In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **BILLY RAY WALDON a.k.a. N. I. SEQUOYAH,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S025520

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

RESPONDENT'S BRIEF

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INTRODUCTION

STATEMENT OF THE CASE

On December 23, 1985, the San Diego County District Attorney filed a criminal complaint charging appellant Billy Ray Waldon with three counts of murder and other offenses committed between December 7 and December 20, 1985. (1 CT 1-4.) Waldon was apprehended and placed under arrest on June 16, 1986. (45 RT 8431-8432; 46 RT 8515, 8610.) On June 18, 1986, a five count complaint was filed charging Waldon, who was initially using the name "Stephen Midas," with five counts related to offenses occurring on June 16, 1986. (1 CT 28.) After his true identity was determined, Waldon was arraigned on the previously issued complaint on June 20, 1986. (1 CT 6.) Waldon was arraigned and pleaded not guilty as to an amended complaint containing both sets of charges on July 2, 1986. (3A RT 3-4; 1 CT 8.) Additional charges were added in September 1986. (1 RT 3-4; 1 CT 50-54.)

On October 6, 1986, the district attorney filed a consolidated information charging Waldon with the burglary (Pen. Code, § 459)[1], robbery (§ 211), and murder of Dawn Ellerman (§ 187) (counts 1-3); animal cruelty (§ 597, subd. (a)) (counts 4 & 5); arson (§ 451, subd. (a)) (count 6); murder of Erin Ellerman (§ 187) (count 7); robbery of Carol Franklin and Nancy Ross (§ 211) (counts 8 & 9); the burglary (§ 459), forcible sexual penetration (§ 289, subd. (a)), rape (§ 261) (two counts), forcible oral copulation (§ 288a), and robbery (§ 211) of Erin Lab (counts 10-15); robbery of Diane Thomas and Julia Meredith (§ 211) (counts 16 & 17); the murder of Charles Wells (§ 187) and the attempted murder of John Copeland (§§ 187, 664) (counts 18 & 19); robbery of Ronald Carr (§ 211)

[1] Any subsequent statutory reference is to the California Penal Code unless otherwise indicated.

(count 20); vehicle theft (Veh. Code, § 10851, subd. (a)) (count 21); carrying an illegal switchblade knife (§ 653k) (count 22); carrying a loaded firearm (§ 12031, subd. (a)) (count 23); and carrying a concealed dirk or dagger (§ 12020, subd. (a)). Special circumstances were alleged that Dawn Ellerman was murdered during the commission of burglary and robbery (§ 190.2, subd. (a) (17) (i) and (vii)); that Charles Wells was murdered during the commission of robbery (§ 190.2, subd. (a) (17) (i) and for the purpose of avoiding arrest or escaping from custody (§ 190.2, subd. (a) (5)); and that Waldon had committed multiple murders (§ 190.2, subd. (a) (3)). It was alleged that Waldon personally used a firearm with respect to counts 1 through 3, 8 through 10, and 17 through 20 (§12022.5) and used a firearm with respect to counts 11-15 (§12022.3, subd. (a)). As to count 19, it was alleged that Waldon inflicted great bodily injury within the meaning of section 12022.7. (1 CT 73-77.)

On October 20, 1986, Waldon entered a plea of not guilty and denied the allegations in the information. (1 CT 78.)

During pretrial proceedings, on May 22, 1987, the trial court declared a doubt as to Waldon's competency to stand trial and criminal proceedings were suspended under section1368. (20 A RT 35-36.) Jury selection for the competency proceedings began August 17, 1987. (25A RT 23.) The jury found Waldon competent to stand trial on September 21, 1987. (31A RT 1193; 5 CT 882.)

On November 3, 1989, the trial court grant's Waldon's motion to represent himself at trial. (84A RT 64.)

An amended information was filed on May 7, 1990, to add an arson special circumstance allegation with respect to count 7, the murder of Erin Ellerman. That special circumstance allegation was later stricken in response to a defense motion under section 995. (14 CT 2903-2907.)

Jury selection began on May 15, 1991. (14 RT 1296.) The jury was sworn on June 25, 1991, and the guilt-phase proceedings began on July 1. (31 RT 5087, 5139; 32 RT 5233.)

On November 18, 1991, the jury found Waldon guilty of all charges and found all enhancement allegations to be true. The jury found each of the murders to be first degree murder. The jury also found each of the special circumstance allegations to be true. (19 CT 4341-4369; 72 RT 14798-14808.)

The penalty phase began November 22, 1991. (72 RT 14865.) On December 19, 1991, the jury determined the appropriate penalty is death. (2 CT 560; 76 RT 16010-16011.)

On February 26, 1992, the trial court denied Waldon's motion to modify the verdict pursuant to section 190.4, subdivision (e). (77 RT 16129.) On February 28, 1992, the trial court sentenced Waldon to death for the murders of Dawn Ellerman, Erin Ellerman, and Charles Wells. As to the remaining counts, the trial court imposed a determinate term of 70 years, four months, to be stayed pending execution of the death penalty. (77 RT 16227-16228; 20 CT 4583-4589, 4591-4594.)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution's Case in Chief

1. Dawn and Erin Ellerman murders and related crimes (December 7, 1985)

13-year-old Erin Ellerman was babysitting for Lloyd and Martha Hutchins on the evening of December 7, 1985. (33 RT 5401-5402, 5407-5408; 39 RT 6906.) The Hutchinsons returned from dinner around 9:20 p.m., and Lloyd drove Erin back home to her house at 13622 Mango Drive in the Del Mar Heights area of San Diego. (33 RT 5402-5403.) It was

about 9:30 or 9:35 p.m. when they arrived at her house. (33 RT 5305.) Erin hopped out and walked toward the front door. (33 RT 5303-5304.)

Just a few minutes later, Thomas Collimore was driving south on Mango Drive, when he saw the glow of a fire coming from the back of a house at the corner of Mango and Calais. Collimore went to see if there was anyone in the house. (32 RT 5321-5326.)

As he approached the house from the driveway, the garage door was closed. (32 RT 5326-5327.) He saw smoke coming from the crack between the front door and the door frame. He pounded on the door and yelled, "Fire!" (32 RT 5327.)

Collimore put his shoulder to the door and broke the door in. He tried to crawl inside on his hands and knees, but the heat and smoke were too intense. (32 RT 5327-5328.) No one inside responded. 32 RT 5328.) The smoke detector was going off inside the home. (32 RT 5332.) He found a hose and faucet outside and started spraying the inside of the house. (32 RT 5328; 33 RT 5412; 34 RT 5722.) The flames had not yet reached the front of the house or the garage area. (32 RT 5330.)

Other men joined in to help Collimore. (32 RT 5330.) He sent them around to the back of the house to break windows to see if anyone was inside. (32 RT 5330, 5340.)

Collimore's daughter, Kathleen, asked the occupants of the house next door to call the fire department, then went back across the street. (32 RT 5339-5340.) From that vantage point, she saw the garage door open from the inside and saw someone run out of the garage to a vehicle parked on the corner of the street. (32 RT 5327.) The man was wearing dark slacks, and a dark, "Members Only" type jacket that zipped up. (32 RT 5356-5357.) He ran to a car parked on the street, got in and drove off down Calais. (32 RT 5344-5345.) Kathleen Collimore later identified Waldon as the man she saw coming out of the garage that night. (32 RT 5342-5343.)

Once the fire department arrived, the Collimores left. When he left, Thomas Collimore saw that the garage door was open and a Porsche was parked inside. (32 RT 5331, 5332, 5341.)

A neighbor, Walter Lippincott, had seen an older light blue car parked in the driveway earlier that day. (32 RT 5348.) When he left his house about 9:15 that evening, he did not notice anything unusual about the Ellerman house. He returned around 10:00 p.m. to find flames coming from the rear of the house. (32 RT 5349.) He sent his daughter in to have his wife call 911, and ran to the Ellerman house. The car he had seen earlier was missing, so he thought no one was home. (32 RT 5350.) He got up to the roof of a nearby house and began to hose it down to try to keep the flames from spreading. (32 RT 5351.)

The call was received at the fire department dispatch center at 9:52 p.m. (33 RT 5447.) The house was only a half mile from the station. When they arrived at 9:57 p.m., they found the single-family home ablaze, with flames coming from the front and back of the home and venting from the top. (33 RT 5410-5412, 5450, 5645.) The structure was fully involved, with the body of the fire reaching 30 or 40 feet high. (33 RT 5463-5464; 34 RT 5724-5725.)

When firefighters arrived, the garage door was open, and there was no fire in the garage. (33 RT 5413, 5451, 5523; 34 RT 5721-5722.) San Diego Fire Captain Ronald Riley had one man attack the fire at the front door, while another went around the side of the home to try to prevent the fire from spreading to neighboring homes. (33 RT 5413.)

It took the responding units about 10 to 15 minutes to get the flames under control to be able to enter the structure. (33 RT 5414, 5469.) As Captain Riley was getting ready to leave the house, a firefighter discovered the body of a young girl, Erin Ellerman, in the hallway. (33 RT 5432-5433, 5470; 34 RT 5820; 38 RT 6559-6560.) Erin's body was headed into the

fire rather than away from the fire. (34 RT 5749.) The position of the body was suspicious because, although she was found face down, it did not appear as if she had been trying to escape the fire. (33 RT 5712-5713.)

A second body, that of Erin's mother, Dawn Ellerman, was in the family room, just off the kitchen. (33 RT 5434; 34 RT 5743-5744, 5765, 5813, 5822.) Dawn's body was found face up with the legs spread apart. (34 RT 5748.) The severity of the burns to Dawn Ellerman's body was extreme considering length of time it took to control the fire. It appeared as if Erin and Dawn could have been dead before the fire began and that the fire started right next to, or on top of the victims. (34 RT 5713.)

In Captain Riley's opinion, the fire was of suspicious origins. Because of how quickly the fire developed and spread throughout the house, he believed that some type of accelerant had been used. (33 RT 5439-5440.) The damage to Dawn's body—the torso was badly burned and the arms and legs were charred to the point where they were no longer attached to the rest of her body—suggested that the fire was unusually intense. (33 RT 5440, 5442.) Dawn was found lying on her back with her arms and legs extended, which was an unusual position for a fire victim. (33 RT 5440-5442.) Captain Riley notified the fire chief and the Metro Arson Strike Team. (33 RT 5434.)

A news video of the house fire was played for the jury. (33 RT 5436.) The video depicted the firefighters attacking the fire from outside the home, and then showed the coroners removing the bodies from the home. (33 RT 5437-5438.)

The autopsy showed that Erin's body had been extensively charred, especially her back and sides, with partially burned clothing still attached to her body. (35 RT 6187.) Most of the scalp had been burned from the back of her head, and a hole had been burned through the back of the skull. Most of her skin had been burned from her back and a significant portion

had been burned from her arms and fingers. (35 RT 6187-6188.) The remains were identified through comparison with Erin's dental records. (35 RT 6188; 37 RT 6454-6455.)

A small amount of soot was found in the back of her throat, indicating that she was alive during the fire. (35 RT 6190.) A significant amount of carbon monoxide was found in the blood. (35 RT 6192-6193.) The cause of death was asphyxia by smoke inhalation. (35 RT 6192, 6195-6196.) If Erin had walked into her home while it was on fire, she would have become incapacitated, unable to move, and rendered unconscious in less than a minute, unable to escape from the fire. (35 RT 6194-6195.)

