IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	No. S224929
Plaintiff and Respondent,	)	
v.	)	
ZEFERINO ESPINOZA, Jr.,	)	
Defendant and Appellant.	)	

Sixth Appellate District No. H039219
Sant Clara County Superior Court No. CC954850
The Honorable Paul Bernal, Judge

ANSWER BRIEF ON THE MERITS

LAWRENCE A. GIBBS (SBN 98866)
P.O. Box 7639
Berkeley, California 94707
Tel: (510) 525-6847
Email: lawgibbs@gmail.com

Attorney for Defendant/Appellant
ZEFERINO ESPINOZA, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

MISCELLANEOUS

ISSUES ON REVIEW

1. Did the trial court err in continuing trial in appellant's absence without a valid waiver of his trial rights or appointment of counsel after appellant, who was out of custody and representing himself, voluntarily failed to appear for his ongoing trial?

2. Was reversal required because the trial court refused to grant appellant a one-day continuance after it granted his motion during jury selection to represent himself?

INTRODUCTION

Appellant, who was charged with various drug and weapons offenses, had extraordinary difficulty working with attorneys. In protracted pretrial proceedings, appellant went through several public defenders. While the trial court viewed appellant's conduct as intentionally disruptive, there was an alternative, more complex explanation: appellant's mental disorder.

In pretrial proceedings, the trial court and the public defender repeatedly stated their belief that appellant suffered from mental disorders. The court told appellant he had a personality disorder, could not process information like most people, could not tell the truth and could not control himself in court. The court remarked, "this is the kind of experience I have had with people who have had a lifelong drug abuse where their minds stop working right."

This was not the only such exchange between the court and appellant. At one point, the court asked, "Mr. Espinoza, do you suffer from any disorder which causes you to be unable to sit still while Mr. Camperi is talking? ... Just so it's clear, on the record I want to say every time Mr. Camperi is talking you're jumping out of your seat, you're wriggling, you're rolling your eyes and you are looking at the deputy as if the deputy should intervene and help you out. I don't know what's going on. Do you have some kind of disorder?" (10 RT 397.) A few moments later, in response to appellant's claim that the public defender had done nothing on his case, the court observed, "I don't know if it's hyperbole or in your world it's really different than everyone else sees. I'm wondering if you suffer from a disorder. ... And I am really concerned for you." (10 RT 399.)

When appellant said he felt personally attacked, the court responded, "Everyone is born with assets and deficits, including myself, right? ... Some people have a condition which causes them not to be able to process information exactly like everybody else because we are all different. But the information I am giving you is not being processed completely, I've witnessed that. And the information you are giving to me is not a reflection of what is really going on and I have witnessed that. ... Maybe you have an inability to receive information." (10 RT 412.)

There was more. Appellant told the court that he believed that an arresting officer had a sexual relationship with an informant, which was all proven by "a bloody handkerchief." Appellant's public defender told the court there was no evidence to support appellant's bizarre claims.

Despite all this, the trial court permitted appellant to waive the assistance of counsel and represent himself. Unsurprisingly, appellant was not up to the task and he failed to appear on the next day of trial.

The trial court then proceeded without appellant and without defense counsel. The ensuing criminal judgment was thus the product of an *ex parte* proceeding in which only the prosecutor participated. In the trial court's view, which is echoed here by the State, by failing to appear, the pro se appellant forfeited not just his right to be present but his right to counsel.

The matter, however, is more nuanced. The Sixth Amendment guarantees two distinct rights: the right to self-representation and the right to the assistance of counsel. When appellant failed to appear, with the intent to obstruct or delay the trial, his right to self-representation became subject to forfeiture. The trial judge, however, wanted to make sure that appellant was represented. The court did not take the obvious solution: re-appointing the

public defender who had prepared the case for trial and had just been relieved. Instead, as the judge candidly acknowledged, the judge himself "sat in defense counsel's seat to protect the rights of the defendant." By acting as self-appointed counsel for appellant, the trial court constructively revoked appellant's right to self-representation.

There is general agreement that, when the trial court terminates a defendant's right to self-representation for misconduct, the right to counsel endures and counsel must be appointed. Because appellant's conviction was obtained in violation of appellant's right to counsel, the judgment of the court of appeal should be affirmed.

STATEMENT OF THE CASE

I. The Charges

An information filed in December 2009 charged appellant with eight counts, consisting of drug and weapons offenses, making criminal threats and attempting to dissuade a witness. (See Ct. App., typed opn. at pp. 3-4.)

Appellant pleaded not guilty. (1 CT 81.)

II. Pretrial Proceedings

A. Denial of Appellant's *Marsden* and *Faretta* Motions And The Court's Concern For Appellant's Mental Health

The pretrial proceedings lasted more than two years, during which appellant made several motions to relieve appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118. (1 CT 95-98 [4/28/10]; 228-229 [3/13/12]; 242 [4/17/12]; 247 [4/23/12].) Seven different public defenders represented appellant in 65 appearances on his behalf. The trial court found this to be a product of appellant's delay tactics and "manipulations of the process." (13 RT 1026.)

The record[1] – including the trial court's own, repeated observations – discloses a more complex explanation for the difficult and protracted pretrial proceedings: appellant's mental disorders.

In March 2012, Mark Camperi from the public defender's office

---

[1] The records of these *Marsden* hearings were unsealed by the trial court. (13 RT 1014-1015.)

represented appellant. (1 CT 228-229.) On March 14, 2012, appellant moved under *Marsden* to relieve Camperi, but after a closed hearing, the court denied the motion. (9 RT 292-312.) During that hearing, Camperi described the difficulties other attorneys in his office had experienced with appellant. The previous attorney assigned to appellant's case "was literally crying when she was talking to him. And she said that he was perhaps one of the most difficult clients she's ever had and nearly drove her off the calendar and she was going crazy." (9 RT 297.) Camperi noted that "[t]he reason nobody wants to handle the case in our office is because he's been so difficult to handle." (9 RT 297-298.) Camperi described an incident in court in which appellant "was moving to different parts of the courtroom getting closer and closer behind me with a notepad, staring directly at me, making faces and taking notes and making weird noises." (9 RT 298.) Camperi told the court that he was willing to continue to represent appellant "despite his personality disorders." (9 RT 300.) The *Marsden* motion was denied. (9 RT 305.)

On April 17, 2012, six days before trial, appellant again moved to relieve Camperi and to represent himself under *Faretta v. California* (1975) 422 U.S. 806. (10 RT 319.) Appellant requested "a conflict of interest attorney to help me handle my case." (10 RT 320.) The court asked appellant when he would be ready for trial. Appellant requested a continuance of "a little bit more than three weeks or so just to see where I'm at." (10 RT 321.) The court denied the *Faretta* motion on the ground that appellant was not

prepared to represent himself in a timely fashion. (10 RT 324-325.) The court also found that "sometimes people use the *Faretta* as a tool to manipulate the court system, which appears to be happening. If you truly wanted to represent yourself you could have brought that motion any time in the last few years in this case and then you would have been ready for trial." (10 RT 324.)

On April 23, 2012, appellant again moved to relieve Camperi. (10 RT 379 et seq.) Appellant made various allegations about Camperi's representation, including that Camperi had threatened him, did not care about the case, failed to investigate certain witnesses, and would not communicate with him. (10 RT 380-384.) Appellant made the following bizarre allegations about Mr. Camperi:

> DEFENDANT: "[Mr. Camperi] hasn't handed over the statements of those witnesses and audio. Especially with it's referring to Officer Jessica Marie Dale, the investigating officer, having a relationship with a confidential witness Augustine Gonzalez, Sr., very important information. As they would put it it's the bloody handkerchief.
>
> THE COURT: The bloody handkerchief?
>
> THE DEFENDANT: Yes.
>
> THE COURT: What's that?
>
> THE DEFENDANT: That's evidence that supports everything that I'm saying and I can show you statements of the witnesses that are making statements about the officers and the personal relationship with the officer and the witness, the confidential informant ... There is a conspiracy and I know that [Camperi] is involved because he's not wanting to represent me.
>
> THE COURT: Can I ask you when you say that Jessica Marie Dale, the peace officer, had a relationship with Augustine Gonzalez, Sr. Do you mean a sexual relationship?

> THE DEFENDANT: Romantic. And he's a felon. And she's claiming that she knows me. ... [Camperi] knew that the officer and the confidential witness Augustine Gonzalez have a romantic relationship. He has her possessions. There is evidence that shows that, not only evidence but statements from people they don't even know the party that it's just evidence that they found in the possession."

(10 RT 383-384.)

The court asked Camperi to respond. Camperi said that, while appellant had been abusive, "I understand that sometimes people have personality disorders." (10 RT 392.) Camperi said that he "didn't have him personally diagnosed or anything like that." (*Id.*) Camperi said there was no evidence to support appellant's allegation of a sexual relationship between the investigating officer and the informant. (10 RT 396.) In its briefing below, the State was candid: it told the court of appeal that in these pretrial hearings, "appellant acted irrationally" and made "unsubstantiated claims." (Resp. Br., at p. 4.)

