.Miami L. Rev. 539, 552-554 ["[E]ven with counsel, criminal defendants are responsible for making some choices on their own; as such, defendants must have a suitable degree of decisional competence."].) However, these "cognitive/communication abilities are limited to what is needed to provide enough information to counsel so that counsel, not the defendant, can carry out the many tasks required to assure reliable adversarial testing of the prosecution's case." (APA Brief, *supra*, 2008 WL 405546 at *22.)

Because there is no counsel to assure that the basic demands of a fair trial are met, self represented defendants be able to perform a far greater number of tasks than represented defendants and must have correspondingly greater cognitive and communicative capacities to assure that a trial is fair. They must be permitted "to control the organization and content of [their] 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.) The unrepresented defendant must make decisions quickly, "without much if any advance warning or chance to prepare, in a public courtroom, under the pressure of knowing that the consequences may be irreversible and the prosecution ready to exploit errors." (APA Brief, *supra*, 2008 WL 405546 at *23.) A pro se defendant must have "the significantly greater

cognition/communication capabilities required to play the roles that executing such decisions entails." (*Ibid.*) A mentally ill defendant who does not have these capacities is incapable of assuring that a capital trial meets minimal standards of a fair trial.

Further, the defendant, though impaired, must have the capacity to meaningfully test the prosecution's case – another requirement of a fair trial. (*Herring*, *supra*, 422 U.S. 853, 862.) Depending on his or her level of functioning, the mentally impaired defendant may not have the skills necessary to comprehend and articulate the elements of the offense, and so show why the prosecution might have incorrectly alleged an offense; s/he cannot formulate and offer effective legal arguments to counter the prosecution; s/he cannot appropriately object to violations of evidentiary rules. Nor can s/he exploit weaknesses in the prosecution's case by means of cross-examination or point out to a jury contradictory testimony. A impaired defendant cannot elicit from the mass of evidence critical facts and summarize them in closing arguments. (See APA Brief, *supra*, 2008 WL 405546 at *24.)

If the defendant suffers from severe anxiety, he or she could well lack the ability to maintain his focus in a stressful environment. (Amer. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition--Text Revision (2000) pp. 349-351.) If suffering from depression, he or she surely struggles to make decisions, and might even intentionally forge a self-destructive course, as struggling with over-whelming feelings of worthlessness. (*Ibid*; Maroney, *Emotional Competence, "Rational Understanding" and the Criminal Defendant* (2006) Amer. Crim. L. R. 1375, 1410 ["The effects of severe clinical depression on, inter alia, attention, perception, concentration, and memory. . . could derail one or more of the stages of competence-relevant decision

making."].) Even when not intending self-harm, a mentally impaired defendant may irreparably damage his case.[168] A pro se defendant will have numerous opportunities to speak before the jury, and, in this capacity, "he will 'almost inevitably' give contradictory or unreliable testimony that will injure his standing in jurors' eyes." (APA Brief, *supra*, 2008 WL 405546 at *25.)

Because the defendant in *Edwards* did not face the death penalty, the Supreme Court did not have to grapple with Eighth Amendment concerns and with the additional due process concerns generated by the death penalty, or with the additional demands placed upon the abilities of a self-represented defendant in a capital case. This Court must do so here. In capital trials, the United States Supreme Court has repeatedly emphasized that given the "irremediable and unfathomable" nature of the death penalty, the Eighth Amendment demands a heightened degree of reliability in all stages of a capital proceeding. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411.) Because there is a qualitative difference between death and any other permissible form of punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Zant v. Stephens* (1983) 462 U.S. 862, 887, citing *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Zant*, *supra*, 462 U.S. 862, 887, citing *Gardner v.*

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[168]This Court has held that it is not error to permit a defendant to represent him or herself when the express purpose of self-representation is to be sentenced to death. (See, e.g., *People v. Bloom* (1989) 48 Cal.3d 1194, 1220; *People v. Clark* (1992) 3 Cal.4th 41, 109). Appellant in this case maintained he was innocent and wanted to win an acquittal or, if convicted, a life sentence.

Florida (1977) 430 U.S. 348, 358; see also *Caldwell v. Mississippi* (1985) 472 U.S. 320, 323 [Eighth Amendment demands heightened degree of reliability in determining death is appropriate punishment in specific case].)