However, the examination of Dawn revealed no sign of smoke inhalation. There was no soot in her airway, indicating that she had not been alive during the fire. (35 RT 6197, 6203.) Her body was even more extensively charred—a significant amount of soft tissue and extremities had burned away. (35 RT 6198.) Dawn was also identified through dental records. (35 RT 6214; 37 RT 6458.) Remnants of charred clothing found beneath the body were brought in with the body, along with the section of carpet she was found lying on. (35 RT 6198.) The only areas of her body that were not burned were a 4 inch by 9 inch area of her right upper chest and back from the shoulder blades to the buttocks. (35 RT 6198.) Most of the skin and soft tissue were burned away from the skull and face. The charring on the front of the body extended into the body cavities. Dawn's forearms and hands were completely burned away, as were the right leg from mid-calf down, and the left leg below the knee. (35 RT 6198.) A small hole, consistent with a gunshot entry wound was found on the top right part of the skull about three inches above the ear. (35 RT 6199-6202, 6217.) A test of Dawn's blood for carbon monoxide confirmed that she was dead before the fire started. (35 RT 6207, 6214.) Further examination of the spinal cord revealed a bullet wound, and a bullet was found

embedded in the marrow of the spinal column at the upper neck. (34 RT 5826-5827; 35 RT 6210-6211.) The bullet had traveled from the front of the spinal column, damaging the bone and severing the spinal cord. The injury was fatal. It would have paralyzed Dawn and prevented her from breathing. (35 RT 6211-6212.) Dawn died as a result of the gunshot wound to the neck. (35 RT 6213.)

The Ellermans had two dogs who tended to bark at strangers. (33 RT 5566-5567; 34 RT 5781-5782; 39 RT 6918, 6838-6839.) Dawn sometimes left one of the sliding doors ajar so that the dogs would have access to the back yard, although they spent most of their time indoors. (33 RT 5567, 5604; 39 RT 6838-6839.) The body of one of the dogs was found inside one of the bathrooms with a throw rug crumpled around it, and the second dog's body was found inside the bathtub. (34 RT 5819; 38 RT 6494, 6606-6607; 38 RT 6638.) Negative carboxyhemoglobin levels of the two dogs indicated that both animals were dead at the time of the fire. (35 RT 6207.) The white dog had extensive damage to its skull and the brain tissue underneath. (39 RT 6881.) Even if the damage did not result in immediate death, the brain damage was sufficient to have eventually caused death. (39 RT 6882.) One of the dogs also had considerable brain hemorrhage, along with skull fractures and fractures to the first cervical vertebra. The injuries were sufficient to cause death. (39 RT 6882-6883.)

Dawn kept a computer in their spare bedroom which they used as an extra family room. (33 RT 5560, 5562.) After the fire, the computer was gone, as was Dawn's jewelry. (33 RT 5567-5568; 38 RT 6675-6676.)

Dawn's vehicle was still in the garage. The glove compartment was open and items had been scattered over the floorboard. (34 RT 5828-5829; 37 RT 6451.)

Metro Arson Strike Team (MAST) investigator Javier Mainar investigated the fire. (38 RT 6619.) Many of the drawers on desks or

chests in different rooms were open at the time the fire occurred. Mainar noted substantial charring on the sides of the drawer, indicating that the drawers were open and the sides of the drawers exposed to fire. (34 RT 5815, 5817; 36 RT 6450; 39 RT 6627, 6642, 6655-6656.) There was a wall unit in Erin's bedroom that had several drawers open during the fire. (38 RT 6642.)

Mainar noted the difference in the degree of damage to the two bodies, given that they were found relatively close together. (38 RT 6628.) The position of Dawn's body was unusual in that she was found lying on her back, in "almost a spread-eagle fashion." Most people who die in fires typically fall forward, bending at the knees and waist. (38 RT 6628, 6648,) Erin's body was found face down, partially covered by collapsed drywall from the ceiling and debris from an adjacent closet. (38 RT 6650-6651.) Unlike Dawn's body, burned materials were found underneath Erin's body, indicating that the fire was already burning when Erin fell to the floor. (38 RT 6653.) Mainar also described the damage done to the home and its furnishings. (38 RT 6630-6646, 6653-6656.)

Fire investigators determined that the point of origin of the fire was the bed within the master bedroom, and that the cause of the fire was arson. (38 RT 6666; 39 RT 6858, 6866-6868, 6875-6876, 6935.) That bedroom suffered significantly more damage than other rooms in the house. There was significant damage to the ceiling and structures directly above the bed. (38 RT 6667, 6672.) Neither Dawn nor Erin were smokers, and fire investigators ruled out any electrical issues as the cause of the fire. (33 RT 5604-5605; 34 RT 5777; 39 RT 6858.) The open drawers throughout the home supported a conclusion that the cause of the fire was arson. (38 RT 6667-6668, 6675.) Fire investigators found two heavily fire-damaged cash boxes that had been pried open. (38 RT 6675.) Because of the appearance that the home had been ransacked before the fire, Mainar suspected that the

fire might have been set to conceal evidence of additional crimes. (38 RT 6676.)

A medium petroleum distillate was found on Dawn's clothing and on the carpet underneath her body. (47 RT 8755-8756.) Medium petroleum distillates are readily ignitable compounds such as mineral spirits, certain paint thinners, and some charcoal starter fluids. (47 RT 8756-8757.) The evidence in this case was consistent with charcoal lighter or some other medium petroleum distillate being sprayed over Dawn's body and clothing and then set alight. (47 RT 8759.) Evidence of the use of an accelerant further supported the conclusion that the fire was arson, as did the recovery of a bullet from Dawn's remains. (38 RT 6683-6684, 6833.)

Dr. Norman Ellerman, Dawn's ex-husband and Erin's father, testified that he and Dawn had an amicable relationship and that he saw Erin as often as possible, given that he lived in Palm Springs. (33 RT 5565; 39 RT 6906-6907.) A few years after the divorce, Dr. Ellerman bought the house on Mango Drive for Dawn and Erin. (39 RT 6909.) He also purchased a computer for Dawn and Erin in December 1984. (39 RT 6910.) A neighbor called him the night of the fire and told him there had been a fire. (39 RT 6919.) A second call let him know that two bodies had been found in the house. (39 RT 6920, 6923.)

Dawn's sister, Deborah Halseth, had been at the Ellerman home over Thanksgiving on November 28, 1985. (33 RT 5565.) Dawn was an immaculate housekeeper and the house was kept in good condition. (33 RT 5605; 34 RT 5777.) After the fire, Halseth went through the house with investigators and identified items that were missing. (33 RT 5567-5568.)

Laura Fallon, Dawn's mother, drove a blue 1968 Chevrolet. (33 RT 5606.) She traded cars with Dawn the morning of the murder so that Dawn could go get a Christmas tree. (41 RT 7409.) Dawn and Erin brought the car back around 5 p.m., and stayed for dinner. (41 RT 7409-7410.) The

two left Fallon's home in La Jolla around 5:45 p.m. because Erin was scheduled to babysit that night at 6:30. (41 RT 7410-7411.)

2. Carol Franklin robbery (December 14, 1985)

Carol Franklin (now Carol Nicolette) lived on Wilbur Street in Pacific Beach. (41 RT 7416.) On December 14, 1985, she returned from a party in Lakeside around 11 p.m. (41 RT 7417-7418.) She pulled into her driveway, unlocked and opened the garage, pulled the car in, and then went back out to close and lock the garage. (41 RT 7418.) She heard someone yell behind her from the end of the driveway. (41 RT 7418.) She turned around and saw a man in a ski mask coming at her. (41 RT 7418-7419.) The man had a gun. She threw her coat, purse, shoes, and keys down the driveway toward him. (41 RT 7419-7420.) The man picked up her purse and ran west on Wilbur, then turned left on Dawes. (41 RT 7421, 7424) She went inside and called 911. (41 RT 7421.) She had a drivers' license, $20, and some makeup in her purse. (41 RT 7422.)

3. Nancy Ross robbery (December 15, 1985)

On the evening of December 15, 1985, Nancy Ross and her mother were returning to her home on Kalamath Drive in Del Mar around 10:00 p.m. (40 RT 6976-6977.) Ross pulled into her driveway and parked in front of the garage. She let her mother out of the car, got out of the car, and then unlocked and opened the garage door manually. After pulling her car into the garage and closing the garage door, she stood up to find someone standing right in front of her wearing dark, tight-fitting pants, a navy blue windbreaker, and a royal blue ski mask with white trim around the eyes and mouth. (40 RT 6977-6979.) He wore black gloves and was holding a gun pointed at her face. (40 RT 6979-6980.)

The man motioned the gun towards her purse and grabbed the purse with his other hand, yanking the purse from her and pulling her to the

ground. (40 RT 6981.) He then turned and ran down the driveway and up the street towards Crest Road. (40 RT 6981-6982.) Ross picked herself up off the ground, ran into the house, and called 911. (40 RT 6986.) Ross's wallet, including her driver's license, credit cards, cash, coins, makeup, and various other items were in the purse that was taken. (40 RT 6986.)

4. Erin Lab burglary, sexual assault & robbery (December 17, 1985)

Elementary school teacher Erin Lab lived in a ground floor apartment at 2228 Felspar in San Diego with her boyfriend, Doug Hackley. (40 RT 7024, 7028, 7180.) On the evening of December 17, 1985, she was returning home from her second job at a boutique a little after 10:00 p.m. (40 RT 7028-7029.) When she got home, she locked her front door, undressed and got in the shower. (40 RT 7029-7030.) When she got out of the shower about ten minutes later, she wrapped a towel around herself and started to open the bathroom door. As she started to turn the handle, the door flew open, and Lab saw a man that she later identified as Waldon standing outside her bathroom. (40 RT 7031, 7055-7057, 7170-7171.) He was wearing a dark blue ski mask and dark, tight-fitting gloves. (40 RT 7031, 7044-7045.)

Lab backed up. Waldon grabbed her arm and said, "Don't scream and I won't hurt you." He was holding a baseball bat in his other hand. Lab told him not to hurt her, and he told her to lie down on the bed and pull the covers over herself. He began to ransack the room. (40 RT 7032.) For the next ten to fifteen minutes, he went through the dresser drawers, went into the walk-in closet and looked under the mattress. (40 RT 7033.) When Lab asked what he was looking for, Waldon replied, "Money." Lab told him she did not have any money. (40 RT 7033.)

Waldon asked if she had any guns in the house and Lab said no. (40 RT 7034.) Waldon approached the bed and told her, "I'm not going to hurt

you[,] I just want to make love to you." (40 RT 7033.) When Lab said no, Waldon took out a gun and asked, "Do you know what this is?" (40 RT 7034.) Lab thought she was going to die. Waldon put a towel over her head, took off his clothes and got into the bed. He got on top of Lab and put his finger in her vagina, keeping the gun pointed at her head. (40 RT 7035.) He put his penis into her vagina, telling her to grab his buttocks and pull him inside. (40 RT 7036.)

He was interrupted by a noise outside the bedroom window. He told Lab to be quiet and then went and looked out the window. Apparently seeing nothing out of the ordinary, he got back in bed. (40 RT 7037.) He put his mouth on Lab's vagina. He had difficulty getting an erection so he made her rub his penis with her hand, then put his penis in her vagina a second time. (40 RT 7038.) He again had her grab his buttocks and ordered her to put her tongue in his mouth. After he ejaculated, he got up and dressed. (40 RT 7039, 7160, 7162-7163.)

Waldon told her to take another shower, and she did so. (40 RT 7040.) He made her put a sweatshirt over her head when she went from the bedroom to the bathroom. (40 RT 7041.) Waldon propped the door open while she showered and placed a blanket over the bathroom floor. (40 RT 7041.) He directed her to wash her hair and make sure that she used soap all over her body. Lab purposefully refrained from washing her vaginal area. (40 RT 7041.) Waldon talked to her while she was in the shower, telling her that he wanted her driver's license. He had found her expired driver's license, but he wanted her new one. He became angry when she said she did not have a new one, and threw the old license over the shower door at her. (40 RT 7041.)