The trial court at that point became concerned about appellant's mental health. The court asked appellant, "Mr. Espinoza, do you suffer from any disorder which causes you to be unable to sit still while Mr. Camperi is talking? ... Just so it's clear, on the record I want to say every time Mr. Camperi is talking you're jumping out of your seat, you're wriggling, you're rolling your eyes and you are looking at the deputy as if the deputy should intervene and help you out. I don't know what's going on. Do you have some kind of disorder?" (10 RT 397.)

Moments later, in response to appellant's claim that Camperi had done

nothing on his case, the court observed, "I don't know if it's hyperbole or in your world it's really different than everyone else sees. I'm wondering if you suffer from a disorder. We just want to make sure that you get quality representation. You get your day in court. You get to say what you get to say.. You get a fair trial. These are my goals. And I am really concerned for you." (10 RT 399.)

When appellant made what appeared to be more false accusations, the court again questioned his mental health: "Are you just lying, or are you making things up, or are you suffering from mental illness? (10 RT 405.) The court continued, "So I'm wondering if you are having an inability to process what Mr. Camperi is telling you and an inability to process what I'm telling you. Did you have problems in school?" When the appellant asked what kind of problems, the court responded, "Just difficulty processing information." (10 RT 408.) The court noted that "this is the kind of experience I have had with people who have had a lifelong drug abuse where their minds stop working right." (10 RT 409.)

Appellant complained that he felt like he was being attacked. The court responded:

> THE COURT: I want to address that. Nobody is attacking you... I'm just trying to have an open discussion with you to help you.
>
> Everyone is born with assets and deficits, including myself, right? Everybody has got their high point and their low points. Some people have dyslexia where they mis-up letters in a word or words in a sentence. Some people have ADHD. They have a problem paying attention. Some people have a condition which causes them not to be able to process information exactly like everybody else because we are all different.

> But the information I am giving you is not being processed completely, I've witnessed that. And the information you are giving to me is not a reflection of what is really going on and I have witnessed that. There's nothing wrong with that, it's just who you are and maybe that's part of the frustration that you're having with Mr. Camperi is maybe you are not catching 100 percent of what he's saying and maybe you have an inability to receive information.

(10 RT 412.)

Camperi denied appellant's accusations. (10 RT 423-426.) The court found no basis for the *Marsden* motion. (10 RT 426.) In denying the motion, the court observed that "the statement that Mr. Espinoza has made to the court regarding the facts associated with this case do not line up with the evidence before the court, or in some cases, reality. The attorneys and the court have discussed the issue of incompetence and Mr. Espinoza falls in the category of he may have a personality disorder , but he does not lack competence to stand trial." (10 RT 427.)

B. The Trial Court Continues To Express Concerns For Appellant's Mental Health Yet Grants Appellant's Motion to Represent Himself.

The next day, in the middle of jury selection, appellant renewed his *Marsden* and *Faretta* motions. The court held another closed hearing. (10 RT 454 et seq.) Appellant sought to initiate contempt proceedings against Camperi, complaining that Camperi lied to him and would not communicate with him. (10 RT 454-462.) When the court questioned appellant's version of events, appellant responded: "And if I seem like I am not sane maybe they

should have an evaluation, maybe I am crazy or something because I don't understand the way he's treating me and the way he's acting. I'm supposed to feel secure. I'm not even allowed to participate in my defense. That's sad." (10 RT 463.)

The court found appellant's allegations to be untrue, and told appellant, "You're a liar. You are a liar, sir." (10 RT 469- 470.) The court again denied the *Marsden* motion on the ground that appellant was "playing the system." (10 RT 473.) The court disputed appellant's characterization of Camperi as uncooperative, and noted that it was appellant who was unable to control himself: "Mr. Espinoza flies off the handle, interrupts, interrupts me, interrupts his attorney, interrupts my deputy, is very animated, throws his hands around, rolls his eyes." (10 RT 474.) The court told appellant, "you have a problem controlling yourself ... I've never seen anyone like you before. This is incredible to me." The court compared appellant's behavior to people on the Ricki Lake Show or the Jerry Springer Show. (10 RT 475-476.)

Appellant moved once again under *Faretta* to represent himself. (10 RT 476.) The court told appellant, "[i]f you are ready to proceed to trial without him you can do it." (10 RT 476.) Appellant requested co-counsel to assist him, which the court denied. (10 RT 476.)

The following colloquy then took place:

> THE DEFENDANT: I am requesting that when I go pro per because I won't be ready like tomorrow. It will take me two weeks.
>
> THE COURT: And that's why you can't have Mr. Camperi taken off

the case.

THE DEFENDANT: He is affecting my case, Your Honor. He doesn't communicate. He doesn't want to talk to me. He's making you believe that I have a mental state. He's making you believe there is something mentally wrong with me. He's making the court's believe that.

THE COURT: Well, I'm not an expert, but I believe you have a personality disorder which is not something to be ashamed of.

THE DEFENDANT: Is that bad?

THE COURT: No, it's not bad. It's not good, it's not bad.

THE DEFENDANT: I don't know, that's the only personality that I have. If people take it in the wrong way there's nothing I can do. I'm really scared here, Your Honor, about what's going on. Camperi is lying.

(10 RT 477.)

Appellant insisted on representing himself rather than proceed with Camperi. (10 RT 480.) Despite the court and counsel's concerns that appellant suffered a personality disorder that made it impossible for him to process information, tell the truth and control himself, the court stated, "very good," and began the process of taking appellant's *Faretta* waiver. (10 RT 481.)

1. *Faretta* Advisements.

Appellant filled out a form entitled, "Petition To Proceed In Propria Persona," which advised appellant of various trial rights, including the right to counsel. (1 CT 251.) As to this right, the form stated:

"I understand that I have the right to be represented by a lawyer

at all stages of the proceedings and, if I do not have funds to employ counsel, one will be appointed for me by the court."

(1 CT 251.) The form required appellant to acknowledge that he was conditionally waiving the right to appointed counsel. The form included the two following advisements:

6. I understand that the right to act in propria persona is not a license to abuse the dignity of the Court. I understand that the Court may terminate my right to self-representation in the event that I engage in serious misconduct and obstruct the conduct and progress of the trial.

7. I understand that if at some point an appointed attorney does have to take over my case, that attorney may be at a great disadvantage in presenting my case.

(1 CT 253.)

The court reviewed the form with appellant. (10 RT 485-487.) The court found that appellant voluntarily waived his right to counsel and added that "the appellant has been working the system as part of a delay tactic." (10 RT 487-488.)

Appellant then asked, "me taking over the case today can I at least get a continuance to tomorrow?" (10 RT 486.) The court replied, "no". (*Id.*) The court told appellant that Camperi would "not be coming back" and that appellant would not be getting co-counsel. Appellant said he was willing to represent himself. (10 RT 497-498.) The court granted the *Faretta* motion and relieved Mr. Camperi. (10 RT 488.)

III. The Trial Begins With Appellant Representing Himself

With appellant representing himself, the court resumed jury selection. (10 RT 1094.) The jury was sworn and instructed, and the prosecutor gave his opening statement. (10 RT 494-510.) Appellant waived his opening statement. (10 RT 510.) The prosecution then called appellant's roommate, Augustine Gonzalez, to testify. (10 RT 510.) Appellant lodged two objections during the prosecution's direct examination, but conducted no cross-examination. (10 RT 527.) The court recessed for the day. (10 RT 531.)

IV. Appellant Fails To Appear

The next morning, appellant failed to appear for trial. (11 RT 606.) All efforts by the court and police to find or contact appellant were unsuccessful. (11 RT 608-615.) The next day, the court convened at 8:50 a.m. Appellant still failed to appear. (11 RT 608.)

The trial then court made the factual finding:

> "The court is making a finding under Penal Code section 1043 that the appellant had voluntarily, knowingly, and purposefully absented himself from trial. The court finds that he knowingly absented himself. The court finds that he abandoned this trial purposefully and that the purpose for which he chose to not come to trial was evasion of the trial or avoiding penalty for the alleged crimes that he allegedly committed or another delay tactic with the appellant perhaps believing that if he didn't show up to trial that the court would terminate this jury trial, send the jurors home and then when he comes in a month he would try to delay the trial again for another three years."

(11 RT 608-609.)

V. The Trial Court's Decision To Try Appellant *In Absentia* Without Appointing Counsel.

The court then stated that "we are going to proceed in absentia pursuant to Penal Code 1043 and *People versus Connolly*." (11 RT 615.) The court did not raise or consider the issue of the complete absence of defense counsel. It simply proceeded with the trial in appellant's absence without appointing defense counsel. The defense table was therefore empty. The prosecutor was the only party to participate.

The prosecution presented testimony from four police officers and a criminalist from the county crime laboratory. (11 RT 625-701.) The court also held hearings under Evidence Code section 402 to determine the admissibility of appellant's statements to police, which the court found admissible. (11 RT 616-624.) The prosecutor, himself, commented to the jury that the entire *ex parte* proceeding "has been at times a little surreal and a little strange ...." (11 RT 716.)