In *Sumner v. Shuman* (1987) 483 U.S. 66, 85, the Court held that the Constitution mandates "heightened reliability in death penalty determinations through individualized sentencing procedures." Justice Blackmun's opinion for the Court specifically noted that while individualized sentencing procedures in noncapital cases are mere matters of state policy, such procedures take on a constitutional dimension in the context of a capital case. (*Id.* at p. 75.)

Defense counsel's role in assuring that these reliability and additional due process requirements are met is substantial. (See *Wiggins v. Smith* (2003) 539 U.S. 510, 514 [describing the rigorous requirements of the Sixth Amendment in the capital defense context]; *Williams v. Taylor* (2000) 529 U.S. 362, 391-393 [recognizing a capital defendant's unique right to have an attorney exhaustively investigate mitigating evidence that might justify leniency by the jury]; *Rompilla v. Beard* (2005) 545 U.S. 374, 377 [recognizing that defendants facing capital charges are entitled to heightened protections under the Sixth Amendment]; *Porter v. McCullum* (2009) 558 U.S. 30, __; 130 S.Ct. 447, 452-455 (per curiam) [Counsel in capital case has an obligation to do a thorough background investigation to discover evidence that would humanize the defendant so that the jury could accurately assess his moral culpability].)

As the United States Supreme Court recognized in *Powell v. Alabama* (1932) 287 U.S. 45, 69, in a death penalty case a person facing criminal charges "requires the guiding hand of counsel at every step in the proceedings against him." As one scholar has explained:

> Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.

(Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences* (1995) 43 Buff. L. Rev. 329, 357-358 [footnote omitted].) Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make "extraordinary efforts on behalf of the accused." (See ABA Standards for Criminal Justice: Defense Function, Standard 4-1.2(c), in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993).) For example, there are particular demands upon counsel in jury selection techniques;[169] there are extraordinary demands in preparation of the guilt phase.[170] An attorney representing the accused in a death penalty case must fully

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[169]"Trial attorneys in death penalty cases must be able to apply sophisticated jury selection techniques, including rehabilitation of venire members who initially state opposition to the death penalty and demonstration of bias on the part of prospective jurors who will automatically vote to impose the death penalty if the defendant is convicted on the capital charge. (American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) 31 Hofstra L. Rev. 913, 924 [ABA Guidelines], footnotes omitted.)

[170]Counsel must be experienced in the utilization of expert witnesses and evidence, such as psychiatric and forensic evidence, and must be able to challenge zealously the prosecution's evidence and experts through effective cross-examination. (ABA Guidelines, *supra,* at p. 924, footnotes omitted.)

investigate the relevant facts with both the guilt and the penalty in mind.[171] Capital counsel must coordinate and integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase.[172]

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[171]"Because counsel faces what are effectively two different trials--one regarding whether the defendant is guilty of a capital crime, and the other concerning whether the defendant should be sentenced to death--providing quality representation in capital cases requires counsel to undertake correspondingly broad investigation and preparation. . . . With respect to the guilt/innocence phase, defense counsel must independently investigate the circumstances of the crime and all evidence -- whether testimonial, forensic, or otherwise--purporting to inculpate the client. . . . [T]he defense lawyer's obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events, and subjecting all forensic evidence to rigorous independent scrutiny. Further, notwithstanding the prosecution's burden of proof on the capital charge, defense counsel may need to investigate possible affirmative defenses--ranging from absolute defenses to liability (e.g., self-defense or insanity) to partial defenses that might bar a death sentence (e.g., guilt of a lesser-included offense). In addition to investigating the alleged offense, counsel must also thoroughly investigate all events surrounding the arrest, particularly if the prosecution intends to introduce evidence obtained pursuant to alleged waivers by the defendant (e.g., inculpatory statements or items recovered in searches of the accused's home)." (ABA Guidelines, *supra*, at p. 925, footnotes omitted.)

[172]"At that phase, defense counsel must both rebut the prosecution's case in favor of the death penalty and affirmatively present the best possible case in favor of a sentence other than death. If the defendant has any prior criminal history, the prosecution can be expected to attempt to offer it in support of a death sentence. Defense counsel accordingly must comprehensively investigate--together with the defense investigator, a mitigation specialist, and other members of the defense team -- the defendant's behavior and the circumstances of the conviction. Only then can counsel protect the accused's Fourteenth Amendment right to deny or rebut factual allegations made by the prosecution in support of a death sentence, and the client's Eighth Amendment right not to be sentenced to

(continued...)