After she got out of the shower, Waldon led her back to the bed, and told her to lie down with her arms over her head. He used toilet paper to wipe down the palms of her hands. (40 RT 7042.) Lab heard more noises,

and heard him turn the television on again. She heard what sounded as if he were drinking water from the refrigerator. (40 RT 7042-7043.) Waldon told her that he was leaving, and that if she called the police, he would hunt her down, put a bullet in her head, and kill her. (40 RT 7043.) She waited for a while, then asked if she could put her hands down. When he did not respond, she realized he was probably gone. She wrapped herself in a blanket and fled through the bedroom window, through the alley, to the apartment manager's apartment, and called police. (40 RT 7044.)

The next day, Lab and Hackley realized that Waldon had cut the window screen, reached in and unlocked the deadbolt to her apartment to gain access. (40 RT 7158, 7185.) All the drawers in her apartment were left open, and Waldon had gone through all the Christmas presents she had purchased for her family. (40 RT 7046.) He took a picture of Lab and her boyfriend, Hackley, from her dresser. He took several American coins and Mexican pesos and other foreign currency. (40 RT 7046-7047, 7185.) He took Hackley's wedding ring from a previous marriage, a watch, a change purse, a Gemco card, and a pair of hand grips. (40 RT 7047, 7183-7184.)

A pubic hair was found on the pants Lab wore to hospital following the rape. The pubic hair was consistent microscopically to a known sample from Waldon and could have come from Waldon. (50 RT 9593-9595, 9601.)

Hackley testified that he saw Waldon in the alley between Olney and Noyes about a block from the apartment a week before the attack. (40 RT 7185-7188)

5. Diane Thomas robbery (December 19, 1985)

On December 19, 1985, Diane Thomas (now Diane De Po) was living at 1501 Chalcedony in Pacific Beach. (44 RT 7963.) She was walking home on Haines Street around 11:30 p.m. and was almost at her apartment when she heard footsteps behind her. She turned around and saw a man in

dark clothing and a ski mask running towards her with his arm upraised. She screamed and tried to run, but fell. (44 RT 7964, 7967-7968.) She did not see anything in his hands, but thought he had a gun. (44 RT 7968, 7995.) She felt someone brush by her, but she did not see what happened to her purse. (44 RT 7967-7969.) Her boyfriend came running outside, and she went in to call police. (44 RT 7969.) She identified Waldon in a lineup, at the preliminary hearing, and at trial. (44 RT 7974-7977.)

6. Julia Meredith robbery / police pursuit (December 20, 1985)

On December 20, 1985, Julia Meredith was living on Van Buren Street in San Diego. (40 RT 7232.) She returned home around 6:00 p.m. (40 RT 7234.) She parked her car and took her briefcase and a package into her house, using the front door. She went back to the car to bring in a second, larger package. (40 RT 7235-7236.) She was planning to leave again to go shopping, but stopped to answer the phone. It was a wrong number. She retrieved a bulb from her Christmas tree lights so that she could find a replacement. (40 RT 7236-7237.)

She grabbed her purse, left her lights on inside, went out the front door, turning the porch light on and locking the door. (40 RT 7237.) As she went around the back of her car, she saw a man spring up next to the car. He was about six feet tall, wearing a black or navy blue ski mask. (40 RT 7239.) The assailant had overwhelming body odor. (41 RT 7254.) Meredith identified Waldon as her assailant at the preliminary examination and at trial. (40 RT 7259-7260; 41 RT 7285.) She screamed and backed away. Waldon reached for her. He grabbed her from behind and punched her in the stomach. (40 RT 7240-7242.) He raised his hand, and Meredith saw the outline of a gun. (40 RT 7242.) Waldon ripped the purse from her shoulder and ran up the street towards Cleveland. (40 RT 7243.) Meredith went back inside and called police. (40 RT 7244.)

San Diego Police Officer Karen Eiben (now Karen Phenix) responded to the reported robbery on Van Buren. (41 RT 7308-7309.) As she approached the scene, she saw a car parked in the alley between Campus and Cleveland. The driver's door was open, but began closing as she observed the car. (41 RT 7311-7312.) Officer Eiben decided to contact the occupant of the car to see if he or she was a potential witness or suspect.

As she pulled into the alley, the car began moving, accelerating to 30 miles per hour, until it reached the end of the alley at Tyler Street. (41 RT 7312.) The car turned left without stopping at the stop sign at Campus and Tyler, continuing at a high rate of speed. The officer turned on her siren and overhead lights, but the car did not yield. Instead, the car continued on, making several turns without stopping at stop signs or signals, and even crossing the median and driving in the wrong direction at one point.[2] When it reached the intersection of Park and University, the car turned right and drove across a raised median into a bank parking lot. (41 RT 7313-7316.) When it reached the far corner of the lot, the driver got out, looked back at the officer, and ran. (41 RT 7317.) Officer Eiben identified the driver as Waldon. (41 RT 7318, 7332-7333.) He was alone in the car. (41 RT 7325.) Waldon jumped over the wall bordering the parking lot. (41 RT 7325.)

The car was a blue Honda Accord, with the keys still inside. (41 RT 7328.) Police found several different pieces of identification with the name Billy Ray Waldon in the car. (41 RT 7326-7327, 7330-7331.)

About three or four minutes after Waldon jumped over the wall adjacent to the bank parking lot, police received notice of shots fired on Cleveland Avenue. (56 RT 11000.) San Diego Police Officer George

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[2] A recording of the police radio transmissions during the pursuit was played for the jury. (41 RT 7379.)

Sikes was searching the area near where the pursuit ended when he heard gunshots. (45 RT 8248.) He headed west toward the shots when he heard a radio call of a shooting on Cleveland Street. (45 RT 8249.)

7. Wells murder, Copeland attempted murder (December 20, 1985)

Alice Wells and her husband Gordon lived at 3792 Cleveland Avenue. (44 RT 8164.) Just before 6 p.m., she spoke to her husband, who was in the garage working on an engine, and asked him to wash up and come in for dinner. (44 RT 8165.)

John Copeland lived in an apartment over the garage at the rear of the Wells property. (41 RT 7436.) When he came home from running errands around 5:30, the garage door was open, and Wells was inside working. (41 RT 7445; 42 RT 7738.) Copeland was inside his apartment at 6:10 p.m. when he heard voices followed by a gunshot coming from the alley below. (41 RT 7441, 7443.) When he went outside and looked down from his balcony, he saw Wells and another man standing just outside the garage where it faced the alley. Wells had blood on his left hand. (41 RT 7441-7442.) The man, who he later identified as Waldon, was wearing a ski mask, dark clothing and fingerless gloves. (41 RT 7453-7454, 7480-7482.) Wells said, "Get out of here, you son-of-a-bitch." (41 RT 7443.) Waldon went into the garage, and Wells followed. (7443-7444.) As he came through the garage, Wells grabbed a stick—what appeared to be the handle of a shovel. (41 RT 7453.) Thinking that Wells needed help, Copeland went downstairs and through the garage into the back yard. (41 RT 7444.) He left the door to the garage open. (41 RT 7447.)

Copeland saw Wells chasing Waldon towards the front gate near the Wells home. Waldon was unable to open the gate. (41 RT 7447-7448.) He turned and fired a shot towards Wells from about eight to ten feet away. (41 RT 7449.) Waldon then tried to go back out through the garage, but

instead he pushed the door closed, locking the garage, (41 RT 7462. 7469-7470.) He went back across the yard to another gate at the southwest corner of the property and tried, but was unable, to climb over the gate. (41 RT 7450-7451.)

Waldon turned around and slid back down the gate. By then, Wells was less than four feet away. (41 RT 7451-7452.) Wells took the stick and poked Waldon in the stomach. Waldon doubled over. (41 RT 7453.) When he straightened up, he moved behind a row of banana trees near the garage. (41 RT 7454.) Wells swung his stick at Waldon, but missed, hitting the banana tree instead. (41 RT 7455.) Waldon said, "Don't come any closer or I'll shoot." (41 RT 7455.) He fired two or three shots at Wells. (41 RT 7456-7457.) Copeland heard Wells fall to the ground. (41 RT 7457.)

Copeland reached back, and Wells pushed the stick into his hands. (41 RT 7457.) Copeland waved the stick in front of him, and Waldon again said, "Don't come any closer or I'll shoot." (41 RT 7457-7458.) Waldon fired a shot at Copeland, striking him in the neck. (41 RT 7458.) Copeland felt numbness from his left elbow to his hand and in his eye. (41 RT 7459.) His voice was hoarse, and his left eye partially closed. (42 RT 7725.) He laid the stick down and walked back through the yard towards the house. He felt blood dripping from his fingers. (41 RT 7459.) He opened the front gate and went up to the front porch. Mrs. Wells asked if she should get a gun, but Copeland told her to call the police and paramedics because he and Wells were wounded. (41 RT 7459-7460.)

While he was waiting for police, he heard the bell attached to the north gate to the back yard ring, so he thought the gunman had left the yard. (41 RT 7461.)

According to Alice Wells, she was taking Christmas cookies out of the oven when she heard a loud noise coming from the back yard. (44 RT

8165, 8167.) She ran to the back door, turned on the outside floodlights, and started out the back door. She saw a masked man running through the yard towards the front gate. (44 RT 8167-8168.) She shut the door and heard someone hit the front gate. (44 RT 8169.) She then saw Copeland chasing the man back towards the garage. (44 RT 8169-8170.) She went to get her .38 caliber revolver, when she heard two more shots. She heard Copeland yelling. (44 RT 8170.) Copeland told her to call for help, so she called 911. (8169, 8171.) Her call to 911 was played for the jury. (45 RT 8243.)

Officer Sikes and Sergeant Nelson arrived at the Wells home at the same time. (45 RT 8249-8250.) They found Copeland sitting on the porch bleeding. In the backyard, they found Gordon Wells lying on the ground. (45 RT 8251-8252.) Officer Sikes performed CPR until the medical helicopter team arrived and took over. Wells was pronounced dead shortly thereafter. (45 RT 8253-8254.) Copeland was taken to the hospital by ambulance. (41 RT 7461.) He was operated on immediately to repair damage to his carotid artery and remained in the hospital for five days. The bullet was still in his neck because a second surgery was deemed too risky. (41 RT 7463-7465.) He was shot in the neck, just to the left of his Adam's apple. He has permanent nerve damage which causes tingling and numbness in his elbow, chest, and fingers. (41 RT 7465.) X-rays showed the .25 caliber bullet lodged in his neck. (42 RT 7730-7731.)

Copeland described the gun used as a small automatic handgun, smaller than a .38 or a .357 caliber. (41 RT 7466.)

The murder victim, Gordon Wells, was blind in one eye, and had trouble hearing. He had had a pulmonary embolism two years before, and was on Coumadin, a blood thinner. He had previously had surgery on his shoulders and was unable to raise his hands above his head. (45 RT 8244-8245.)

The 59-year-old Wells suffered four gunshot wounds, three to the head and one to the shoulder. (44 RT 7944-7945.) One bullet grazed the forehead without penetrating the skull. (44 RT 7945-7946.) Based on the stippling around the entrance wound, the gun was less than 18 inches away when it was fired. (44 RT 7946-7947.) A second bullet entered the left cheek from less than 18 inches away and exited in front of the left ear. (44 RT 7948-7949.) Another bullet entered Wells's left shoulder and exited above the scapula on the back. (44 RT 7949.) The fatal wound stuck near Wells's left eyebrow and penetrated through the skull into the left temporal lobe. (44 RT 7950.) The pathologist removed a bullet from Wells's brain. (44 RT 7945, 7952.) Wells would have become unconscious very suddenly, and death would have occurred within minutes. (44 RT 7951.)

Gordon Wells's eyeglasses were found in the middle of the alley behind the garage. (44 RT 8195-8196; 45 RT 8245, 8284-8289.) Four shell casings were found at the scene. (45 RT 8255; 48 RT 9129-9134.) A fifth shell casing was found inside the Wells's garage on December 30, 1985. (43 RT 7857-7858; 44 RT 8188-8189.) A projectile was found in a beam over the Wells's patio several months later. (44 RT 8180-8182, 8192-8194; 52 RT 9987-9988.)