Although there was no defense counsel during the trial, the trial court recognized the need for counsel and, accordingly, took it upon itself to step into defense counsel's shoes. Thus, following the hearing on the admissibility of appellant's statement, the court stated: "The court has also taken into consideration the argument likely that the defendant/or his defense attorney would have made if they had been present ...." (11 RT 624.) Before a second police officer testified to appellant's statements, the court stated,

"The court is going to conduct a 402 hearing as if defense were here and had objections to things that this officer would be testifying to and the court is having this hearing to protect the rights of the defendant in his absence." (11 RT 662-663.) The court made a similar comment in respect to the jury instructions. (E.g., 11 RT 761-762 ["The Court took into consideration arguments, requests, and objections that the defense would have made."];

At the close of evidence, the court instructed the jury, "[d]o not consider [appellant's] absence for any purpose in your deliberations." (11 RT 709. See also 11 RT 734-735.)

The jury convicted appellant on the counts related to drug possession and being a felon in possession of a firearm and ammunition. (2 CT 320-327.) The jury acquitted appellant of making criminal threats and attempting to dissuade a witness through a threat of force. (*Id.*)

IV. Post-Trial Events

In May 2012, a month after the end of the trial, appellant voluntarily reappeared in court with counsel, and the court remanded him into custody. (12 RT 903-904.) The court denied appellant's motion to exonerate his $50,000 bail, which he forfeited by failing to appear. (12 RT 907.)

Appellant moved for a new trial on various grounds including that the trial court erred by proceeding with the trial without the appointment of counsel. (3 CT 445, 454-464.) The court denied the motion. (13 RT 1024-1030.) The court ruled that appellant "volitionally" chose not to appear for

trial, and the trial could therefore proceed. (13 RT 1029-1030.) But the court noted that appellant was not entirely without counsel. Here, the trial court gave its most thorough explanation of its role as surrogate defense counsel:

> "In his absence during the trial, I, as a court, voiced a defense position on behalf of the defendant as if he were here during the trial. I iterated what the defense would want on all substantial issues and motions. ***I basically sat in defense counsel's seat to protect the rights of the defendant,*** and I took all possible, reasonable defense positions into account before I ruled on any issues that was [sic] before the court in the defendant's absence."

(13 RT 1029-1030 [emphasis added].)

The court then sentenced appellant to two years, eight months in prison. (5 CT 1038-1040.)

COURT OF APPEAL'S OPINION

The court of appeal reversed. The case, according to the court "concerns the constitutionality of a trial held without the presence of the defendant or defense counsel." (Typed opn. at p. 1.) The court explained that the constitution granted appellant various trial rights including the right to counsel; that appellant could waive all such rights; but that any such waiver must be "knowing and intelligent." (*Id.* at pp. 9-10, 16.) While the record established that appellant voluntarily absented himself from the trial, "nothing in the record shows defendant knew the trial would proceed or was proceeding without him. Hence the record fails to support any inference that defendant made a knowing waiver of his fundamental trial rights." (*Id.* at pp. 16-17.)

Though not essential to its decision, the court suggested three measures the trial court could have taken to both safeguard appellant's constitutional rights and ensure the integrity of the judicial process. The trial court could have appointed Mr. Camperi as standby counsel, so that he would have been available to conduct the trial in appellant's absence. (*Id.* at p. 18.) The trial court could have re-appointed Camperi to proceed with the trial upon appellant's disappearance. This option was eminently workable since Camperi had fully prepared the case for trial and was "well prepared to step in." (*Id.* at p. 19.) Or, the trial court could have advised appellant during the *Faretta* process that, in the event he failed to appear for trial, the trial would proceed without him and without counsel. Such advisement would insured

that appellant's failure to appear would have constituted a knowing and intelligent waiver of his trial rights. (*Id.*)

The court of appeal further held that the trial court abused its discretion by refusing to grant appellant a one-day continuance after the trial court granted appellant the right to represent himself.

THE STATE'S CONTENTIONS

The State argues that there was no legal impediment to conducting the trial in the absence of both appellant and defense counsel. The State makes two main points: First, appellant's voluntary absence from trial simply reflected his decision to "conduct[] his defense by nonparticipation. A competent, self-representing defendant has a right to choose 'simply not to oppose the prosecution's case,'" which decision is consistent with the defendant's right of self-representation, and must be respected by the trial court. (Op. Br. at pp. 26-28.) The appointment of counsel was not required (or even permitted) because appellant, in choosing to defend the case by nonparticipation, remained as counsel. Second, the appointment of counsel was not required because, when appellant initially secured the right to represent himself, he entered a valid waiver of the assistance of counsel. (*Id.* at pp. 35-36.)

As to the trial court's denial of a one-day continuance, the State argues that there was no abuse of discretion. Where the trial court, as here, grants an untimely *Faretta* motion, it may do so on the condition that there be no delay in the proceedings. (*Id.* at pp. 36-39.)

SUMMARY OF ARGUMENT

I. Violation of the Right to Counsel

When appellant failed to appear at trial, the trial court ordered the trial to proceed in his absence. The court acted pursuant to Penal Code section 1043, which permits the trial of a voluntarily absent defendant to proceed. But that statute only concerns the forfeiture of the defendant's right "to be personally present at the trial." (Pen. Code section 1043, subd. (a).) Section 1043 is silent on the question whether such trial may proceed without counsel for the defendant.

To answer this question, we must return to basic Sixth Amendment principles. The Sixth Amendment provides the right to assistance of counsel at all critical stages of a criminal prosecution. (*Powell v. Alabama* (1932) 287 U.S. 45.) A defendant may waive that right to counsel and choose to represent himself. (*Faretta v. California* (1975) 422 U.S. 806.) The right to self-representation, however, is subject to forfeiture, and can be terminated, if the defendant "deliberately engages in serious and obstructionist misconduct." (*Id.* at p. 834, fn. 46.) Where the right to self-representation has been terminated -- explicitly or impliedly -- counsel must be re-appointed.

A self-representing defendant who declines to participate in the trial may, but does not necessarily, forfeit his right to self-representation. Where non-participation is a "conscious decision to simply force the prosecution to its proof," (*People v. Clark* (1992) 3 Cal.4th 41, 116), as where the self-

representing defendant vows to "stand mute" throughout trial, the defendant's right to control his own defense prevails and his right to self-representation is not subject to forfeiture. (*People v. Teron* (1979) 23 Cal.3d 103, 115.) In such a case, the defendant remains as counsel, and there is no right to, or need for, the appointment of additional counsel.

But where a defendant's non-participation is not a considered defense strategy, but "a deliberate course of action designed to cause as much disruption as possible," (*People v. Clark*, *supra*, 3 Cal.4th at p. 116), or "to interject error and delay into the proceedings," the right to self-representation is subject to forfeiture and trial court may revoke it. (*Id.*; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1046.) Even in this situation, however, while the right to self-representation may be forfeited, the right to the assistance of counsel endures. Where the trial court revokes the appellant's right to self-representation, it must appoint counsel. The failure to do so is reversible error.

In the instant case, the trial court expressly found that the appellant's failure to appear (or "non-participation") was intended to obstruct and delay the trial. Appellant's right to self-representation was therefore subject to forfeiture.

And it was in fact terminated. The trial court clearly indicated its termination of appellant's *Faretta* right. The court did not permit appellant to control his defense through non-participation. Instead, throughout trial, the court took it upon itself to serve as appellant's counsel. As the trial court candidly explained, "I basically sat in defense counsel's seat to protect the

rights of the defendant. ...." (13 RT 1029-1030.) The trial court's error in this case was in undertaking the appellant's representation itself, rather than appointing counsel for that task. And the public defender, who had been relieved only the previous day, was fully prepared to accept that re-appointment could readily have picked up where he left off the day before.

The fact that appellant, in initially seeking self-representation, conditionally waived his right to counsel does not require a different result. In every case in which the defendant is granted the right to self-representation, the defendant necessarily waives the right to the assistance of counsel for as long as his right to self-representation endures. (*Faretta v. California* (1975) 422 U.S. 806, 835.) Yet, where the trial court revokes the right of self-representation, the courts agree that counsel must then be appointed. The rationale is plain: the initial waiver of the right to assistance of counsel was conditioned, implicitly or explicitly, upon the defendant's continued ability to represent himself. Once the court revokes the defendant's right to self-representation, the condition underlying the waiver of counsel ceases to exist, and the initial waiver is no longer effective. At that point, the Sixth Amendment requires the appointment of counsel.

The appointment of counsel was also required by state law. Once appellant's federal *Faretta* rights were terminated, appellant's right to proceed pro se became subject to state law. California does not recognize the right to self-representation, though it may be granted as a matter of discretion if the defendant meets standards of competence. In *People v. Johnson* (2010) 53 Cal.4th 519, 530, this Court held that trial courts have discretion to deny

self-representation to mentally ill defendants who "cannot carry out the basic tasks need to present the defense without the help of counsel." The trial court here failed to exercise its discretion under *Johnson*, at two points: first, when it granted appellant the right to self-representation; and second, when appellant failed to appear. Had the court exercised its discretion, it would have concluded that appellant did not meet the *Johnson* standard, and that the appointment of counsel was required.

Because appellant's trial proceeded without counsel, the judgment of the court of appeal should be affirmed.