Along with preparing to counter the prosecution's case for the death penalty, capital defense counsel must develop an affirmative case for sparing the defendant's life – a requirement that must be met to assure that the imposition of the death penalty meet constitutional demands. A capital defendant has an unqualified right to present any facet of his character, background, or record that might call for a sentence less than death. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-115; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plurality opinion).) This Eighth Amendment right to offer mitigating evidence presupposes that the defense lawyer will unearth, develop, present, and insist on the consideration of those "compassionate or mitigating factors stemming from the diverse frailties of humankind." (*Woodson, supra*, 428 U.S. 280, 304 (opinion of Stewart, Powell, & Stevens, JJ).) All this requires competent counsel. Moreover, "[a] properly litigated capital sentencing hearing is adversarial: the state presents its strongest evidence and arguments why the defendant deserves to be executed, and the defense counters with its "case for life." (Toone, *The Incoherence of Defendant Autonomy* (2005) 83 N.C. L. Rev. 621, 629.) If no mitigating evidence is presented, the hearing becomes a one-sided affair, and the likelihood that death will be imposed is high.

Thus, competent capital counsel is required to ensure that a capital trial meet both Fifth and Fourteenth Amendment due process and Eighth Amendment reliability requirements. Competent counsel who can perform the tasks delineated above is critical to ensuring that the proceedings lead to a reliable verdict. The likelihood of death is greater if the case for life is put on by someone without the mental capacity to do so. Moreover, a capital

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[172](...continued)
death based on prior convictions obtained in violation of his constitutional rights." (ABA Guidelines, *supra*, at pp. 926-927, footnotes omitted.)

trial without competent counsel is not fair – and does not appear to be fair. A capital trial without counsel where a mentally limited self-represented defendant has not prepared a meaningful defense against the prosecution at guilt or penalty, has not meaningfully defended against the prosecution's case for death, and, most importantly, has not meaningfully made the case for life, does not "affirm the dignity" of the unrepresented individual. As such, a death penalty may not stand unless the trial which led to the penalty has met heightened reliability requirements and due process fairness requirements, requirements which cannot be met unless a defense is forcefully presented and prosecution evidence vigorously tested at both guilt and penalty trials.

It follows that these Amendments require that the Sixth Amendment right of self-representation in capital cases be limited to only those defendants who can muster the skills delineated above of capital attorneys, in spite of any mental impairment from which they suffer. The Supreme Court has frequently held that due process and heightened reliability requirements in a death penalty trial demanded additional procedural protections than the due process protections applicable in all non-capital criminal cases. (See, e.g., *Kennedy v. Louisiana* (2008) 544 U.S. 407 [striking down statutory regimes permitting capital punishment for child rape, in part, because of concerns about reliability of child testimony in a capital case]; *Turner v. Murray* (1986) 476 U.S. 28, 35-36 (White, J., plurality opinion) [imposing a requirement of voir dire regarding racial prejudices, not applicable in a trial for non-capital crimes, in capital prosecution for interracial murder]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 5 n.1 [noting due process provides capital counsel with opportunities to protect rights not necessarily extended to non-capital defendants]; *Green v. Georgia* (1979) 442 U.S. 95, 97 [requiring admission of important

mitigating evidence notwithstanding its hearsay nature, in a capital case]; *Gardner*, *supra*, 430 U.S. 349, 357-362 [imposing unique presentence report disclosure requirement in capital cases].)

A state must require defendants with mental impairments so serious that they are unable to competently represent themselves in capital proceedings to be tried with the assistance of counsel. As one judge has recently put it:

> The Eighth Amendment requires heightened reliability in the adjudicative process leading up to a death sentence. *Lowenfield v. Phelps* (1988) 484 U.S. 231, 238–39, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion). Such heightened reliability is inconsistent with allowing a severely mentally ill defendant to represent himself at trial, *Faretta* notwithstanding, no matter how well he may appear to the trial court at that time. The risk of an unfair trial is too great to tolerate.