8. Ronald Carr robbery (December 20, 1985)

Later that same evening, around 7:30 or 8:00 p.m., Ronald Carr was leaving his home at 2940 First Street in San Diego. When Carr reached the end of his driveway where his El Camino was parked, a man wearing a ski mask and holding a gun approached him and demanded his keys. (49 RT 9426-9427, 9430.) The man asked if Carr had any money, but Carr told him that he was on his way to the gym and did not have any cash with him. Waldon looked in Carr's bag and searched his jacket. (49 RT 9430-9431) Waldon told Carr to lie down in his driveway and look away. Carr heard the car start. Waldon asked Carr several questions about how to operate the

vehicle, and asked for directions. (49 RT 9431-9433.) The gun was a small caliber automatic. (49 RT 9433.) Waldon told Carr to jump over the fence behind his property and he would not shoot him. Carr did so. He saw Waldon back out and drive away. He waited a few minutes, then climbed up the retaining wall and back over the fence and called the police. (49 RT 9434-9436.)

Carr's El Camino was found on Raedel Drive in south San Diego on January 25, 1986. (50 RT 9556-9557.)

9. Evidence found in Waldon's car

San Diego Police Sergeant Kenneth Anderson responded to assist Officer Eiben's pursuit of the robbery suspect. (43 RT 7862-7863.) He secured the abandoned vehicle. The engine was still running, the lights were on, and the driver's door open. (43 RT 7863-7864.) A wallet, passport and some coins were found between the door and the front tire. (43 RT 7864.) The passport belonged to Billy Ray Waldon. Inside the wallet were two driver's licenses, one belonging to Waldon and the other belonging to Carol Franklin. (43 RT 7864, 7870; 44 RT 8073.) At trial, Franklin identified the license as the one taken from her during the robbery. (41 RT 7422-7423.) Also in the wallet were a GEMCO card with the name Keiko Waldon, a Navy Federal Credit Union deposit slip, and a food stamp identification card with an address of 2509 Imperial, indicating that Waldon had applied for the food stamps on December 12, 1985. (43 RT 7866, 7868-7869, 7871.)

A pair of pants with the name Waldon stenciled on the back was found farther down the embankment near where Waldon abandoned the car. (43 RT 7867-7868.)

The car was registered in Waldon's name. (44 RT 8267.) The back of the car was full of miscellaneous items. (41 RT 7329; 44 RT 8068-8137.) It appeared as if Waldon had been living in his car. (44 RT 8077.)

Inside the car, police found Oklahoma and Florida driver's licenses belonging to Waldon, as well as a Long Beach State University student ID. (43 RT 7871-7873; 44 RT 8073.) A 1986 Thomas Brothers map was found opened to the page showing Mission Hills, Hillcrest, North Park and Normal Heights. (44 RT 8094; 49 RT 9403.) Several other papers found in the car had Waldon's name on them. (44 RT 8097.) Waldon's name was on miscellaneous paperwork in glove compartment. (44 RT 8116.) Also in the glove compartment was a folded page from a Thomas Brother's map showing the Del Mar area where the Ellerman home was located. (44 RT 8117-8118.) Police also found a receipt from an auto parts store in Tahlequah, Oklahoma, dated November 14, 1985 and an Oklahoma Highway Patrol citation for speeding written to Waldon who was driving the same 1982 Civic at the time of the citation, September 18, 1985. (44 RT 8127-8128, 8130.) An appointment card for a counselor at the MAAC project, a local social services agency, dated December 13, 1985 was found in the car. (44 RT 8128.)

A computer, monitor, keyboard, printer, several computer manuals, computer paper, a box of computer diskettes, and other computer equipment were found in the car. (44 RT 8079-8084.) The serial numbers on the computer equipment matched the serial number on the invoice provided by Erin Ellerman's father. (53 RT 10255; see 69 RT 14318.) A suitcase with Erin Ellerman's name and address on the luggage tag was on the right rear passenger floorboard. (44 RT 8084-8085.) Inside the suitcase was a burgundy notebook, and inside the notebook was a City Bank Visa card in the name of D.S. Ellerman. Also inside the suitcase was a handcrafted wooden jewelry box with several items of jewelry inside, a pocket calculator, a Sony Walkman, and a silver jewelry case containing several pieces of jewelry including a bracelet engraved with the name Erin Ellerman. (33 RT 5575; 44 RT 8085-8087.) A coin purse containing

$11.68, several foreign coins, and a game token was also found in the suitcase, along with a blue Snoopy wallet, a yellow Texas Instruments calculator, a blue knit cap, a book, and a foreign power converter. (44 RT 8087-8089.)

At trial, Deborah Halseth identified the computer, keyboard, monitor, and printer as looking like the computer equipment that belonged to her sister. (33 RT 5570.) Halseth and Dr. Ellerman also identified an employee ID card belonging to Dawn Ellerman. (33 RT 5572; 39 RT 6918.) Halseth identified the suitcase as belonging to Dawn and Erin Ellerman. (33 RT 5573, 5576.) She also identified a child's calculator found inside that she recognized as belonging to Erin. The other calculator found inside was identical to one that Dawn Ellerman had bought for Halseth. (33 RT 5574.) Halseth recognized a bracelet found in the jewelry case as one that Erin's father gave to her that had Erin's name on it and an emerald necklace that also belonged to Erin. (33 RT 5576-5577.)

Underneath one of the floor mats was a picture of Erin Lab and Doug Hackley, a GEMCO card belonging to Lab, a California license belonging to Nancy Ross, a blank check with Hackley's name and address, a Chalet wrist watch, a Seiko wristwatch, a gold wedding band, and two keys. (44 RT 8098-8100.) Also found were a knife, a box of matches, a Toyota key ring, a business card with Erin Lab's father's name, an SDG&E business card imprinted with Nancy Ross's name, a pair of hand grips, $7.03 in U.S. currency, a Mexican peso, and a Polynesian coin. (44 RT 8101.) At trial, Ross identified the business card and her driver's license found in Waldon's car. Both were in her purse when it was stolen. (40 RT 6987-6988.) Lab identified her Gemco card, a blank check belonging to Doug Hackley, her father's business card, and the picture of Lab and Hackley as items that had been taken from her apartment. (40 RT 7048.) At the preliminary hearing, she also identified the wedding ring and hand grips

found in Waldon's car. (40 RT 7050.) Hackley identified the picture of him and Erin, his blank check, Erin's GEMCO card, and the copy of her father's business card found in Waldon's car as items taken from their apartment. (40 RT 7182-7183.)

A black leather purse with a broken strap containing papers and a wallet belonging to Julia Meredith was found on the front seat. (41 RT 7329; 44 RT 8093.) Meredith identified the purse at trial. (40 RT 7254-7257.)

Also among the items found in the car was a plastic bag with a black vinyl purse inside, along with Diane Thomas's identification, checkbook, an ATM card and other credit cards in Thomas's name, and other miscellaneous personal items. (44 RT 8095.) Thomas identified her purse and its contents, including her driver's license, at trial. (44 RT 7972.)

A metal yardstick and a paper bag containing a black leather spring-type sap were found in the rear cargo area. (44 RT 8090.) Police found a box of pistol cartridges with 27 cartridges remaining stuffed inside two socks in the rear side passenger compartment. (44 RT 8091-8092.)

Police also found a red handbag containing two Cherokee language audiotapes, a cassette player and headphones, a pair of leather gloves, a Minnesota Vikings ski mask, and two wigs. (44 RT 8105, 8107, 8109.)

A Doritos bag with a switchblade knife and an oil can inside were also found in Waldon's car. (44 RT 8108.) Several items of clothing were found in the trunk. One of the coats had the USS Midway insignia. One pair of military uniform trousers had "Waldon" stenciled above the right rear pocket. (44 RT 8111-8115.) Police also found a matchbook from the Georgetown Plaza Motel in Tulsa, OK (44 RT 8116.)

10. Ballistics evidence

The projectile recovered from Dawn Ellerman's body, the projectile recovered from Wells's body, and the projectile found lodged in the patio

cover at the Wells's home were all fired from the same weapon—a .25 caliber Automatic Colt Pistol. (45 RT 8383-8385; 47 RT 8762-8764; 48 RT 9093.) Each of the .25 caliber shell casings found at the Wells crime scene were fired from the same weapon. (45 RT 8387-8388; 47 RT 8764; 48 RT 9092-9093.)

The cartridges found in Waldon's car were .25 caliber ACP cartridges manufactured by Federal Cartridge Corporation. (45 RT 8390.) The projectiles recovered from Dawn Ellerman, Gordon Wells, and from the Wells's home were consistent with that same manufacturer, and the shell casings recovered were made by the same manufacturer. (45 RT 8390.) Based on the markings stamped on the head of the cartridges by the manufacturer, it was very likely that the ammunition recovered from the crime scenes came from the box of ammunition found in Waldon's car. (45 RT 8397-8400.)

The physical characteristics of the projectiles and casings were consistent with being fired from a .25 caliber ACP pistol manufactured by Firearms Import and Export Company. (45 RT 8394, 8397, 8400.) The jury was shown an FIE .25 caliber ACP pistol. Carol Franklin, Nancy Ross, Erin Lab, and Julia Meredith each testified that the sample weapon was similar to the gun used by their assailant. (40 RT 6990-6991, 7060; 41 RT 7285, 7426.)

11. Events leading to Waldon's arrest (June 16, 1986)

After the December 7 and 20th homicides, police sought the assistance of the FBI, and Waldon was listed on the "most wanted" lists in various communities. (49 RT 9334.)

Naval officer Stephen Midas shared a condominium with three other naval officers at 270 Dahlia Street in Imperial Beach from December 1985 through April 1986. (43 RT 7762-7763.) Sometime in January 1986, he noticed that his wallet was missing. The night before, he had gone to the

weight room at Naval Air Station North Island to work out, leaving his keys and wallet in the car. (43 RT 7765-7766.) He returned home, locked the car and went inside. He left the wallet in his car. (43 RT 7766-7767.) He did not realize his wallet was missing until later the next day when he was stopped by police and asked for his license. (43 RT 7767.)

His New York driver's license and military ID were in the wallet, along with a credit card and a card from the apartment complex with the address in Imperial Beach. (43 RT 7768, 7772.) Another naval officer, Daniel Roman, lived in that same apartment complex. (43 RT 7772.) When Midas moved out of the apartment, he asked the manager to give his portion of the security deposit to the three remaining roommates. (43 RT 7825.)

Terina Medina was the apartment manager at the apartment complex at 270 Dahlia in Imperial Beach. (49 RT 9292.) In June 1986, a man came into the office, claiming to be Steven Midas, and requesting the return of a security deposit. (49 RT 9293.) Her records indicated that the security deposit had already been returned to the other tenants, in accordance with the Midas's request. (49 RT 9294.) The apartment that Waldon asked about was vacant, but the occupants of the neighboring apartment had complained that they had heard water running in the vacant apartment, and when Medina checked the apartment, the shower was dirty. She had the locks to the apartment changed. (49 RT 9297-9298.) At trial, she identified Waldon as the person who had requested the return of the deposit. (49 RT 9295-9296.)

Navy Ensign Daniel Roman was living at 270 Dahlia on June 16, 1986, when he discovered his white 1965 Mustang convertible, license plate number 655KSF, missing from the garage area at around 7:15 a.m.. He did not give Waldon permission to take his car. (48 RT 8708-8712.)

The Mustang was stolen from the apartment complex a few days after Waldon's argument with the apartment manager. (9302-9304.)