II. Denial of One-Day Continuance

The State argues that it is not an abuse of discretion for the trial court to condition granting a *Faretta* motion on the granting of no continuances. The law is to the contrary. While the trial court may ***deny*** self-representation to a defendant who requires a continuance of the trial, the situation is different if the court ***grants*** the *Faretta* motion. In that case, "a necessary continuance must be granted if a motion for self-representation is granted ...." (*People v. Valdez* (32 Cal.4th 73, 103.) Here, because the trial court granted appellant the right to represent himself, it was obligated to grant him "a necessary continuance" to prepare. Under this standard, as the court of appeal properly held, denial of a one-day continuance was an abuse of discretion.

ARGUMENT

I. The Trial Of A Voluntarily Absent Pro Se Defendant, Who Has Forfeited His Right To Self-Representation, Cannot Proceed Without The Appointment of Counsel.

The court of appeal, and the State have assumed that, in determining whether a court must appoint counsel for an absent pro se defendant, the governing distinction is whether the defendant's absence is voluntary or involuntary. (See Typed Opn., at pp. 12-15; Op. Br. at pp. 24-28.) The State argues that appellant's voluntary absence from trial simply reflected appellant's decision to "conduct[] his defense by nonparticipation. A competent, self-representing defendant has a right to choose 'simply not to oppose the prosecution's case.'" (Op. Br. at p. 27, quoting *People v. Parento* (1991) 235 Cal.App.3d 1378, 1381.) That decision is consistent with the defendant's right of self-representation, and must be respected by the trial court. (Op. Br. at pp. 26-28.)

As explained below, the lower court and the parties have not fully understood the caselaw. The relevant distinction is not whether the pro se defendant's absence is voluntary or involuntary. While that distinction is relevant under Penal Code section 1043 for determining whether the defendant has forfeited his *right to be present and confront witnesses*, a different analysis governs with respect to a pro se defendant's *right to counsel*. The relevant question is whether the pro se defendant has forfeited his right to self-representation. If the right to self-representation has been forfeited, counsel must be appointed.

Further, as this Court's decisions make very clear, depending on the nature of the pro se defendant's absence, even a voluntarily non-participating pro se defendant can forfeit his right to self-representation. Here, while appellant's absence was voluntary, the trial court found that his absence was simply intended disrupt the trial. Appellant's right to self-representation was therefore subject to forfeiture, and the trial court terminated it. Once the right to self-representation was terminated, the trial court was obligated to appoint counsel.

A. Legal Principles

The Sixth Amendment provides the right to assistance of counsel at all critical stages of a criminal prosecution. (*Powell v. Alabama, supra*, 287 U.S. 45.) This right is automatic: "Where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." (*Carnley v. Cochran* (1962) 369 U.S. 506, 513.) A defendant may of course waive the right to counsel and choose to represent himself. (*Faretta v. California, supra*, 422 U.S. 806.) *Faretta* made it clear, however, that the right to self-representation can be forfeited by misbehavior. "The trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Id.* at p. 834, fn. 46.) *Faretta* further advised that "a State may – even over objection by the accused – appoint a 'standby counsel' ... to be available to represent the accused in the event that termination of the defendant's self-representation is

necessary." (*Id.*)

The Supreme Court's suggestion in *Faretta* – that a state court might prepare for termination of a defendant's self-representation by having stand-by counsel available – makes an important distinction. While they are both rooted in the Sixth Amendment, the right to self-representation is distinct from the right to counsel. Thus, the forfeiture of self-representation does not entail forfeiture of the assistance of counsel. "A defendant does not forfeit his right to representation at trial when he acts out. He merely forfeits his right to represent himself in the proceeding." (*United States v. Mack* (9th Cir. 2004) 362 F.3d 597, 601; *Davis v. Grant* (2d Cir. 2008) 532 F.3d 132, 144, fn. 8.)

This issue has most commonly arisen in the context of the so-called "involuntary" removal from the courtroom of a misbehaving, pro se defendant.[2] Several California cases have confronted this fact pattern, and all have held that, while the misbehaving defendant forfeited his right to self-representation, he retained the right to the assistance of counsel thereafter. (*People v. Soukomlane* (2008) 162 Cal.App.4th 214; *People v. El* (2002) 102 Cal.App.4th 1047; *People v. Carroll* (1983) 140 Cal.App.3d 135.) In each of these cases, the appellate court found error in the trial court's failure to appoint counsel for the pro se defendant who had been removed from court.

---

[2] The term, "involuntary removal" is a misnomer. In each of these cases, the pro se defendant misbehaved, was warned by the trial court that further misconduct would result in expulsion, and the defendant voluntarily defied the court and continued his misconduct. The defendant's ejection from court was thus the product of his *voluntary* decision to defy the court.

The facts of *People v. Carroll* are typical. Carroll was granted the right to self-representation. However, he continually disrupted the proceedings. The trial court warned Carroll he would be removed if he continued his disruptions. Carroll continued his misconduct, and he was removed during the testimony of several witnesses. The court of appeal noted *Faretta's* admonition in footnote 46 of that opinion -- that forfeiture of the right to self-representation does not forfeit the right to representation by standby counsel. (*Id.* at pp. 142-143.) The court explained:

> In this case, excluding defendant from the courtroom meant that certain parts of the People's case proceeded without the presence of the defendant, or counsel for the defense. Such a situation offends the most fundamental idea of due process of law, as defendant is totally deprived of presence at trial and even of knowledge of what has taken place. Because defendant represented himself, his removal from the courtroom deprived him not only of his own presence, but of legal representation.

(*Id.* at p. 141. See also *People v. El*, *supra*, 102 Cal.App.4th 1047, 1050 ["'Justice cannot be done' in one-sided criminal proceedings where neither defendant nor defense counsel is present."[3]]; *People v. Soukomlane*, *supra*, 162 Cal.App.4th at p. 234 [citing *Faretta's* footnote 46 for the proposition that the defendant's right to counsel survives forfeiture of the right of self-representation, and reversing where pro se defendant removed from courtroom and counsel not appointed to represent him in his absence].)

The vast majority of federal and sister-state courts to consider the

---

[3] The court in *El* found the error in proceeding without counsel harmless in light of the brief time defendant was deprived of representation. (*People v. El*, *supra*, 102 Cal.App.4th at pp. 1050-1051.)

issue have similarly held that, when a defendant forfeits his right to self-representation, the right to counsel endures and the trial court must appoint counsel to represent and protect the defendant's interests. (E.g., *People v. Cohn* (Colo.Ct.App. 2007) 160 P.3d 336. 343 [holding that a misbehaving pro se defendant may forfeit his right to self-representation, but not the right to counsel in his absence]; *Saunders v. State* (Tex.App. 1985) 721 S.W.2d 359, 363-364 [finding error where misbehaving, pro se defendant was removed from courtroom but counsel was not appointed to represent him in his absence]; *State v. Menefee* (Or.App. 2014) 341 P.3d 229, 246 [finding violation of the right to counsel where court removed misbehaving pro se defendant, but did not secure defendant's waiver of his right to representation at trial or appoint counsel].)

While the State does not address or mention these so-called involuntary removal cases, it resists application of the principle announced in these cases on the ground that appellant's absence from the trial is materially different: The State notes that appellant's absence was the product of his voluntary departure, rather than the product of his voluntary disobedience of a court order and subsequent removal. The State claims that appellant's voluntary absence from trial simply reflected appellant's decision to "conduct[] his defense by nonparticipation." (Op. Br. at p. 27, quoting *People v. Parento* (1991) 235 Cal.App.3d 1378, 1381.) Put otherwise, because appellant chose to defend himself by the acceptable legal strategy of non-participation, his right to self-representation was not subject to forfeiture.

Hence, though absent from the trial, appellant remained as counsel.

However, the State entirely ignores a critical distinction this Court has made in determining whether a particular defendant's right to self-representation may be revoked. A self-representing defendant who declines to participate in the trial may, but does not necessarily, forfeit his right to self-representation.

People v. Clark (1992) 3 Cal.4th 41, 116, is the leading case. There, Clark had been initially represented by appointed counsel. On the day of trial, Clark moved for self-representation. The trial court denied the motion as untimely. The defendant renewed his motion before opening statements, but the court again denied it because Clark was not ready to proceed immediately with trial. On the fourth day of trial, Clark again moved to represent himself and told the court he was ready to proceed. The court granted defendant's *Faretta* motion, but ordered his appointed counsel to remain as standby counsel. After complaining that his trial preparation was being impeded, Clark requested additional resources, which were denied. Clark then vowed to "stand mute" throughout the trial. (*Id.* at pp. 91-95.) The trial court ruled that Clark thereby "had renounced his right to represent himself," terminated his *Faretta* rights, and ordered standby counsel reinstated. (*Id.* at pp. 96-97.)