(*Ex parte Panetti* (Tex. Crim. App. 2010) 326 S.W.3d 615, 620 (dis. statement of Holcomb, J.)[173] In this case, there was no finding by the trial

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[173]Appellant is aware that this Court has, in several cases that predated *Edwards*, rejected the claim that California may limit the right to self-representation in a capital case. (See, e.g., *People v. Blair* (2005) 36 Cal.4th 686, 736-740; *People v. Koontz* (2002) 27 Cal.4th 1041, 1073-1074; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365; *Bloom, supra*, 48 Cal.3d 1194, 1222-1223.) In the wake of *Edwards*, however, it is now apparent that the holdings of these cases were based on an incorrect view of the *Faretta* right as absolute. Thus, in *People v. Bloom*, *supra*, 48 Cal.3d 1194, this Court acknowledged that the Eighth Amendment imposed a "high requirement of reliability on the determination that death is the appropriate penalty in a particular case," but stated that "the high court has never suggested that this heightened concern for reliability requires or justifies forcing an unwilling defendant to accept representation . . . in a capital case." (*Id.* at p. 1228.) *Edwards* has now made that very suggestion. Similarly, in *Bradford*, *supra*, 15 Cal.4th 1229, and *Koontz*, *supra*, 27 Cal.4th 1041, this Court again acknowledged "the state's

(continued...)

court that appellant's mental disabilities did not interfere with his ability to competently put on the penalty phase of a capital defense. As such, the verdict must be reversed.

D. The Trial Court Violated Penal Code Section 686.1 by Permitting Appellant to Waive Counsel Without Determining Whether his Mental Impairment Prevented him From Effectively Representing Himself

Code Section 686.1 provides that "a defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings." The language and intent of the statute is clear: proceedings leading up to the imposition of death must be reliable; and reliability, in the Legislature's judgment, requires that the defendant be represented by counsel. As Justice Chin has pointed out, the statute represents "the legislatively stated policy . . . of this state." (*People v. Dent* (2003) 30 Cal.4th 213, 224 (conc. opn. of Chin, J.).) California courts have ignored this legislative mandate, believing that implementation of the statute is blocked by the right guaranteed in *Faretta*, *supra*, 422 U.S. 806, which this state's courts have interpreted as being "absolute." (*People v. Taylor* (2009) 47 Cal.4th 850, 872; *People v. Clark* (1990) 50 Cal.3d 583, 618, fn. 26.) However, as appellant has shown above, this Court incorrectly interpreted *Faretta* as mandating no limitations on the right of self-representation. In fact, states may (and indeed in capital cases must) impose requirements beyond the mere capacity to waive the right to counsel, before permitting a defendant to represent himself at trial. Supreme Court case law, properly

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[173](...continued)
significant interest in a reliable penalty determination," but held that "a defendant's fundamental constitutional right to control his defense governs." (*Bradford*, *supra*, 15 Cal.4th 1299, 1364-1365; *Koontz*, *supra*, 27 Cal.4th 1041, 1074.) *Edwards* holds, however, that the defendant's right to control his defense, in fact, does not always govern or determine the self-representation issue.

understood in light of the decision in *Edwards*, permits California to implement the policy, embodied in Penal Code section 686.1, of requiring that capital defendants be represented by counsel when a defendant's mental impairments prevent him from effectively representing himself.

Nine years ago, Justice Chin, joined by Justices Baxter and Brown, bemoaned the fact that California was prevented by *Faretta* from enforcing the mandate of section 686.1. (*Dent, supra*, 30 Cal.4th 213, 223-224.) As Justice Chin stated:

> There is much to be said for modifying *Faretta*, at least in capital cases, to give the trial court discretion to deny a request for self-representation when no good ground exists for the request and the defendant is not capable of effective self-representation. But such modification is not for us to do. As Justice Richardson stated, we must "await further instruction on the point from the high court" which originated the *Faretta* principle.

(*Id.* at p. 224.) *Edwards* has clarified the law and provided that "further instruction" anticipated by justices of this Court. For reasons explained above, section 686.1 can be enforced where the defendant "is not capable of self-representation." Thus, the trial court's failure to enforce the clear mandate of the statute in appellant's trial was error, requiring reversal of the conviction and sentence.

E. The Conviction Must be Reversed and on Remand, if Appellant Seeks Pro Se Status, the Trial Court Must Determine Whether Appellant is Competent to Represent Himself at a Capital Trial

Because of the errors of state and federal law shown above, appellant's verdict must be reversed, and the case remanded to the trial court to determine whether appellant should have been permitted to represent himself. The test on remand is implicit in *Edwards*. *Edwards* described competence to represent oneself at trial as the ability "to carry out the basic

tasks needed to present [one's] own defense without the help of counsel." (*Edwards, supra,* 554 U.S. 164, 175–176.) Appellant noted above the multiple tasks necessary to present a defense at a capital trial. Consideration of the abilities needed to carry out these tasks must be the focus of the trial court's assessment on remand. There are extraordinary demands on capital counsel, and a capital defendant must proportionally possess these greater capacities to ensure the fairness and reliability of the trial. (*Dillard, supra,* at p. 500, fn. 244 ["[I]f counsel needs to have a more refined ability to handle the complexity of a capital case, so too must the capital defendant."].)