San Diego Police Officers Kevin Barnard and Ivan Sablan were on patrol on June 16, 1986 around 3:30 p.m., when Barnard spotted a 1965 Mustang headed east on Garnet in Pacific Beach. (45 RT 8423-8424; 46 RT 8511.) He initiated a traffic stop after noting that the car had no rear brake lights. (45 RT 8425-8426.) The Mustang started forward slowly and the driver opened the driver's side door. The car eased through the intersection then accelerated suddenly. (45 RT 8426-8427.) The car then turned right through a parking lot and into an alley. (45 RT 8426-8427.) After a short pursuit, the Mustang ended up on Felspar where it crashed into a front yard of a residence. (45 RT 8427-8430; 46 RT 8511.) The driver fled on foot. Officer Sablan followed on foot, while Barnard drove south on Haines to try to cut him off. (45 RT 8431; 46 RT 8511-8512.) The driver had an object in his hands as he fled the car and was fumbling with something at his left side. (45 RT 8441-8442.)

The driver ran between two residences and through an alley towards Garnet. (46 RT 8513-8514.) When he reached the corner at Garnet, he stopped and fell to the ground. Officer Sablan eventually took the driver into custody at the corner of Haines and Garnet. (45 RT 8431-8432; 46 RT 8515, 8610.)

Officer Barnard identified Waldon as the driver of the Mustang. (45 RT 8433.) However, at the scene, Waldon gave his name as Stephen Midas. (45 RT 8434-8435; 46 RT 8522.) When asked for his name a second time, he paused and then said, "Oh, you'll find out, I'm already in enough trouble." (45 RT 8439.)

Waldon had a switchblade knife, a folding knife, an ice pick, a mini-flashlight, a pair of handcuffs, and some .357 Magnum ammunition on his person. (45 RT 8433, 8443-8444, 8450; 46 RT 8517, 8519-8520, 8610-

8612.) He had a red knit ski cap with holes cut into it. (45 RT 8436; 46 RT 8520, 8613-8614.) He also had a women's Citizen watch in his pocket. (45 RT 8451; 46 RT 8520, 8611.) Waldon also had a clear plastic pouch with coins in it, and a key in his pocket.(45 RT 8444-8445.) A pair of gloves and a page from a Thomas Brothers map showing Imperial Beach was found on Waldon's person. (45 RT 8446-8447; 46 RT 8520-8521, 8613.)

Waldon had an empty gun case on his belt. (45 RT 8439.) When they retraced the path of the foot pursuit, Officer Sablan found a Smith and Wesson Model 28 .357 Magnum revolver. (45 RT 8440; 46 RT 8516-8517.) The firearm had five rounds in it. (45 RT 8450.)

There was no key in the Mustang's ignition, instead the car had been hot-wired. (45 RT 8437.) The car was registered to Daniel Roman. (45 RT 8439.) Three screwdrivers were found on the passenger floorboard, along with a pair of pliers. (45 RT 8442-8443; 46 RT 8519.) Police also found two garage door openers in the car. (46 RT 8520.) The screwdrivers, pliers, and garage door opener found in the car did not belong to Roman and were not in the car when it was taken. (48 RT 8713-8715.)

When San Diego Police Agent Samuel Campbell asked Waldon for his name after his arrest, Waldon initially refused, then gave him the name Stephen Midas three times, spelling the first name differently each time and giving slightly different dates of birth. (48 RT 8735-8737.)

When San Diego Police Detective Richard Thwing spoke to Waldon on June 19, 1986, after his arrest, Waldon insisted that his name was Stephen Midas. (49 RT 9337-9338.)

San Diego Detective Gerald Berner investigated arrest of the man who had given his name as Stephen Midas. (45 RT 8413.) Detective Berner matched the photograph of "Midas" to a photograph of Waldon on a

wanted poster posted in the station. (45 RT 8414.) A fingerprint comparison confirmed that the man was Waldon. (45 RT 8414.)

Deputy District Attorney Greg McClain was in court on June 18, 1986, when Waldon gave his true name as "Stephen Matthew Midas." (50 RT 9667.) Former Deputy District Attorney Charles Patrick was present at court proceedings on June 20, and July 2, 1986, when Waldon gave his true name as "Billy Ray Waldon." (50 RT 9648.)

On August 29, 1986, a lineup was ordered to be held on September 8, 1986. On that date, Waldon had a mustache and a beard. (50 RT 9650.) When he appeared for the lineup, he had shaved the mustache. (50 RT 9650-9651.)

12. Waldon's background and his activities from September 1985 to June 1986

According to Waldon's half sister, Iris Rose, Waldon lived with his mother and stepfather until the age of 16 or 17, when he went to live with his maternal grandmother. (47 RT 8660-8661.) He has always been known as Billy Ray Waldon. Waldon has a very small amount of Indian blood on his mother's side. (47 RT 8661.) He grew up in Tahlequah, Oklahoma, but joined the Navy as an adult and was sent to San Diego for training. (47 RT 8661-8662.) When he joined the Navy, he was married to a woman named Rhonda. Iris saw Waldon briefly once every year or two. He eventually divorced Rhonda and married his second wife, Keiko. He and Keiko had two children, Sequoyah and Eli. (47 RT 8662-8663.) Waldon was discharged from the Navy in the early to mid-1980s and lived in Los Angeles while attending school in Long Beach. (47 RT 8665.)

Rose was living in San Diego in September 1985, on Via Alicante, off of Gilman Drive. (47 RT 8666-8667.) Waldon stayed with her for a week or two in September 1985. (47 RT 8668.) He was driving a blue Honda. (47 RT 8668.) He brought with him a swing bike that he intended to ask

the Cherokee nation to market for him. (47 RT 8669.) When he left, he told his sister he was going back to Oklahoma. (47 RT 8671.)

He returned to Rose's condominium on November 25, 1985 at around 3:30 or 4:00 in the morning. When she answered the door, Waldon told her not to turn on any lights. He told her that he had driven straight through from Oklahoma and had had car trouble. (47 RT 8671-8672.) He left San Diego again for a couple of days, telling his sister that he was going to Los Angeles to see Keiko and his children. He returned to San Diego in time to spend Thanksgiving Day, November 28, with Rose. (47 RT 8672-8673.)

When Waldon arrived at her house, he had a mustache and goatee, but later shaved the goatee off. (47 RT 8689, 8706.) Waldon was unemployed, but was looking for work or some type of schooling. (47 RT 8690-8692.) Waldon told Rose not to give out any information if anyone called and asked for him. (47 RT 8693.)

He stayed with Rose for several weeks, keeping irregular hours and sometimes staying out very late. (47 RT 8673-8674, 8681-8682.) Waldon went to a holiday party with his sister on December 11, and she saw him at the condominium on December 12 as well. (47 RT 8675-8677.) On Monday, December 16, the two had dinner together at the Hare Krishna temple in Pacific Beach. (47 RT 8677-8680.) On December 18, they went to another party at La Jolla Bank and Trust. (47 RT 8680.) The last time she saw him was the morning of December 20 as she was leaving for work. (47 RT 8681.)

She found out that Waldon was wanted by police from her aunt Vivian, who called her early on the 21st. (47 RT 8683.) She identified the blue Honda as the car Waldon was driving. (47 RT 8683.) She was interviewed by police and turned over Waldon's paperwork and other belongings. (47 RT 8684-8689.)

After his arrest, Waldon became angry at Rose because she had not paid the fees for a storage unit in Los Angeles where he was storing some of his belongings. (47 RT 8695-8696, 8702.) Rose turned over the bicycle to the district attorney's office. (47 RT 8703-8704.) While he was staying with her, Waldon talked to Rose about founding a religion. He never claimed to be a religious person, instead, money was one of the reasons he gave for wanting to found his own religion. (47 RT 8704-8705.)

According to Michael Finneran, a counselor with the MAAC Project, a social services agency in San Diego County, Waldon had an appointment with one of their counselors in the employment training services division on December 13, 1985. (49 RT 9413-9414.) Waldon was scheduled for clerical and data entry training. (49 RT 9414-9415.) There was no record that Waldon actually kept the appointment. (49 RT 9418.)

Leroy Martin, Assistant Deputy Director, Department of Social Services in San Diego testified that Waldon had been issued an identification card indicating that he was eligible to receive food stamps. (50 RT 9582.) The address on Waldon's card was that of the department's district office on Imperial Avenue. The office used that address in cases where the applicant may have been homeless and did not have an address. (50 RT 9582-9583.)

A man calling himself "Stephen Midas" attended a computer class at Mar Vista adult school in April 1986. (48 RT 9119-9120.) Gloria Renas, a teacher at Mar Vista identified Waldon as the student who attended her computer applications class in April-June 1986. He was using the name Stephen Midas. (50 RT 9541-9543, 9547.) He wore a baseball cap and dark rimmed glasses all the time while attending classes. (50 RT 9543, 9549.)

Neireda Spreitzer attended that same class. (50 RT 9548.) She identified Waldon as the student who called himself Stephen Midas. (50 RT 9548-9549.)

13. Escape attempt

San Diego Sheriff's Deputy Douglas Sanders was assigned to Central Detention Facility on September 21, 1986. Around 10:30 p.m., he investigated a report of an unusual noise in his area. (48 RT 9182-9183.) He found Waldon in his cell chipping at the rear wall with a bolt wrapped in a sock. (48 RT 9184.) The bolts supporting a shelf had been removed and a hole had been chipped into the wall behind the shelf. (48 RT 9189-9190.) The hole could be concealed if the shelf was moved back into place and the bolts reattached. (48 RT 9216.) The hole was about eight inches by ten inches, and an inch and one-quarter deep. (48 RT 9280.) Deputies also found a bag with metal parts and screws inside, an L shaped metal rod, a handcuff, spoons, screws, and other contraband. (48 RT 9191-9194.)

B. Defense

1. Waldon's proffered defense

Waldon testified in his own defense, claiming that he was innocent of the charged crimes, and that he had been framed by the FBI, or possibly CIA operatives, because of his work with respect to Native American autonomy and his work with the Esperanto[3] language. (63 RT 12651.) Waldon believed that the media attention he got because of his activities in support of Indian autonomy led the CIA and the FBI to target him. (64 RT

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[3] Esperanto is "an artificial international language based as far as possible on words common to the chief European languages." Merriam-Webster.com. Merriam-Webster, n.d. Web. 8 May 2014. <http://www.merriam-webster.com/dictionary/Esperanto>.

12937-12938.) Waldon claims to have been a victim of the FBI's Counter Intelligence Program, or COINTELPRO.[4]

Waldon was raised by his maternal grandparents in Tahlequah, Oklahoma, the capitol of the Cherokee nation. (61 RT 12244, 12251.) He was not close to his biological mother, and eventually his grandmother adopted him. (60 RT 11959-11960; 61 RT 12254.) His grandfather was "approximately" half-Cherokee, making Waldon "approximately one-eighth Cherokee." (60 RT 11961; 61 RT 12254-12255.) His grandfather gave him the Cherokee name Nvwtohiyada Idehesdi Sequoyah when he was four years old. (61 RT 12263-12264.)

He graduated from Tahlequah High School in 1970. (63 RT 12775.) Waldon divorced his first wife, Rhonda, in April 1977. (63 RT 12790.) He served in the U.S. Navy for over ten years, and was discharged in March 1984. (61 RT 12340-12344.) While in the Navy, he also lectured to Esperantist groups on Cherokee history, language and autonomy. (61 RT 12346.)

Waldon claimed that he was being framed for crimes he did not commit because of Poliespo. (63 RT 12651.) Poliespo is a language that Waldon created between 1958 and 1985 that combines Esperanto with affixes from the Cherokee language, allowing one to think, read or write faster. (63 RT 12652, 12658.) Waldon was also attempting to found the

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[4] From the FBI website: "The FBI began COINTELPRO—short for Counterintelligence Program—in 1956 to disrupt the activities of the Communist Party of the United States. In the 1960s, it was expanded to include a number of other domestic groups, such as the Ku Klux Klan, the Socialist Workers Party, and the Black Panther Party. All COINTELPRO operations were ended in 1971. Although limited in scope (about two-tenths of one percent of the FBI's workload over a 15-year period), COINTELPRO was later rightfully criticized by Congress and the American people for abridging first amendment rights and for other reasons." (vault.fbi.gov/cointel-pro.)