After he was convicted, Clark appealed on the ground that the trial court erred by revoking his right of self-representation when he vowed to stand mute. This Court noted that "we have upheld cases in which the trial

court allowed a self-represented defendant not to actively participate in the defense," citing *People v. Teron* (1979) 23 Cal.3d 103, and similar cases. (*Id.* at p. 114.) The Court nonetheless held that the revocation was proper. Where a pro se defendant's non-participation is a "conscious decision to simply force the prosecution to its proof," as it was in *Teron*, the defendant's right to control his own defense prevails and his right to self-representation is not subject to forfeiture. (*Id.* at p. 116; *People v. Teron, supra*, 23 Cal.3d at p. 115.) In such a case, the defendant remains as counsel, and there is no right to, or need for, the appointment of additional counsel. But where a defendant's non-participation is not a considered defense strategy, but "a deliberate course of action designed to cause as much disruption as possible," the right to self-representation is subject to forfeiture and the trial court may revoke it. (*People v. Clark, supra*, 3 Cal.4th at p. 116. See also *People v. Stansbury* (1993) 4 Cal.4th 1017, 1046 [where pro se defendant's vow to stand mute is intended "to interject error and delay into the proceedings," defendant's self-representation may be revoked].)

While *Clark* established the circumstances in which a non-participating defendant's right to self-representation may be subject to forfeiture, in *People v. Carson* (2005) 35 Cal.4th 1, this Court established the factors that a trial court must consider in determining whether to revoke that right. The decision must be guided by whether "the defendant's misconduct seriously threaten[s] the core integrity of the trial." (*Id.* at p. 7.) The Court explained: "Whenever 'deliberate dilatory or obstructive behavior' threatens

to subvert 'the core concept of a trial,' or to compromise the court's ability to conduct a fair trial, the defendant's *Faretta* rights are subject to forfeiture." (*Id.* at p. 10, citations omitted.) A trial court is entitled to revoke self-representation for conduct "occurring in court or out of court – that threatens to compromise the court's ability to conduct a fair trial." (*Id.* at p. 7.)

In addition to the defendant's conduct and its impact on the trial proceedings, the factors to be considered in revoking a defendant's *Faretta* right include "the availability and suitability of alternative sanctions," "whether the defendant has been warned that particular misconduct will result in termination of in propria persona status," and whether "the defendant has 'intentionally sought to disrupt and delay his trial.'" Such a purpose "in many instances ... will suffice to order termination." (*Id.* at p. 10.)

B. Application Of The Legal Principles To Appellant's Case.

Under the legal principles described above, appellant's right to self-representation was subject to forfeiture; the trial court terminated appellant's right to self-representation; and that termination was fully within the trial court's discretion. The error lies in the trial court's failure to thereafter appoint counsel.

1. Appellant's Right To Self-Representation Was Subject To Forfeiture.

The facts of the instant case are very similar to *Clark*. The trial court

in appellant's case expressly found that the appellant's non-participation was intended to obstruct and delay the trial. The trial court could not have been clearer:

> "The court finds that [appellant] knowingly absented himself. The court finds that he abandoned this trial purposefully and that the purpose for which he chose to not come to trial was evasion of the trial or avoiding penalty for the alleged crimes that he allegedly committed or another delay tactic with the appellant perhaps believing that if he didn't show up to trial that the court would terminate this jury trial, send the jurors home and then when he comes in a month he would try to delay the trial again for another three years."
>
> (11 RT 608-609.)

Contrary to the State's view, appellant's non-participation was not, in intent or effect, a "conscious decision to simply force the prosecution to its proof," (*People v. Clark*, *supra*, 3 Cal.4th at p. 116) as it was in *People v. Teron*. Rather, it was "a deliberate course of action designed to cause as much disruption as possible," (*id.*), and intended "to interject error and delay into the proceedings" (*People v. Stansbury, supra*, 4 Cal.4th at p. 1046.) Appellant's right to self-representation was accordingly subject to forfeiture.

Without considering the critical distinction drawn by this Court in *Clark* and *Stansbury*, the State argues that appellant, as part of his *Faretta* rights, was entitled "to select his or her defense or to make no defense." (Op. Br. at p. 17.) Appellant absconded, and "deliberately made no defense." (*Id.*) The State's position, however, fails to take into account *Clark*'s holding that non-participation is not always a legal strategy that precludes forfeiture of the right of self-representation. The trial court's own finding

that appellant's failure to appear was intended to evade trial, avoid the penalty, and sow delay into the proceedings distinguishes this case from those upon which the State relies where the pro se defendant's non-participation is a legal strategy to put the prosecution to its proof. The State's assertion that "it is a large assumption that the Sixth Amendment would allow a court to terminate a pro se defendant's right to self-representation when he or she voluntarily fails to appear for trial," (Opening Br. at p. 17), is belied by *Clark* and *Stansbury.* It is not a large assumption; it is the law of those cases.

The distinction made in *Clark* and *Stansbury* similarly undermines the case the State most heavily relies upon, *People v. Parento* (1991) 235 Cal.App.3d 1379. In *Parento*, a pro se defendant was denied a continuance and thereafter refused to participate in the trial. Relying on *People v. Teron* for the proposition that "the choice of self-representation preserves for the defendant the option of conducting his defense by nonparticipation," (*id.* at p. 1381), *Parento* held that the trial could proceed in the defendant's absence and without the need to appoint counsel. The holding was explicitly based on the theory that the defendant's refusal to participate was a conscious defense strategy to put the prosecution to its proof, that he continued to act as counsel, and his right to self-representation was therefore not subject to forfeiture.

Parento was decided prior to *People v. Clark* and *People v. Stansbury*, which qualified the rule of *People v. Teron* in an important respect: While

Teron seemed to suggest that a pro se defendant's non-participation was always a choice of defense, and that was therefore not subject to forfeiture, *Clark* and *Stansbury* held that, depending on the facts of the case, a defendant's non-participation might not be a choice of defense but an attempt of delay, obstruct or sow error into the proceedings. As such, it is not a defense strategy, and may render the defendant's pro se status subject to forfeiture. Having not had the benefit of this Court's decisions in *Clark* and *Stansbury*, the *Parento* court did not evaluate whether the defendant's pro se conduct was subject to forfeiture or not. While the application of that distinction in *Parento* is speculative, there can be no speculation about its application in the instant case. The trial court here expressly found that appellant's conduct was intended to disrupt the proceedings. It was therefore subject to forfeiture.

For this reason, the State's reliance on various out-of-state and federal cases, finding that a pro se defendant's voluntary absence carries no forfeiture of the right to self-representation, is misplaced. (See Op. Br. at pp. 27-28, citing *Clark v. Perez* (2d Cir. 2008) 510 F.3d 382; *Torres v. United States* (2d Cir. 1998) 140 F.3d 392; *United States v. Lawrence* (4th Cir. 1998) 161 F.3d 250; *People v. Brante* (Colo.App. 2009) 232 P.3d 204; *State v. Eddy* (R.I. 2013) 68 A.3d 1089; *State v. Worthy* (Minn. 1998) 583 N.W.2d 270.)

In several of these cases, the pro se defendant's voluntary absence was of the first variety discussed in *People v. Clark*: it was a conscious defense

strategy intended to put the state to its proof. As such, it could not result in forfeiture of the right of self-representation. Thus, in both *Torres v. United States* and *Clark v. Perez*, the pro se defendants, who were members of a Puerto Rican liberation group, challenged the trial court's jurisdiction over them based on their political belief of Puerto Rican independence. Torres did not participate in trial, "but exercised her right to defend herself so that she could further her political objectives as a Puerto Rican freedom fighter." (*Id.* at p. 402.) Echoing this Court's holding in *People v. Clark*, the Second Circuit noted that Torres' right to self-representation could be terminated for "serious and obstructionist misconduct," but not for choosing her own defense. (*Id.* at p. 403. The court in *Clark v. Perez*, confronted the same facts and arrived at the same conclusion. (*Clark v. Perez*, *supra,* 510 F.3d at p. 397 [defendant "adopt[ed] a conscious strategy to use [her] trial to further [her] political objectives and to challenge the jurisdiction of the court and win political sympathy." (*Id.* at p. 397.)[4]

The out-of-state cases are also distinguishable, though on a different basis. In *Brante*, the defendant repeatedly engaged in obstreperous and contemptuous behavior toward the court, including obscene gestures and profane statements. The trial court twice removed Brante from the court.

---

[4] The decision in *United States v. Lawrence*, *supra*, 161 F.3d 250, contains insufficient facts to draw any relevant conclusions. Lawrence represented himself but he also had advisory counsel. While Lawrence asked not to be present at trial, it is unclear from the decision whether, in his absence, standby counsel conducted the defense. Indeed, the only constitutional right the decision discusses is the right to be present, which Lawrence clearly waived, and which is not at issue here.

Following his second removal, the court told advisory counsel that "it did not believe it had the authority to appoint him to represent Brante." (*People v. Brante*, *supra*, 232 P.3d at p. 206.) Brante told the court he was "not going to be part of a kangaroo court," and left. Trial continued without Brante and without counsel, resulting in a conviction which was affirmed on appeal.