As noted, a capital defendant as part of a defense at the penalty phase of a trial has an unqualified right to present any facet of his character, background, or record that might call for a sentence less than death. (*Eddings, supra*, 455 U.S. 104, 113-115.) The trial court on remand must therefore assure itself that appellant is capable of presenting evidence about his character and background that might give the jury a reason to sentence him to life without the possibility of parole. This aspect of the remand will require the trial court's careful attention since it is apparent from the record that appellant appears to have a severe limitation when it comes to his ability to assess psychological evidence regarding his mental condition, particularly as it relates to a possible "case for life." Appellant presented no evidence whatsoever about any mental limitations at his penalty phase. On remand the trial court must assure itself that appellant can "select or reject a [penalty] defense based on that evidence after full consideration of the strategies available to him and after giving a plausible reason for whatever course he chooses." (Johnston, *Representational Competence: Defining the Limits of the Right to Self-representation at Trial* (2011) 86 Notre Dame L. Rev. 523, 595 (bracketed material added).)

XXI.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital-sentencing scheme violate the United States Constitution. This Court consistently has rejected cogent arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Section 190.2 is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the

pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, section 190.2 contained 19 special circumstances, one of which, murder while engaged in a felony under subdivision (a)(17), contained 11 qualifying felonies. Appellant objected to the felony murder special circumstance, and its breadth, as unconstitutional under the Eighth Amendment of the United States Constitution. (23CT:4739-4741.)

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. Appellant objected to this statutory scheme that fails to perform a constitutionally mandated narrowing function. (23CT:4742.) This Court has routinely rejected challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3, Factor (a), Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 76RT 15935-15937; 19CT 4397-4398.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the

defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. In this case, for instance, the prosecutor argued that the circumstances of the murder were aggravating because of the manner in which the homicide occurred, the time it occurred, the location, the method, and the loss to and pain endured by the victim's family.

This Court never has applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." Thus, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that this Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence is Unconstitutional Because it is not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (CALJIC No. 8.88; 76RT 15943-15944; 19CT 4413.)

Blakely v. Washington (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, require any fact that is used to support an increased sentence (other than a prior conviction) to be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 19CT 4413.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring* and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The

trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring* and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Fourteenth Amendment Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof is Required, or the Jury Should Have Been Instructed That There was no Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was the appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (76RT 15935–15937, 19CT 4397-4398; 76RT 15943-14944, 19CT 4413), failed to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has rejected any instruction on the presumption of life (*People v. Arias* (1996) 13 Cal.4th 92, 190). Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges this Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact to the jury.

(Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict was not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court has "held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring*, *supra*, 536 U.S. 584. (See *Prieto*, *supra*, 30 Cal.4th 226, 275.)

Appellant asserts that *Prieto* was incorrectly decided, and that application of *Ring*'s reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged

with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that alleged acts of prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 76RT 15937-15938; 19CT 4399.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, factor (b), violates due process and the

Fifth, Sixth, Eighth and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant and argued that such activity supported a sentence of death. (See, e.g., 73RT 1511-15120 [Tvedt and Hensley shooting], 72RT 14889-15108 [Bellinger robbery], 73 RT 15056-15283 [Richardson homicide].)

The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270, *Blakely*, *supra*, 542 U.S. 296, *Ring*, *supra*, 536 U.S. 584, and *Apprendi*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) Appellant asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to sentence appellant to death hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 76RT 15943-15944; 19CT 4413.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a

manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard, supra*, 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this Court to reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination was Whether Death is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson, supra*, 428 U.S. 280, 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (76RT 15943-15944; 19CT 4413.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant, supra*, 462 U.S. 862, 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

This Court has previously rejected this claim. (*Arias, supra*, 13 Cal.4th 92, 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed to Inform the Jurors That if They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. (76RT 15943-44; 19CT 4413.) By failing to conform to the mandate of section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks*, *supra*, 447 U.S. 343, 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a life-without-parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson, supra*, 428 U.S. 280, 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde, supra*, 494 U.S. 370, 380.) That occurred here because the jury was left with the impression that appellant bore some particular burden in proving facts in mitigation.