Cherokee Bicycle Company, seeking to market a bicycle that was propelled by pushing the pedals up and down while pulling the handlebars back and forth. (63 RT 12663-12665.) He had purchased the bicycle from the inventor in Germany, and he attempted to interest the Cherokee nation or other Cherokees in establishing a factory to manufacture the bicycle. (63 RT 12665-12667.) In Switzerland in 1984, Waldon helped found the World Humanitarian Church, the World Esperanto Organization, the World Poliespo Organization, and the United Nations of Autonomous Peoples (UNAP), as well as the "exiled government of the Cherokee Nation." (58 RT 11494-11500; 63 RT 12641-12642, 12648-12650.)

Waldon was a student at San Francisco State University (SFSU) and California State University, Long Beach until the summer 1985. (62 RT 12416-12417.) Waldon met Birgitta Holenstein at Fisherman's Wharf in San Francisco while he was attending a course at SFSU in July 1985. (58 RT 11514-11515; 63 RT 12780.) Waldon was having a conversation with Mark Williams. As he turned to leave, Holenstein stopped him to return a flier that he had dropped. (58 RT 11516; 63 RT 12781.) The two struck up a conversation, and agreed to meet again. (63 RT 12781-12782.) After his first meeting with her, they met for coffee a second time at Fisherman's Wharf. (58 RT 11517-11518; 64 RT 12922.) Holenstein testified that they talked about Mark Williams and Karen Eiben[5], who she assumed was Williams's girlfriend. (58 RT 11518-11519.) According to Waldon, Williams gave him Eiben's name and phone number to use if he wanted to contact Williams. (64 RT 12962.) Holenstein believed that Williams was working for the CIA and was trying to recruit American Indians to go to Nicaragua as part of a CIA army. (59 RT 11619.)

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[5] Karen Eiben is the San Diego Police Officer that initiated the police pursuit of Waldon's vehicle following the Meredith robbery.

According to Waldon, he first saw Williams at his Hawthorne, California apartment. The two men discussed Waldon's organizations and Williams offered to donate $200 to support the organizations. (64 RT 12896.) Waldon saw Williams again twice on the campus at CSU Long Beach, and one other time at his apartment in Hawthorne. (64 RT 12904.) He also saw him in San Francisco in the Summer of 1985, and at a powwow in Riverside. The main speaker at this powwow was Russell Means, an activist for Native American autonomy. (64 RT 12905.) Russell Means invited Waldon to accompany him to Nicaragua to join an army of American Indians in support of the Misquito and Suma attempts to gain autonomy and to fight the Sandinistas. Waldon declined to join this effort. (64 RT 12906-12907.) He also saw Williams at the National Congress of American Indians in Tulsa, Oklahoma in late 1985, just before Waldon's stay with his sister in La Jolla in November and December 1985. While he was in Tulsa, Waldon demonstrated his bicycle to Williams. (64 RT 12908-12909.) Waldon saw Williams in Ausburg, Germany and Rome, Italy in 1985. (64 RT 12909.) He believed Williams was a drug dealer who used others to transport drugs for him. (64 RT 12924-12925.)

He saw Williams another time in Tahlequah, Oklahoma, with attorney Mary Barksdale. (64 RT 12291-12292.) Waldon told the jury that Barksdale, an advocate for Indian rights and autonomy, was murdered by Williams, although Williams was never charged or prosecuted for the murder. According to Waldon, Barksdale was killed shortly after writing to Waldon at the jail and promising to send information related to COINTELPRO defenses and to assist him in his defense. (64 RT 12292-12293.) Although Barksdale's death certificate and autopsy indicates that she died in February 1987 of natural causes (65 RT 13320-13321), Waldon believed that Williams murdered Mary Barksdale. (67 RT 13627.) Waldon believed that the CIA had developed an aerosol spray that could cause the

type of cerebral hemorrhage that killed Barksdale. (67 RT 13629, 13631.) According to Waldon, Williams admitted to having the ability to kill someone using this method. (67 RT 13633.)

Waldon later traveled to Europe as the leader of a youth delegation from the Esperanto League for North America. (62 RT 12417.) Waldon created a two-page document, titled, *The Fundamentals of Poliespo*, that he reproduced and distributed to Esperantists while he was in Europe in 1985. (63 RT 12659-12660.) Both Mark Williams and another man, William Dickerman, were in Augsburg, Germany, at the same time as Waldon. Waldon believed both men were CIA agents. Waldon had seen Dickerman before, in his class at San Francisco State, and at Esperanto conventions in Portland, Oregon and Vancouver, Canada. He thought Dickerman was monitoring his activities. (62 RT 12418-12422.) Waldon gave Williams his itinerary while he was traveling in Germany. (67 RT 13606.)

Waldon's half-sister, Iris Rose testified that she was living in a condominium on Via Alacante in La Jolla in December 1985. (66 RT 13367.) Waldon stayed with her there for about a week in September 1985. Waldon had the bicycle with him, and Rose agreed to be on the board of directors for his company. (66 RT 13367-13368.)

Waldon left for Oklahoma, but returned on November 25. (66 RT 13371.) When Waldon came back from Oklahoma, he told her that he had spoken with representatives from the Cherokee nation, and that they were not interested in the bicycle company. (66 RT 13465-13466.)

Waldon was working on college applications and looking for a job while he was staying with his sister. (62 RT 12426-12427; 66 RT 13389.)

Waldon was still staying with her on Saturday, December 7, the day of the Ellerman murders. That day, when Rose returned from shopping around 6:30 or 7:00 p.m., Waldon was not there. (66 13372-13376.) Rose remembered seeing something on television when she got home about a fire

in which some people had died. She took a nap, and when she awoke around 8:30 or 9:00 p.m., Waldon was in the kitchen making himself something to eat. (66 RT 13376.) She saw what looked like a burn on Waldon's neck. Waldon told her he had burned himself on a sauce pan while heating something in the oven. (66 RT 13454-13455.) Rose testified that Waldon was with her in her condominium from the time she woke up until she went back to bed at around 10:00 p.m. (66 RT 13377.)

While he was staying with Rose, Waldon told her that he was going to hook up a computer. She later learned that the computer found in his car was the same brand as the computer he had said he wanted to set up in her house. (66 RT 13458-13459.)

Fellow inmate Erwin Spruth met Waldon in December 1985, while Waldon was riding his bicycle on the University of California, San Diego campus. (55 RT 10633; 64 RT 12909-12910.) The two men met for a second time on December 14, 1985 and talked about the organizations Waldon had founded and the Cherokee bicycle company. Waldon was driving a blue Honda Accord. (55 RT 10637-10639; 64 RT 12911.) Waldon testified that he was with Erwin Spruth at a Denny's in Clairemont from around 10:00 on December 14 until 12:30 a.m. on December 15, 1985. (64 RT 12909.) The two men talked about Waldon's organizations, the Cherokee Bicycle Company, Poliespo, and other languages. (64 RT 12911.) Spruth agreed to be a member of the board of directors of Waldon's organizations and the Cherokee Bicycle Company. (55 RT 10641; 64 RT 12922-12923.) The two were supposed to meet again a week later, but Waldon never showed. (55 RT 10645-10646.) According to Spruth, he received a phone call some time in December 1985 from someone identifying himself as Mark Williams and who claimed to be a member of the board of directors of Waldon's organizations. (55 RT 10668.)

Waldon applied for a social security card at the Social Security Administration office in Pacific Beach on December 17. That branch office is only a couple of blocks away from Lab's Pacific Beach apartment. (65 RT 13249-13250; 66 RT 13556.)

Waldon and Holenstein both testified that they were together the evening of December 19, 1985. (63 RT 12629.) Holenstein arrived in Los Angeles the afternoon of December 19. Waldon met her at the airport. (58 RT 11486, 11490; 63 RT 12638.) The two drove to San Diego in Waldon's car, the Honda Accord, arriving in San Diego around 6:00 p.m.. (58 RT 11491-11492; 63 RT 12639.) They went to Balboa Park to see the Mayan fountain. (58 RT 11492-11493.) From there they went to the student housing at United States International University (USIU) to arrange a place for her to stay. (58 RT 11493-11494; 63 RT 12640.)

At around 10:00 p.m., they went to a Denny's restaurant in Clairemont where they talked about American Indian rights and autonomy, as well as the four organizations Waldon had helped found in Switzerland in 1984. (58 RT 11494-11500; 63 RT 12641-12642, 12648-12650.) Waldon persuaded Holenstein to become a member of the board of directors of the four organizations. (63 RT 12662.) Waldon's sister, Iris Rose, and Irwin Spruth, a friend that he met at UCSD, had also agreed to be on the board of directors, as did Michael and Linda Cartwright, and Mary Barksdale. Holenstein also agreed to join the board of directors. (58 RT 11500-11501; 63 RT 12667-12668.) Waldon and Holenstein left Denny's around 11:00 or 11:30 and drove to the beach. (58 RT 11494-11500; 63 RT 12648.)

Holenstein testified that when they got to the beach, Waldon told her he wanted to go to Europe to continue his work on American Indian rights. They discussed Mark Williams and the conversation Holenstein had overheard in San Francisco. Waldon assured her that he would be careful.

(58 RT 11501.) When they got back to the car, Waldon proposed to her and she accepted. They had sex in the back seat of the car and later returned to USIU, arriving after midnight. The two exchanged marriage vows in the car. (58 RT 11502, 11505; 64 RT 12921.) While they were parked at the beach, Waldon wrote dedications to Holenstein in a Cherokee prayer book and on a copy of a newspaper, the Cherokee Phoenix. (63 RT 12630.)

Waldon dropped Holenstein off at USIU at about 1:30 a.m. on December 20th. (63 RT 12682.) He went back to his sister's house for the rest of the night. That morning, Mark Williams called Waldon at his sister's house and offered him $1000 for the bicycle. They agreed to meet later that day in Imperial Beach. (63 RT 12687-12688.) Later that morning, he went the barber shop where he got his hair cut and his mustache shaved. (63 RT 12683.)

He picked Holenstein up at around 9:30, then went to the Veteran's Administration in La Jolla. Holenstein waited while Waldon spoke with an AMVETS counselor. (54 RT 10509-10510;58 RT 11512; 63 RT 12684-12686.) The two went to a Denny's in La Jolla to eat, then drove to Imperial Beach to meet with Mark Williams. (63 RT 12686-12687.) Waldon did not have the bicycle with him when he went to Imperial Beach. (65 RT 13302.)

Holenstein testified that she did not see any computer equipment in the car when she was with him on December 20. (58 RT 11715.) She did not see the brown suitcase. (58 RT 11718.) The back seat was folded down, and the cargo area was 80 to 90 percent empty. (58 RT 11718-11719.) She did not see any women's purses in the car other than her own. (58 RT 11732-11733.) She never saw a gun, knife, ice pick, or ski mask. (58 RT 11733.)

Waldon parked the car near a 7-Eleven off Seacoast Boulevard. He told Holenstein he was meeting with Williams at the Imperial Beach pier. (58 RT 11465-11466, 11514; 63 RT 12689-12690.) Waldon told her to be careful not to let Williams know that she was with him. (63 RT 12691.) Before he went to meet Williams, out of concern for her safety, he told Holenstein that if anything happened to him, she should not tell anyone, or go to the police or to his family, but for her to just leave. She eventually agreed. (64 RT 12922.)