While the Colorado trial court in *Brante* believed he did not have authority under state law to revoke Brante's right to self-representation and appoint counsel after Brante's involuntary removal, that is not the case in California. As discussed above, under this Court's decision in *People v. Clark*, a misbehaving pro se defendant like Brante may forfeit his right to self-representation, and authorizes appointment of standby counsel to represent the defendant.[5]

State v. Eddy, *supra*, 68 A.3d 1089, is similarly distinguishable. There, defendant engaged in extensive delay tactics, fired three attorneys, obtained pro se status, and then declared he would not attend trial. Counsel was not appointed and Eddy was convicted. (*Id.* at pp 1093-1094, 1096-1098.) The Rhode Island Supreme Court approved of proceeding without

---

[5] The decision in *Brante* is particularly curious since *Faretta* itself authorizes forfeiture of self-representation and appointment of standby counsel. (See *Faretta*, *supra*, 422 U.S. at p. 834, fn. 46.) Further, California appellate decisions provide for the appointment counsel for an involuntarily removed pro se defendant – a power the court in *Brante* did not believe it had. (*People v. El*, *supra*,102 Cal.App.4th 1047 [requiring appointment of counsel after involuntary removal of pro se defendant]; *People v. Carroll, supra*, 140 Cal.App.3d 135 [same]; and *People v. Soukomlane, supra*, 162 Cal.App.4th 214 [same].)

counsel – but on a theory this Court rejected in *Clark*. The *Eddy* court explained: "In the case of voluntary absence by choice, the cause of the defendant's non-presence is the defendant's own decision to leave the courtroom, ***which carries with it no forfeiture of the right of self-representation***." (*Id.* at p. 1108, citing *Torres v. United States*, *supra*, 140 F.3d at p. 402 [emphasis added].) This, of course, is not the law in California. Here, under *People v. Clark, People v. Stansbury,* and *People v. Carson*, the right to self-representation of defendants like Eddy, who engage in protracted delay tactics and then claim they will not participate, ***is*** subject to forfeiture.

Nothing in the cases the State relies upon precluded the trial court from finding that appellant had forfeited his right to self-representation, and revoking that right. Based on this Court's decisions in *Clark* and *Carson,* the trial court in appellant's case was fully empowered to do just that. As explained below, the trial court in fact terminated that right.

2. The Trial Court Constructively Terminated Appellant's Right To Self-Representation

The trial court terminated appellant's *Faretta* rights. This much is clear from the fact that the court did not permit appellant to control his defense through non-participation. Instead of permitting appellant to exercise and control a defense strategy of non-participation, the court took the unusual step, throughout trial, of serving as appellant's counsel. As the trial court candidly explained, "I basically sat in defense counsel's seat to

protect the rights of the defendant. ...." (13 RT 1029-1030.) Thus, the court conducted hearings on the admissibility of appellant's statements, and considered arguments "that the defendant/or his defense attorney would have made if they had been present ...." (11 RT 624.) The court conducted a section 402 hearing before a police officer testified to appellant's statements, and "as if defense were here and had objections to things that this officer would be testifying to." The court stated it was conducting "the hearing to protect the rights of the defendant in his absence." (11 RT 662-663.) The court made similar comments at other points in the trial. (E.g., 11 RT 761-762 ["The Court took into consideration arguments, requests, and objections that the defense would have made."].)

This is not the conduct of a court that has permitted an absent defendant to remain as counsel and to control his defense by non-participation. It is the conduct of a court that has literally taken over the defense of the case. And that is precisely what the court stated on the record when it gave its most thorough explanation of its role as surrogate defense counsel:

> "In his absence during the trial, I, as a court, voiced a defense position on behalf of the defendant as if he were here during the trial. I iterated what the defense would want on all substantial issues and motions. ***I basically sat in defense counsel's seat to protect the rights of the defendant,*** and I took all possible, reasonable defense positions into account before I ruled on any issues that was [sic] before the court in the defendant's absence."

(13 RT 1029-1030 [emphasis added].)

The trial court's decision to sit in defense counsel's seat is entirely inconsistent with the appellant's right to self-representation, much in the same way that an overly active or intrusive advisory counsel is inconsistent with a defendant's right to self-representation. As this Court has observed, "the powers and responsibilities attendant upon the representation of a person criminally accused ***never*** should be conferred jointly and equally on the accused and the attorney ... [E]ither the accused or the attorney should be in charge. Stated otherwise, at all times the record should be clear that the accused is either self-represented or represented by counsel; the accused cannot be both at once." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1368, emphasis added. See *McKaskle v. Wiggins* (1984) 465 U.S. 168 [placing limits on standby counsel's participation in order to protect pro se defendant's *Faretta* rights].)

In this respect, the position of the State and the position of the trial court are fundamentally at odds. The State insists that the trial court permitted appellant to continue to represent himself through a strategy of non-participation. The trial court insists that it performed the duties of defense counsel. The record, however, supports the trial court's description of its own conduct in the case. The trial court's conduct indicated that it found that appellant's interests were not protected by counsel (including appellant as pro se counsel), and that counsel other than appellant was required. The court thus constructively terminated appellant's *Faretta* rights.

As explained below, the revocation of appellant's self-representation

was not error. *People v. Clark* and *People v. Carson* gave the trial judge full authority to do so.

3. The Revocation Of Appellant's Right To Self-Representation Was Within The Trial Court's Discretion

The trial court's decision to terminate appellant's right to self-representation, and "[sit] in defense counsel's seat," was fully within its discretion. Under the principles this Court established in *People v. Carson*, *supra*, 35 Cal.4th 1, the trial court could lawfully terminate appellant's pro se status if it found that appellant's "dilatory or obstructive behavior threatens to subvert the core concept of a trial." (*Id.* at p. 10.) Failing to appear for trial had that precise effect. Not only was appellant's conduct obstructive and intended to delay and sow error into the trial, but it threatened to produce, and in fact did produce, a one-sided proceeding. This threatened a core concept of a criminal trial.

A core concept of a criminal trial is that it is an adversarial, not an ex parte, proceeding. As the United States Supreme Court has explained, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. It is that 'very premise' that underlies and gives meaning to the Sixth Amendment. It 'is meant to assure fairness in the adversary criminal process.' Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial

itself." (*United States v. Cronic* (1984) 466 U.S. 648, 655-656.) If a criminal trial "loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: 'While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.'" (*Id.* at pp. 656-657.)

The result of the pro se appellant's failure to appear at trial was the complete evisceration of the adversarial process. It is difficult to conceive of conduct that more deeply offends the core concept of a criminal proceeding.

The rest of the *Carson* factors also supported termination of appellant's *Faretta* rights. There were no alternative sanctions, such as contempt, that the court could impose on appellant to induce his return. The defendant was warned that "the Court may terminate my right to self-representation in the event that I engage in serious misconduct and obstruct the conduct and progress of the trial." (1 CT 253.) And, most importantly, the trial court found that appellant had intentionally sought to disrupt and delay the trial. As *Carson* noted, this factor alone is often sufficient to justify termination. (35 Cal.4th at p. 10.)

In sum, appellant's conduct made his self-representation subject to forfeiture. The trial court terminated appellant's right to self-representation. And that decision was fully within the trial court's discretion. As explained below, having terminated appellant's right to self-representation, the trial court was obligated to appoint counsel.

C. Where The Court Terminates A Pro Se Defendant's Right To Self-representation, The Trial Court Must Appoint Counsel.

1. Appointment Under The Sixth Amendment

Once the trial court has revoked a defendant's federal right to self-representation, the defendant is without counsel for the remaining critical stages of the criminal proceeding. At that point, the Sixth Amendment requires the appointment of counsel (*Powell v. Alabama*, *supra*, 287 U.S. 45; *United States v. Wade* (1967) 388 U.S. 218, 223-227), unless the defendant has "knowingly and intelligently" waived that right. (*Faretta*, *supra*, 422 U.S. at p. 835; *Adams v. Carroll* (9th Cir. 1989) 875 F.2d 1441, 1444 ["The right to the assistance of counsel is automatic; assuming the right is not waived, assistance must be made available at criminal stages of a criminal prosecution."].)

For this reason, the courts are generally in agreement that, when the trial court revokes a defendant's right to self-representation, counsel must be appointed. That has certainly been the holding of California cases. (See, e.g., *People v. El*, *supra*, 102 Cal.App.4th at p. 1050; *People v. Carroll*, *supra*, 140 Cal.App.3d at pp. 142-143; *People v. Soukomlane*, *supra*, 162 Cal.App.4th at p. 234.) As *Carroll* put it, conducting a trial without counsel after a defendant's right to self-representation has been revoked, "offends the most fundamental idea of due process of law ... The right to counsel at trial is one of the rights of due process which are necessary to insure he fundamental human rights to life and liberty. If this safeguard is not provided, justice

cannot be done. The state is without the power and authority to deprive an accused of life and liberty unless he has or waives assistance of counsel." (140 Cal.App.3d at p. 141.) The federal and sister-state decisions are in accord. (E.g., *United States v. Mack* (9th Cir. 2004) 362 F.3d 597, 601; *Davis v. Grant* (2d Cir. 2008) 532 F.3d 132, 143-144; *People v. Cohn* (Colo. 2007) 160 P.3d 336, 343; *State v.* Menefee (Or. 2014) 341 P.2d 229; Saunders *v. State* (Tex.Ct.App. 1985) 721 S.W.2d 359, 363.)[6]