The failure to provide the jury with appropriate guidance was prejudicial, and requires reversal of appellant's death sentence, since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of*

Life: A Starting Point for Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.) and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

In *Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39

Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellants's Constitutional Rights

1. The use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85(d) and (g); Pen. Code, § 190.3, factors (d) and (g); 76RT 15935–15937, 19CT 4397-4398), acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills*, *supra*, 486 U.S. 367, 384; *Lockett*, *supra*, 438 U.S. 586, 604.) Because the offending restrictive adjectives remained in the instructions under factors (d) and (g), the error that occurred and harm that resulted was not remedied by the trial court's modification of CALJIC No. 8.85 to include, in factor (k), that an aspect the jury may consider was "whether the defendant committed the offense while under the influence of a mental or emotional disturbance, which disturbance need not be extreme." (76RT 15935-15937; 19CT 4397-4398.)

Appellant is aware that this Court has rejected the argument that the use of restrictive adjectives are barriers to the consideration of mitigation in violation of the federal Constitution (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See, e.g., CALJIC No. 8.85; 76RT 15935–15937; 19CT 4397-4398.) The trial court's failure to omit the

designated factors likely confused the jurors and prevented them from making a reliable determination of the appropriate penalty, in violation of appellant's constitutional rights.

Appellant asks the Court to reconsider its decision in *Cook*, *supra*, 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (76RT 15935-15937; 19CT 4397-4398.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h) and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.)

Appellant's jury was therefore left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on nonexistent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) Appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. California's Capital-Sentencing Scheme Violates the Equal Protection Clause

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes, in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and noncapital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a noncapital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, and aggravating and mitigating factors must be established by a preponderance of the evidence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has

previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but asks the Court to reconsider.

H. California's use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*Cook, supra*, 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.)

In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

* * * * *

XXII.

THE CUMULATIVE PREJUDICE FROM ERRORS IN THE COMPETENCY, GUILT AND PENALTY TRIALS RISES TO THE LEVEL WHERE REVERSAL OF THE COMPETENCY, GUILT AND PENALTY VERDICTS IS REQUIRED

Multiple errors over the guilt and penalty phase of a capital trial must be considered cumulatively in assessing whether the defendant "was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial." (*People v. Hill* (1998) 17 Cal.4th 800, 844-847, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn. 13 [granting reversal of judgment and a retrial to a death-sentenced defendant].) "Where, as here, there are a number of errors at trial, a balkanized, issue-by-issue harmless error review is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381, internal quotation omitted; see also *In re Reno* (2012) 55 Cal.4th 428, __, 283 P.3d 1181, 1224.) In cases where errors of federal constitutional magnitude are combined with other errors, reversal is required unless the cumulative effect of all of the errors was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* standard to cumulative error analysis where some errors are of federal constitutional dimension].) Here, reversal of the competency verdict, conviction, special circumstance findings, and death verdict is required because there is a reasonable possibility the combined effect of the many errors noted herein was not harmless.

In the competency trial, there were numerous egregious errors, the most serious of which are the trial court's giving of an instruction that

entirely omitted "rationality" from the definition of competency to stand trial, and its continuing failure to rule on appellant's *Marsden* motion while allowing the prosecutor to make the issues related to it the focus of the competency trial and admitting testimony misleading the jury about the respective roles of counsel and client by wrongly explicating the holding in *People v. Frierson* (1985) 39 Cal.3d 803. Thereafter another egregious error occurred: the writ challenging the competency verdict was dismissed as moot, while appellant was unrepresented in the Court of Appeal.

More serious errors occurred during pretrial proceedings. First, the trial court granted appellant pro se status while he was unrepresented and without taking into consideration his mental capacity as related to his knowing, intelligent, and voluntary waiver of his right to counsel. Then, the Court of Appeal erred in reversing the rulings of a trial court judge who subsequently attempted to correct that flawed ruling. Thereafter, the trial court again seriously erred by inviting and encouraging "advisory counsel" to develop a shadow defense, which interfered with appellant investigating, preparing, and presenting his own chosen defense.