Holenstein testified that she stayed with the car, and Waldon walked toward the pier. (58 RT 11469.) She went into the 7-Eleven for cigarettes, and when she came out, she saw Waldon walking with a man that she recognized as Mark Williams. (58 RT 11470.) She followed the two men because she was concerned for Waldon's well-being. (58 RT 11471.) The two men walked up Seacoast Boulevard then turned onto Palm Avenue. Waldon and Williams went in between two buildings and disappeared from her sight. Holenstein waited a while and then followed them. (58 RT 11472.) She came to a fenced area behind one of the buildings and saw a brown van with its rear doors standing open. Williams was near the van talking with another man and Waldon was lying on the ground, face up and unmoving. (58 RT 11473.) A third man emerged from behind the doors of the van. He and the man talking with Williams were wearing ski masks, dark pants, and dark sweatshirts that had "Federal Agent" printed on them. (58 RT 11474-11475.) The second man kicked Waldon in the ribs as he was lying on the ground and yelled, "This is for your Cherokee autonomous horse shit." (58 RT 11476.) She turned to walk away and heard him say the same thing about Poliespo. She ran back to Waldon's car. (58 RT 11476.) She had been waiting near the car for about half an hour when the same brown van pulled up near Waldon's car. Williams got out from the passenger side, opened Waldon's car (presumably with Waldon's keys) and

drove it away. She did not see the driver of the van. When she looked back, the van was gone as well. (58 RT 11477-11478.) She went back to where she had seen Waldon lying on the ground, but he was gone, as were the men she had seen with Williams. (58 RT 11480-11482.) Holenstein got a ride back to USIU. She stayed there overnight and left for Hawaii the next day. (58 RT 11482-11484.)

She never reported what she saw to the police or other authorities even though she believed that Waldon had been murdered. Holenstein had promised Waldon before he went to meet with Williams that she would not talk to anyone about anything that happened. Waldon told her he felt his life was in danger and that he was concerned for her safety. (58 RT 11609-11610.) She did not hear from Waldon again until 1990 when he called her from jail. (58 RT 11659-11660.) The two were legally married in April 1991. (58 RT 11506.)

Waldon told the jury that when he reached the pier, Williams suggested that they go to his apartment where he would give Waldon the money for the bicycle. He and Williams walked toward Seacoast Boulevard, then followed Seacoast to Palm Avenue, where they turned right. (63 RT 12692-12693.) Williams turned between two buildings, telling Waldon that this was the way to his apartment. When they got to a lot behind the building, Waldon was struck by Williams and another man. (63 RT 12694.) Waldon saw two people to his left wearing dark ski masks and shirts with Federal Agent printed in block letters on the front of the shirts. The van was brown. (64 RT 12894.) The two men were similar in height and build to the two that he saw in June. (64 RT 12895.) As he was being kicked, he heard curses directed toward Poliespo, his Indian autonomy activities, and his Cherokee identity. (64 RT 12895.) He fell to the ground and was unable to get up, having been struck with a piece of metal above his right eye. (63 RT 12694.) The next thing he remembered,

he was being kicked in the ribs, legs, arms, and back. Waldon was loaded into the back of a nearby van. (63 RT 12695, 12698.) The van drove to another location where Waldon was taken out of the van, and placed in a chair. His feet and ankles were chained together and fastened to the chair. (63 RT 12698.) A black plastic bag was secured around his head with a rubber band. After about 20 to 30 minutes, he was put back into the van and driven to another location. The van stopped at three of four different locations. (63 RT 12698-12699.) Waldon was in pain and bleeding profusely. He was able to chew a hole in the plastic bag so that he could see the back of the van. (63 RT 12700.) He was able to free himself from his handcuffs and leg restraints using a clip from a notebook he found in the van. (63 RT 12700-12701.)

Waldon ran from the van. He laid down in an alley "and more or less went into sort of a combination of sleep and coma." (63 RT 12702.) When he awoke, his right eye and part of his face was covered with blood, and he could not open the eye. (63 RT 12702-12703.) He cleaned himself up. (63 RT 12703-12704.)

Waldon learned that he was wanted by police after reading a newspaper. (64 RT 12927-12928.)

Waldon started sleeping in the crawl space almost immediately after he became a fugitive. (62 RT 12570.) He did not turn himself in because he did not want to be convicted of crimes he did not commit. He wanted to research COINTELPRO in order to defend himself. He thought his life was in danger and that he would not receive a fair trial. (62 RT 12575.)

Waldon testified that on June 19, 1986, he spent the day in Imperial Beach. (62 RT 12467.) Around sunset, he was looking for food in a dumpster in an alley near a 7-Eleven near Seacoast Boulevard. (62 RT 12468-12469.) He met a young Hispanic man sitting behind the 7-Eleven, and offered him food and a place to stay. He took the man to an abandoned

house where he had been staying in the crawl space underneath the house. (62 RT 12470-12473.) As they started to enter, three armed men appeared. One of them was Williams. The other two wore ski masks. Waldon recognized one of the ski masks as a red ski mask that he had found about a month earlier and had been wearing at night. (62 RT 12474-12480.) Waldon was handcuffed and led to a brown Oldsmobile that was parked nearby. (62 RT 12480-12481.) Waldon and the young Hispanic man were placed in the backseat and driven to another location. The young man was ordered out of the car and Waldon's legs were chained together. He was left in the back seat for a long time. He heard a vehicle drive up and the doors open. He felt items being placed in his pockets and socks and something was pinned to his belt and clothing. After another long wait, the car he was in started moving again. Someone placed a black plastic bag over Waldon's head. (62 RT 12481-12485.) When the car stopped, the driver took the plastic bag off Waldon's head and removed the handcuffs and leg chains. Waldon saw Mark Williams holding a small gun. A white Mustang convertible was parked nearby. (62 RT 12486-12487.)

When the Oldsmobile came to a halt, Williams unfastened Waldon's handcuffs and ankle chains, took the bag off his head, and ordered him out of the car at gunpoint. (62 RT 12530.) Williams's gun was similar in appearance to the gun shown to the jury as the type of gun used to commit the charged offenses. (62 RT 12531.) Williams said that if he moved, he would blow Waldon's head away. (62 RT 12533.) Williams ordered him to get into the Mustang. Waldon got into the drivers seat. Just as Williams put the gun to Waldon's head as if he were going to shoot him, someone shined a flashlight in their direction and asked what was going on. (62 RT 12533-12534.) Waldon threw the car into reverse and drove away. (62 RT 12535.) In the rearview mirror, he saw Williams's car attempting to turn around in the alley. (62 RT 12537.)

According to Waldon, he drove for a while, driving fast and making several turns to make sure he was not pursued. (62 RT 12537.) He parked the car and ran around the corner and waited for 20 to 30 minutes to catch his breath. He examined the items that had been placed in his pockets and socks, and looked at the pouch that had been attached to his belt, but did not open it. (62 RT 12537.) When a light came on nearby, he got back into the Mustang and drove away. He opened the pouch at his waist and found a large handgun. He realized he was in Pacific Beach. A police car pulled in behind him and turned on their lights. He tried to evade the police, but he eventually stopped, jumped out of the car and ran. He reached into the pouch, pulled out the handgun, and threw it down. (62 RT 12538-12540.) He collapsed on the ground. When police officers caught up with him, they conducted a pat down search and removed the items from his pockets and socks. He had a watch on him that he had found on the beach. (62 RT 12541-12542.) Waldon admitted that while he was driving the Mustang, he did not yield when police tried to stop him and that he tried to escape. He ran from the car and threw the gun away as he ran from the officers. (65 RT 13295-13296.)

Waldon eventually told police that he was Stephen Midas. He had been using that name to attend Mar Vista adult school. (62 RT 12545; 65 RT 13297-13298; 66 RT 13559.)

Waldon obtained the name Stephen Midas from some identification he found in a dumpster. (63 RT 12818.) According to him, he never entered the condominium complex or garage at 270 Dahlia Street in Imperial Beach. (63 RT 12821.) He denied going to that condominium complex to ask for Stephen Midas's security deposit. (63 RT 12824.)

Although Waldon admitted that some of the items found in his car belonged to him (65 RT 13185-13199, 13212-13215), Waldon denied being at the Ellerman home the night of the murders or any other time. He did

not know the Ellermans. He never had any of their property in his possession. He said that he never murdered anyone, and he never maliciously killed an animal. He never shot another person. He did not know Nancy Ross and did not rob her or steal anything from her. He denied being at Lab's apartment on December 17. He did not know Lab and has never raped anyone. He did not know Julia Meredith, and did not rob or steal from her. (64 RT 12839-12840.) He denied being in the alley in Pacific Beach, and denied speaking to Hackley. (63 RT 12825.)

He did not know Charles Wells or John Copeland and did not murder Wells or attempt to murder Copeland. He did not know Ronald Carr and did not steal his car. He denied having a switchblade, a loaded firearm, or a concealed dirk or dagger. (64 RT 12840-12842.) He did not commit arson. He did not know Carol Franklin, and did not rob or steal from her. He denied committing burglary, sexual penetration, and rape. He did not take personal property from Lab. He did not know Diane Thomas and did not rob or steal from her. He had never been to the Wells home. (64 RT 12842-12844.)

After his arrest, there was another attempt on his life in jail. Waldon believed the attempt was orchestrated by his own attorney. One of the men who tried to kill him was another client of Waldon's court-appointed attorney. (62 RT 12576, 12582.)

The damage to the wall of Waldon's jail cell was there when he moved into the cell. He did not attempt an escape. (64 RT 12876-12880, 12891.)

2. Other defense evidence

Criminalist John Simms examined items from Lab's apartment and determined that hairs found on some of the items submitted for examination did not match the hair samples from either the victim or from Waldon. (54 RT 10388-10399, 10408-10413.)

Phillip Sanford, from the city engineering and development department, testified that at the time of the December 1985 police pursuit, there were no stop signs or signals at two of the intersections at which Officer Phenix claimed that Waldon had failed to stop. (60 RT 12054-12055, 61 RT 12154-12155.).)

William Riker was an eyewitness to the December 1985 police pursuit. From the balcony of his apartment overlooking Park Boulevard, he saw a car drive over the median and blow a tire. The driver got out and jumped over the fence onto a building and to the ground. According to Riker, the police officers following him did not arrive until after the driver jumped. (57 RT 11147-11154.) A videotape of a television interview from the night of the police chase was played for the jury, in which Riker stated that the police car was right behind Waldon's car. (57 RT 11164-11166, 11171.) Riker told a defense investigator that two female officers took a pair of jeans out of the back of the Honda, and removed a wallet from those jeans. (67 RT 13775.)

Scott Fraser, an expert on eye witness identification, explained factors that could affect the reliability of an eyewitness identification. Whether the observer or the target is in motion at the time of the incident, distraction, cross-racial bias, stress, the presence of a weapon, and the lack of distinctive cues are all factors that could affect the person's ability to accurately store information for later identification. (61 RT 12294-12310.) Viewing a photograph related to the event can alter a person's recollection of the event. (61 RT 12313-12316.)

3. Character witnesses

Fellow inmates Kenneth Grant and Erwin Spruth testified as to Waldon's humanitarian and nonviolent character, as did several of Waldon's Esperantist colleagues, and a former high school friend. (54 RT 10475-10480 [Grant]; 55 RT 10617-10621, 10632, [Spruth]; 55 RT 10713-

10722 [Eliza Kehlet]; 56 RT 11027-11036 [Bernice Garrett]; 57 RT 11110-11116, 11126-11129 [John Wells]; 57 RT 11351-11358 [Ruth Culbert]; 57 RT 11374-11378 [Sidney Culbert]; 57 RT 11385-11387 [William Harmon]; 59 RT 11749-11757 [Sharon Colligan].) Waldon's wife, Birgitta Holenstein Sequoyah, his ex-wife, Keiko Sequoyah, and his sister, Vivian Reimer also testified as to Waldon's character for nonviolence and humanitarianism. (59 RT 11542-11544;

C. Rebuttal

San Diego Police Officers Jeffrey Johnson and Dave Williams participated in the December 20 pursuit. Officer Eiben was directly behind Waldon's car, and Johnson's vehicle was directly behind Eiben. Waldon's car crossed the median and entered the parking lot of the Glendale Federal Bank. After Waldon's car came to a stop, Waldon ran in front of Eiben's car, then jumped over the wall. (67 RT 13786-13789, 13692-13693.)