Davis v. Grant is particularly instructive on this point. While the result denying relief in that case was dictated the circumscribed standard of review on federal habeas, the court stated that if the question were presented on direct appeal, it would be inclined to hold that "the Sixth Amendment requires that a defendant who is involuntarily removed from the courtroom must be provided with replacement counsel during his absence." (532 F.3d 132 at p. 144.) The Second Circuit gave three reasons to support that rule: First, without appointment of counsel, "an absent defendant can protect neither his constitutionally guaranteed trial rights nor his interest in the outcome of the proceeding." Second, "the government's 'independent interest' in ensuring that criminal trials are fair and accurate favors the appointment of replacement counsel." Third, "the judiciary's interest in

---

[6] As discussed above, while these cases involve appointment of counsel following the involuntary removal of a pro se defendant, the more relevant factor is whether the trial court revoked the defendant's right to self-representation. As this Court held in *People v. Clark* and *People v. Stansbury,* revocation can occur not only in involuntary removal cases, but in voluntary absence cases as well.

ensuring that criminal proceedings 'appear fair to all who observe them' strongly favors the appointment of replacement counsel." (*Id.* at pp. 143-144.) *Davis* quoted former Chief Justice Berger, who was a dissenter in *Faretta*: "A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself." (*Id.* at p. 144, quoting *Mayberry v. Pennsylvania* (1971) 400 U.S. 455, 468 [conc. opn. of Berger, C.J.].)[7]

In light of these indisputable interests in avoiding one-sided criminal proceedings, as occurred here, the Sixth Amendment requires appointment of counsel following revocation of a defendant's *Faretta* rights.[8]

---

[7] As *Davis v. Grant* noted, the American Bar Association Standards for Criminal Justice endorses appointment of counsel following revocation of a defendant's right to self-representation. "If a defendant who is permitted to proceed without the assistance of counsel engages in conduct which is so disruptive ... that the trial cannot proceed in an orderly manner, the court should, after appropriate warnings, revoke the permission and require representation by counsel." ABA Standards for Criminal Justice 6-3.9 (1986) (3d ed.2000).

[8] Nor could the trial court's effort to act as defense counsel be a substitute for the actual appointment of counsel. Over 80 years ago, *Powell v. Alabama, supra*, 287 U.S. 45, squarely rejected the idea that a defendant may be denied counsel at a critical stage in a felony case so long as a judge is present to protect his interests: "It is apparent to the least consideration, that a court can never furnish a person accused of a crime with the advice, and assistance necessary to make his defense." (*Id.* at 63.) Moreover, judges are precluded from the practice of law. (Cal. Code of Judicial Ethics, Canon 4(G).) The Advisory Committee Commentary to this Canon explains that "this prohibition refers to the practice of law in a representative capacity...." A judge is automatically disqualified from hearing any case in which "the judge served as a lawyer in the proceeding"

The State disagrees, arguing that appellant waived his right to counsel when he initially opted for self-representation. Thus, according to the State, there is no Sixth Amendment violation from the failure to appoint counsel. (Op. Br. at p. 36.)

There are two flaws in this argument. First, the State's argument proves too much. In every case in which a defendant opts for self-representation, he necessarily waives the right to the assistance of counsel. (*Faretta*, *supra*, 422 U.S. at p. 835 ["[I]n order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits [associated with the right to counsel]"; *Von Moltke v. Gillies* (1948) 332 U.S. 708, 724.) As noted above, in virtually every case in which the trial court terminated the pro se status of a misbehaving pro se defendant, that defendant had previously waived the assistance of counsel. If the State's argument were correct, those courts could, citing the defendant's prior waiver of counsel, refuse to appoint counsel. They do not do so.

Second, there is a compelling reason the initial waiver of the assistance of counsel does not extend to the situation in which the right to self-representation is revoked. That is, the original waiver was conditioned on the court permitting the defendant to represent himself. When the trial court revokes the defendant's self-representation, that condition fails and the

---

or "gave advice to any party in the present proceeding upon any matter involved in the action or proceeding." (Cal. Code Civ. Proc. § 170.1(a)(2).)

waiver is no longer valid. Viewed in this way, the State's assertion that appellant waived the assistance of counsel when he moved for self-representation under *Faretta* is not entirely accurate. It is clear from the *Faretta* proceeding that appellant entered a conditional waiver of counsel. This Court is familiar with conditional waivers of counsel, having considered them in *People v. Carter* (1967) 66 Cal.2d 666. There, defendant moved for self-representation on the condition that he be allowed access to the law library. During trial, however, he was denied access to the library, and convicted. This Court reversed because there was "no effective waiver of the right to counsel." (*Id.* at p. 670.) As this Court explained,

> "In the present matter there was no effective waiver of the right to counsel. Manifestly, a waiver of counsel which is made conditional by a defendant cannot be effective unless the condition is accepted by the court. Here it is clear from the record that defendant's willingness to proceed without counsel was predicated upon his mistaken belief, reinforced by the failure of the trial judge to promptly and unequivocally reject the condition imposed by defendant, that he would be permitted some sort of meaningful access to and use of library facilities."

(*Id.* at p. 670.)

Appellant's waiver of counsel in the instant case was limited, in much the same way as the waiver in *People v. Carter*. The only difference is that in appellant's case, the court accepted the condition. When the trial court took appellant's waiver, appellant was specifically advised of, and stated that he understood, the following:

> 6. I understand that the right to act in propria persona is not a license to abuse the dignity of the Court. I understand that the Court may terminate my right to self-representation in the event

that I engage in serious misconduct and obstruct the conduct and progress of the trial.

7. I understand that if at some point an appointed attorney does have to take over my case, that attorney may be at a great disadvantage in presenting my case.

(1 CT 253.)

The import of these two advisements was that the court could terminate appellant's pro se status for misconduct, but that if it did so, "an appointed attorney" may "have to take over [his] case... at a great disadvantage...." Appellant agreed to these conditions on his right of self-representation. And, these conditions were valid: they were not only accepted by the trial court; they were specifically required by the trial court in the *Faretta* form appellant filled out and filed in court. When the trial court in the instant case terminated appellant's pro se status, the conditional waiver of counsel precluded the court from proceeding without the appointment of defense counsel. The Sixth Amendment required the appointment of counsel.

2. Appointment Under State Law

Appointment of counsel following revocation of the right to self-representation was also required by state law.

As noted above, California law does not recognize the right to self-representation. The law in California "has long been that criminal defendants have *no* right of self-representation." (*People v. Johnson* (2012) 53 Cal.4th 519, 523.) "When *Faretta* was decided, the law in California had

been that a criminal defendant had no constitutional or statutory right to self-representation, although in non-capital cases the trial court had discretion to grant a defendant's request for self-representation." (*Id.* at p. 526.)[9] *Faretta*, of course, superceded California law on this point. However, in *Indiana v. Edwards* (2008) 554 U.S. 806, the Supreme Court held that, *Faretta* notwithstanding, "the states may, but need not, deny self-representation to defendants who, although competent to stand trial, lack the mental health or capacity to represent themselves at trial – persons the court referred to as 'gray-area defendants.'" (*People v. Johnson*, *supra*, 53 Cal.4th at p. 523.) In *Johnson*, this Court accepted *Indiana v. Edwards*' invitation. This Court held: "Because California law – which, of course, is subject to the United States Constitution – has long been that criminal defendants have *no* right of self-representation, we conclude that California courts may deny self-representation when the United States Constitution permits such denial." (*Id.*) As this Court stated, "California courts should give effect to this California law when it can." (*Id.* at p. 526.)

---

[9] The Legislature had good reasons for limiting self-representation: "When the Legislature enacted Penal Code section 686.1, requiring the appointment of counsel, it made this finding: 'The Legislature finds that persons representing themselves cause unnecessary delays in the trials of charges against them; that trials are extended by such persons representing themselves; and that orderly trial procedures are disrupted. Self-representation places a heavy burden upon the administration of criminal justice without any advantages accruing to those persons who desire to represent themselves.' (Stats.1971, ch. 1800, § 6, p. 3898; see People v. Sharp, supra, 7 Cal.3d at p. 463 [quoting this policy statement].)." (*People v. Johnson, supra*, 53 Cal.4th at p. 526.)

Here, when the trial court terminated appellant's right to self-representation, his federal rights under *Faretta* were extinguished. At that point, California law disfavoring self-representation became applicable. The trial court was then obligated "to give effect to this California law." Appellant's forfeiture of his *Faretta* rights made the application of California law possible.

The law of California would strongly have favored, if not required, the appointment of counsel. Under pre-*Faretta* law in California, the trial court could not accept a waiver of counsel unless the defendant "has an intelligent conception of the consequences of his act and understands the nature of the offense, the available pleas and defenses, and the possible punishments." (*People v. Floyd* (1970) 1 Cal.3d 694, 703.) The record before the trial court contains no such information as to appellant's capacity or understanding of his case. Indeed, his bizarre, unsupported notion that the arresting officer was having an affair with a witness as indicted by "a bloody handkerchief," demonstrates appellant lacked any such understanding.

Further, appellant's mental illness provided a basis for the trial court to appoint counsel. As *Johnson* held, California trial courts may deny self-representation where "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." (*Id.* at p. 530.) When a trial court doubts that a defendant has this capacity, it must exercise its discretion in determining whether to grant or deny *Faretta* rights. (*Id.* at p. 531.)