In the guilt phase, the most egregious errors resulting in fundamental unfairness to appellant involve the trial court's failure to declare a doubt as to appellant's competency or take steps to inquire into his mental capacity, although the judge stated again and again that the defense was a product of fantasy and delusion. The trial court also committed prejudicial error when it barred appellant from presenting his chosen defense by excluding evidence offered to support it on relevancy grounds.

Another gross error making the entire proceeding fundamentally unfair was the indecorous shifting of the case from one judge to another – twenty three judges in all – in the face of obviously unresolved issues which made it impossible for the court to meet its duty of assessing whether and to

what degree there was doubt as to appellant's competency to stand trial and the propriety of allowing him to proceed without the assistance of counsel.

As appellant has shown above, a number of these errors are structural in nature and require reversal per se; should this Court think differently, however, the errors nonetheless require reversal under a harmless-error analysis. The numerous substantial errors during the competency trial, pretrial proceedings, and the guilt phase of the trial create not only a reasonable possibility (*Chapman v. California, supra*, 386 U.S. 18, 24), but also a reasonable probability that errors influenced the determination that appellant was competent to stand trial and the guilt and special circumstances verdict. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) These errors considered cumulatively establish violation of appellant's right to a fair trial and the convictions and special circumstance finding must be reversed. As this Court recently stated in *In re Reno, supra*, 55 Cal.4th 428, __, 283 P.3d 1181, 1124, quoting *People v. Hill, supra*, 17 Cal.4th 800, 844, "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error."

The errors infecting the jury's determinations in the guilt phase cast a heavy shadow as well on appellant's penalty trial – where appellant again represented himself, and lacked the assistance even of advisory counsel. Again appellant was barred from presenting his chosen defense. The guilt trial and the resulting prosecution verdict placed a passel of aggravation under section 190.3, subdivision (a) on the table before the penalty trial even commenced. Errors in the guilt and penalty phase combined to create a reasonable possibility that the penalty verdict was adversely affected. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259 [applying *Chapman* harmless error review to constitutional violation in penalty phase of capital

trial]; see also *People v. Brown* (1988) 46 Cal.3d 432, 447 [endorsing reasonable possibility standard for non-federal penalty phase error].)

Society's interest in a meaningful and reliable penalty trial was neglected entirely in this case. As explained in Argument XX, *ante*, both state law and federal constitutional principles mandate that self-representation by a mentally disturbed defendant in a capital case is an egregious error, the prejudicial effect of which cannot be exaggerated.

It is far more difficult to show harmlessness under *Chapman v. California, supra*, at the penalty phase than at the guilt phase. When a jury makes a guilt determination, it must mechanistically determine whether the prosecution has proven every element of a crime. The jury's penalty phase determination is quite different, because it has discretion to make a subjective moral judgment.

> [T]he nature of the penalty phase necessarily endows a jury with greater discretion than does the guilt phase. Guilt phase jurors are expected to make findings of fact and apply the law to the facts without injecting their personal feelings or sense of justice. [Footnote.] Penalty phase jurors, by contrast, are expected to bring their own values into play. . . . Since the jury cannot be instructed regarding the proper expression of these values, the death penalty decision necessarily involves subjective and discretionary elements not present when a jury decides the question of guilt.

(Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases – A Comparison & Critique* (1991) 26 U.S.F. L. Rev. 41, 52-53 (hereafter Kessler); accord, Scoville, *Deadly Mistakes: Harmless Error in Capital Sentencing* (1987) 54 U. Chi. L. Rev. 740, 755 ["[T]he statutory definitions of aggravating circumstances act as only a partial constraint on the decision of the sentencer in a capital case: the sentencer may find some aggravating circumstances and yet still choose not to impose a death sentence. In

noncapital cases or in the guilt phase of a capital case, on the other hand, the tribunal's choice is constrained as soon as it finds that the statutorily defined elements of a crime are present."].) Harmless-error analysis at the penalty phase must take this distinction into account. (See *Satterwhite v. Texas*, *supra*, 486 U.S. at p. 258 ["the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer"]; *State v. Kleypas* (Kan. 2001) 40 P.3d 139, 271-273 [recognizing how harmless-error analysis differs at penalty phase]; Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied* (1993) 28 Ga. L. Rev. 125, 150 ["The individual choices jurors make about the existence of mitigating circumstances coupled with the unique weighing of factors creates a proceeding fundamentally different from a guilt trial. [¶] An analysis of harmless error in the penalty phase should be refined to take into account the unique characteristics of the decision"]; McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should it Be?: An Assessment of United States and Louisiana Supreme Court Case Law* (1999) 59 La. L. Rev. 1105, 1144].)

Using an overwhelming-evidence test to conduct harmless-error analysis of a penalty phase error is not appropriate, despite this Court's practice of finding penalty phase errors harmless due to the presence of overwhelming aggravating evidence. (See *People v. Brown*, *supra*, 46 Cal.3d at 448.) The overwhelming-evidence test is unduly deferential and is particularly ill-suited for penalty phase errors.

> [S]ince capital punishment is reserved for those who have committed only the most heinous crimes, if error is held harmless whenever the aggravating evidence is overwhelming, penalty phase error will rarely be prejudicial. In addition, the "overwhelming evidence" test is particularly inappropriate in

> death penalty cases since the evidence presented and evaluated is of a moral rather than a factual nature.

(Kessler, *supra*, 26 U.S.F. L. Rev. at p. 88.) Application of the overwhelming-evidence test to penalty-phase errors improperly transforms harmlessness analysis into something akin to a sufficiency-of-the-evidence test. (Cf. *Kyles v. Whitley* (1995) 514 U.S. 419, 434-435 & fn. 8 [contrasting sufficiency test from materiality prong of *Brady* claim].)[1]

It cannot be shown beyond a reasonable doubt that the numerous egregious errors throughout the proceeding did not contribute to the death verdict. The constitutional errors were not harmless. (See *Satterwhite v. Texas*, *supra*, 486 U.S. at p. 258.) Therefore, the judgment of death must be vacated.

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[1] These factors likely explain why the United States Supreme Court uses the contribute-to-the-verdict test articulated in *Chapman v. California*, *supra*, 386 U.S. at p. 24, in upholding the use of harmless-error analysis for penalty-phase errors (see *Sochor v. Florida* (1992) 504 U.S. 527, 540; *Satterwhite v. Texas*, *supra*, 486 U.S. at p. 258), and has not endorsed an overwhelming-evidence test like that used in *People v. Brown*, *supra*, 46 Cal.3d at p. 448.

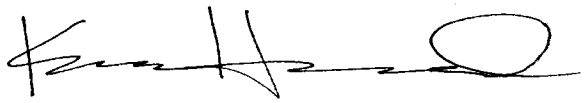
CONCLUSION

For all of the reasons stated above, the entire judgment – the verdict of competence to stand trial, the convictions, the special circumstance findings, and the sentence of death – must be reversed.

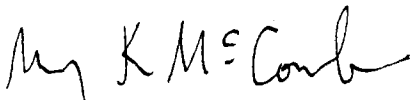
DATED: October 24, 2012

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



KAREN HAMILTON
Deputy State Public Defender



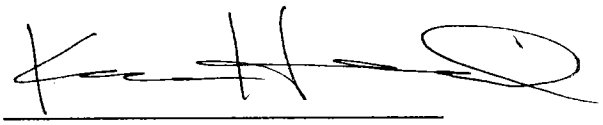
MARY K. McCOMB
Supervising Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630)

I, KAREN HAMILTON, am the Deputy State Public Defender assigned to represent appellant BILLY RAY WALDON, also known as N.I. SEQUOYAH, in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office computer software. On the basis of that computer-generated word count, I certify that this brief is 258,526 words in length.

DATED: October 24, 2012



KAREN HAMILTON
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Billy Ray Waldon (N.I. Sequoyah)**
Case Number: **Supreme Court Crim. No. S025520**
San Diego County Superior Court No. CR82986

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 770 K Street, Suite 1000, Sacramento, California 95814. I served a copy of the following document(s):

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The envelopes were addressed and mailed on **October 24, 2012,** as follows:

NI Sequoyah (B.Waldon), H27800
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San Quentin, CA 94974

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 24, 2012, at Sacramento, California.

DENISE A. ARMENDARIZ

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DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Billy Ray Waldon (N.I. Sequoyah)**
Case Number: **Supreme Court Crim. No. S025520**
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Department of Justice
Office of the Attorney General
Holly Wilkens
110 West "A" Street, Suite 1100
San Diego, CA 92101

San Diego County Superior Court
Attn: Capital Appeals Unit
220 W. Broadway
San Diego, CA 92101

District Attorney for San Diego County
Hall of Justice
330 W. Broadway
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 25, 2012, at Sacramento, California.

DENISE A. ARMENDARIZ

СОЬД