In light of the trial court's serious concerns for appellant's mental illness, and his consequent inability to process information, tell the truth, or control himself in court, the trial court was obligated to exercise its discretion under *People v. Johnson* to determine whether appellant suffered from a 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."

Clearly, the trial court should have conducted this inquiry when appellant first sought self-representation. It did not, even though the court's concerns were more than sufficient to find appellant not competent to waive counsel. Even more clearly, however, the trial court should have made this inquiry after appellant failed to appear for trial. At that point, the trial court decided, only with reference to Penal Code section 1043, to continue the trial in appellant's absence and without appointing counsel. The trial court did not exercise any discretion at all to appoint counsel, and did not exercise any discretion under *Johnson* to determine if appellant's perceived mental illness made him unfit "to carry out the basic tasks needed to present the defense without the help of counsel."

Had the trial court exercised its discretion, it would have been obliged under *Johnson* to appoint counsel. In considering this point, it must be remembered that the trial judge constructively terminated appellant's pro se status when the judge decided that he would "[sit] in defense counsel's seat to protect the rights of the defendant." (13 RT 1029-1030.) By acting in this manner, the trial court implicitly found that appellant could not carry out the

basic tasks of defense without counsel. The only question pertinent to *People v. Johnson*, is whether appellant's inability was due to his mental disorder. The record before the trial court was compelling proof that it was. Both the public defender and the court agreed that appellant suffered from a mental disorder and that the disorder made it impossible for him to process information in a rational way, to tell the truth or control himself. This is precisely the kind of mental state that this Court found in *Johnson* was sufficient to require appointed counsel. (See *Johnson*, *supra*, 53 Cal.4th at p. 532 [citing the defendant's "disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety and other common symptoms of mental illness...."].) And the State, itself, in briefing in the court of appeal, characterized appellant's pretrial behavior as "irrational." (Resp. Br. at p. 4.)

The trial court's failure to exercise its discretion to appoint counsel deprived appellant of the assistance of counsel. Moreover, because complete deprivation of the right to counsel is structural error (*United States v. Cronic*, *supra*, 466 U.S. at pp. 658-659.), the judgment of the court of appeal should be affirmed.

II. The Trial Court Abused Its Discretion In Denying Appellant A One-Day Continuance After The Court Granted Him The Right To Represent Himself.

A. Relevant Facts

Appellant first moved to represent himself on April 17, 2012, six days before trial. The court denied the motion because appellant was not ready to proceed to trial. The next day, appellant again requested to represent himself and requested a two week continuance. That motion was denied on the ground that appellant was not prepared to go to trial. On April 23, just before jury selection, appellant moved again to represent himself, which was again denied. The court began jury selection.

On the next morning, April 24, appellant again moved to represent himself. (10 RT 480.) The court stated, "I would love for you to represent yourself, but you've got to be ready to go right now." (*Id.*) The court then told appellant the following: "Okay. Mr. Espinoza, I want to make it clear if you represent yourself you are not going to get any special treatment. ***You are not going to get any continuances unless they are reasonable requests***, which given the time frame we've given to the jurors we need to move forward with this case. I'm not going to be extending it beyond that time limit I gave to the jurors...." (10 RT 482, emphasis added.)

Appellant then filled out a *Faretta* form, which the court began to review with him. The following colloquy took place:

THE DEFENDANT: Your Honor, can I ask a question?

THE COURT: Of course you can.

THE DEFENDANT: Me taking the case today, can I at least get a continuance to tomorrow?

THE COURT: No.

THE DEFENDANT: Just to get everything, because he's going to hand over the files, Your Honor, ...

THE COURT: You have a copy of the file.

THE DEFENDANT: No, but I'm asking whatever else they may have that I may not have.

THE COURT: You are not entitled to internal memorandums about how difficult you are, you don't get that.

THE DEFENDANT: No, I'm asking about statements and videos, am I entitled to that stuff, Your Honor?

THE COURT: Yes, you are. You will get a copy of all of the discovery in this case which you already have.

MR. CAMPERI: And, Your Honor, I can assure the court I will go back and look to see if there is anything that I am unaware of at this time and I'll bring it right over if there is something I am unaware of at this time.

(10 RT 485-486.)

The court of appeal held that the trial court's refusal to give appellant the requested one-day continuance was a reversible abuse of discretion. (Typed Opn. at pp. 21-23.) The court reasoned that, while a court may deny a request for self-representation if it would delay trial, "if the trial court, in its discretion, determines to *grant* the request for self-representation it must then grant a reasonable continuance for preparation by the defendant." (*Id.* at p. 22, quoting *People v. Fulton* (1979) 92 Cal.App.3d 972, 976.)

B. The Trial Court Abused Its Discretion In Denying A One-Day Continuance.

The State argues that the trial court acted within its discretion by denying the continuances: According to the State, while the trial court must grant a reasonable continuance if it grants a *Faretta* motion, when the trial court grants an untimely *Faretta* motion, it may do so on the condition that there be no continuances. (Op. Br. at pp. 36-38.) Here, "the trial court did not grant appellant's *Faretta* motion until after appellant clearly understood he would not obtain a continuance by reason of self-representation." (*Id.* at p. 38.)

The matter, however, is not so clear. On the morning of April 24, the court initially told appellant that he could represent himself "but you've got to be ready to go right now." (10 RT 480.) The court then told appellant, "[y]ou are not going to get any continuances ***unless they are reasonable requests*** ... [that will not] extend[] it beyond that time limit I gave to the jurors." (10 RT 481, emphasis added.) By "reasonable requests," the court apparently meant that it would not grant a continuance beyond when the jury was due back in court, which was the following day. (10 RT 448.) Moments later, the court granted appellant's *Faretta* motion. (10 RT 488, 494.) Immediately thereafter, appellant asked "to get a continuance to tomorrow." Since the jury was due back the following day, it appeared that appellant was asking for the remainder of the afternoon to collect the trial file and prepare. The court denied the request even though appellant's further questions, and Mr. Camperi's statement that he would check to see if there

was other material in his office that had not been provided, indicated that appellant may not have had the entire case file.

This Court's decision in *People v. Valdez* (2004) 32 Cal.4th 73, is dispositive. There, the defendant asserted his right to self-representation on the day of jury selection. The court denied the motion as untimely and made for the purpose of delay. (*Id.* at p. 103.) When the defendant insisted he had a right to represent himself, the trial court "indicated that it would allow defendant to represent himself if he was able to proceed with the trial without delay." (*Id.*) This Court then noted a critical fact: "[The trial court] did not, however, actually grant the *Faretta* motion." (*Id.*) That fact was critical because, as the Court explained, "Although a necessary continuance must be granted if a motion for self-representation is granted, it is also established that a midtrial *Faretta* motion may be denied on the ground that delay or a continuance would be required." (*Id.*)

In the instant case, the trial court advised appellant that the court would only grant a "reasonable request" for a continuance. It then granted appellant's *Faretta* motion. Appellant then made what could only be considered to be a reasonable request: Appellant was unsure that he had the entire trial, and the public defender was similarly unsure that he had provided appellant with the entire file, including all statements and recordings. Appellant therefore made the eminently reasonable request for a continuance to the following day to make sure he had a complete file.

In light of *Valdez*, once the trial court granted appellant's *Faretta* motion, "a necessary continuance must be granted." Appellant's requested

continuance was both brief and necessary.

The court abused its discretion by denying that motion. The denial of a proper request for a continuance to prepare a defense constitutes an abuse of discretion and a denial of due process." (*People v. Cruz* (1978) 83 Cal.App.3d 308, 324–325.) The erroneous denial of a defendant's request for a continuance after being granted in propria persona status is "usually treated as prejudicial per se." (*People v. Hill* (1983) 148 Cal.App.3d 744, 758.) The judgment of the Court of Appeal should be affirmed.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that the judgment of the Court of Appeal be affirmed.

Date: September 21, 2015

Respectfully submitted,

/s/ Lawrence A. Gibbs
Attorney for Appellant

CERTIFICATE PER CAL. RULES OF COURT, RULE 8.204(c)

I certify that this petition is produced in 13-point proportional type and contains 13,998 words.

Date: September 21, 2015

/s/ Lawrence A. Gibbs
Attorney for Appellant

PROOF OF SERVICE

I declare that I am employed in the County of Alameda. I am over the age of eighteen years and not a party to this cause. My business address is P.O. Box 7639, Berkeley, California. Today, I served the foregoing **Answer Brief on the Merits** on all parties in this cause by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at Berkeley, CA, addressed as follows:

Office of Attorney General
455 Golden Gate Ave., #11000
San Francisco, CA 94102

Sixth District Appellate Program
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050

Santa Clara County District Attorney
70 W. Hedding St.
San Jose, CA 95110

Clerk, Sixth District Court of Appeal
333 West Santa Clara St., #1060
San Jose, CA 95113

Santa Clara County Superior Court
Criminal Division - Hall of Justice
San Jose, CA 95113-1090

Zeferino Espinoza
2243 Angie Ave.
San Jose, CA 95116

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 23, 2015 in Berkeley, California.

Lawrence A. Gibbs