Rhonda Watson was married to Waldon from 1973 to 1976. (68 RT 13970-13971.) The couple discussed divorce, and Waldon was aware of the divorce proceedings and even gave her money to pay for the divorce via his grandmother. Watson gave his grandmother a copy of the divorce decree in April 1976. (68 RT 13977-13978.) In her opinion, Waldon did not have a good character for honesty or for being a law abiding citizen. While they were married, rules seemed to be a game to him. He would lie or steal if he could get away with it. He prided himself on being a good liar. He stole books from a bookstore. (68 RT 13978-13980.) In 1981 or 1982, Waldon called her and told her that since the divorce, he had been receiving money that was allotted to her from the Navy. He asked her to sign a statement falsely stating that she had been receiving the allotment. He offered her $3000 to sign the statement. (68 RT 13980-13981.) Watson was a member of the Cherokee tribe. During the marriage, Waldon never

claimed to have any kind of Cherokee or other Native American heritage. (68 RT 13981-13982.)

II. PENALTY PHASE

A. Prosecution Case-in-Aggravation

1. Cynthia Bellinger robbery, shooting (November 15, 1985)

Around 9 p.m. on November 15, 1985, Cynthia Bellinger (now Cynthia Tankersley) arrived at her parent's house at 3305 South 82nd East Avenue in Tulsa, Oklahoma. She parked in the driveway, next to her parents' van, and got out of her car. She saw a man wearing a ski mask and dark clothing and holding a gun approach her from the front of the van to her right. (72 RT 14888-14890.) When the man demanded her purse, she froze. He ran up to her, repeated his demand, put the gun to her left temple and grabbed the purse. (72 RT 14890-14891.) He pulled the purse out from under her arm and fired at the same time. (72 RT 14891-14892.) The next thing she remembered, she was lying on the ground next to her car. She saw her assailant run across the street and through the yard of the house on the other side. (72 RT 14892.) She got up, walked to the front door, and knocked. Her father answered the door. He put a towel on her head to stop the bleeding and took her to the hospital where she was treated for a gunshot wound to the head. Her injury required stitches, but did not penetrate the skull. She was hospitalized overnight for observation. (72 RT 14894-14895.)

Tulsa Police Officer John Cleary gave Bellinger a police escort to the hospital. She had a bullet graze on the left side of her head. (72 RT 14903.)

Police found a container of mascara near the driveway and a .25 caliber shell casing nearby. (72 RT 14910-14912.) They found a red comb

across the street, and a small tube of Vaseline two houses north of the crime scene. Both items were from the victim's purse. (72 RT 14910.)

2. Anna Richman murder (November 17, 1985)

Two days after the Bellinger shooting, Annabelle Richman and Carole Sitz had dinner together. After dinner, Richman went to Sitz's home to watch television with Sitz and her fiancé. (73 RT 15056.) Richman left shortly after 10:00 p.m. to head home to her apartment which was five minutes or less away. Sitz walked her to her car. Richman was carrying a large Gucci bag with a handle when she got into her car. (73 RT 15057-15058.)

Around 10:00 p.m., Julene Johnson was at her apartment at 4742 South Harvard in Tulsa when she heard four or five rapid gun shots outside. (74 RT 15270-15271.) Her husband, George Johnson, looked outside when he heard the shots and saw a man wearing dark clothing running through the parking lot towards the street. (74 RT 15287-15288.) The man climbed onto a car and over the fence. (74 RT 15288.) George Johnson spotted his neighbor, Annabelle Richman, lying on the ground. (74 RT 15288-15289.) He told his wife to call the police and an ambulance, then got a blanket to cover Richman. (74 RT 15289.)

Julene Johnson went outside to comfort the victim. She put a blanket over her and tried to talk to her. She got no response other than moaning, and the sound of blood gurgling in the body. Johnson stayed with Richman until she was taken away by emergency personnel. (74 RT 15272.)

When Tulsa Police Officer David Ashby arrived at the apartment complex, he found Richman lying on the grass with a bullet wound to her left temple and another to the back of her head. She appeared to be having a seizure. (72 RT 14932-14934.) He repositioned her to maintain an airway until she was transported by ambulance shortly thereafter. (73 RT

14934-14935.) Richman died at the hospital, about 26 hours after the shooting. (72 RT 14935; 73 RT 15032.)

The autopsy showed that Richman was shot four times. (72 RT 15010; 73 RT 15027.) The first shot entered the back of the arm, fractured the humerus, and exited the front of the arm. (72 RT 15011.) The second bullet entered the upper right shoulder from the front and entered the lung cavity where it broke one of her ribs and sliced through the top of both lungs. (72 RT 15011-15012.) The third bullet entered the front of the left arm, skimmed through the soft tissues of the arm and lodged in her armpit. A projectile was recovered from that gunshot wound. (72 RT 15013; 73 RT 15028.) The fourth gunshot wound was to the back of the head. The projectile went through the entire left portion of the brain and exited the forehead. (72 RT 15013-15014.) The bullet to the head broke her skull in several places and entered her left brain, destroying brain tissue and causing hemorrhage and swelling to the brain. (73 RT 15027.)

Richman's car was parked nearby. (72 RT 14937, 14962.) Her leather key case was found in a grassy area near the sidewalk. (72 RT 14939, 14964.) It appeared as if Richman had been shot while she was on her way to her apartment from her car. (72 RT 14966.) They did not find her purse or handbag. (72 RT 14940.)

Two .25 caliber shell casings were found nearby. (72 RT 14964-14965; 73 RT 15037.) Both casings were marked with the manufacturer's initials, "FC," indicating that they were Federal brand cartridges. (72 RT 14965; 73 RT 15037, 15331.)

3. Tvedt, Hensley robbery, shooting (November 22, 1985)

Tammy Tvedt and Frank Hensley attended a prayer meeting on November 22, then went out to eat with several people from the meeting. Afterwards, Frank Hensley drove Tvedt to Hensley's Broken Arrow,

Oklahoma apartment and parked. The car belonged to a friend Tvedt was staying with, and Tvedt planned to drive herself home after dropping Hensley off. (73 RT 15111-15112, 15177, 15193.) Hensley got out and held the door for Tvedt to get into the driver's seat. (73 RT 15177-15178.) As Tvedt walked around the back of the car to the driver's side, the two were confronted by a gunman wearing a dark ski mask, dark jacket and pants. (73 RT 15112-15113, 15125, 15184.)

The man came from behind a van parked to Hensley's right and pointed a gun to Hensley's face. He demanded their wallets. Hensley said that he did not have one. The gunman demanded their wallets a second time, and Tvedt and Hensley began praying aloud. The gunman shouted, "I don't care," and fired the gun. A bullet struck Hensley in the tip of the nose, traveling through his sinus cavity, and lodging between his cheek and jaw. (73 RT 15113-15114, 15178-15179.)

Tvedt was looking at the ground when she heard a shot. When she looked up, she was struck by a second bullet. (73 RT 15115.) Hensley ran to his apartment and called for his roommate. He threw his glasses and Bible down and told his roommate that he had been shot and to call for help. (73 RT 15115, 15179.) The gunman ran after him and fired another shot. (73 RT 15115.)

Tvedt was lying on the ground face down. The assailant approached her and rolled her over. He was wearing a mask, but she could see a beard. (73 RT 15116.) She closed her eyes so that he would not know that she was still alive. (73 RT 15117.) The man took off running. (73 RT 15118.)

Hensley went back outside and saw the gunman crouched over Tvedt. Hensley picked Tvedt up, put her in the car, and drove to the hospital. (73 RT 15119, 15180.)

Tvedt was hospitalized for eleven days. (73 RT 15121.) The bullet struck her in the left side of the neck. (73 RT 15122.) She underwent

exploratory surgery to determine the extent of the damage to her neck. She suffered injuries to her larynx, and to her esophagus. A tracheotomy was done because of the amount of swelling in her vocal chords. (73 RT 15122, 15321-15322.) A second surgery was done once she was stable to remove the bullet. (73 RT 15323-15324.)

Hensley stayed in the hospital until the next morning. He opted not to have the bullet removed. Several months after the shooting, in July 1986, the bullet fell out while he was eating and he took it to the Broken Arrow police. (73 RT 15165, 15183, 15206.)

Two shell casings were collected at the scene of the shooting. (73 RT 15067, 15165.)

4. Ballistics evidence

Three ballistics experts examined the projectiles recovered from the Oklahoma crimes and the charged murders and agreed that the projectiles recovered from Richman and Tvedt were fired from the same weapon used to kill Dawn Ellerman and Charles Wells. (73 RT 15145; 74 RT 15355, 15382.) Two of the experts also concluded that the same weapon also fired the projectile recovered several months later from Frank Hensley. (74 RT 15143-15144; 74 RT 15355.) The shell casings from the Oklahoma crime scenes were all fired from the same weapon and matched those recovered from the Wells home. (73 RT 15146-15147; 74 RT 15347-15348, 15352-15353, 15381.) All eleven shell casings found at the Oklahoma and San Diego crime scenes were fired from the same weapon. (74 RT 15355.) The seven shell casings from the Oklahoma crimes scenes also had the same distinct markings as the cartridges from the box found in Waldon's car in December 1985. (74 RT 15384.)

B. Defense case-in-mitigation

Waldon presented the testimony of several character witnesses. Bernice Garrett testified that Poliespo is a language built on Native American linguistics and Esperanto. Garrett assisted in printing and publishing *The Fundamentals of Poliespo*. (75 RT 15498-15499.) Its publication was important to language and language students and possibly to humanity at large. (75 RT 155501.) She described the contents of the publication, which was written primarily in Esperanto. (75 RT 15501-15513.) Allowing Waldon to continue to teach Poliespo by correspondence course and to write or publish writings about Poliespo would benefit language students and advance the ability to communicate with one another and would benefit humanity at large. (75 RT 15517-15520.) Garrett testified about the organizational goals of the World Esperanto Organization, the United Nations of Autonomous Peoples, the World Poliespo Organization and the World Humanitarian Church. (75 RT 15522-15535.)

Waldon's wife, Birgitta Holenstein Sequoyah, testified that the World Humanitarian Church, the World Poliespo Organization, and the United Nations of Autonomous Peoples had beneficial and worthy goals. (75 RT 15563-15570.) Waldon's execution would be a tragedy for Waldon's children. (75 RT 15579-15580.)

Dietrich Weidman is a founding member of the United Nations of Autonomous Peoples (UNAP), founded in 1985. (75 RT 15592.) He supports the goals and purposes of the organization. (75 RT 15594.) He personally and financially supported the publication and distribution of *The Fundamentals of Poliespo*. (75 RT 15595.) In Weidman's opinion, Waldon is "active, intelligent, good hearted and loves humanity." (75 RT 15597.) Weidman was willing to help Waldon's work with his humanitarian organizations if Waldon was sentenced to life without parole.

(75 RT 15597.) Weidman was working on a book about Waldon and this case. (75 RT 15598.)

Earl Minneman grew up with Waldon in Oklahoma. (75 RT 15600.) Waldon supported nonviolence. Minneman thought Waldon was intelligent. (75 RT 15601.) He believed Waldon would try to be a good father if sentenced to life in prison without parole, but that the decision was for the jury to make. (75 RT 15604-15605.)

Kathy Carter-White knew Waldon in Tahlequah, Oklahoma in 1985. (75 RT 15627.) Waldon talked about Esperanto, Cherokee autonomy and sovereignty and his plans for the Cherokee Bicycle Company. (75 RT 15642.) When she saw Waldon on November 18, 1985, he appeared to be clean and well-groomed. (75 RT 15671-15672.) She felt Waldon could make a humanitarian contribution to society and could continue his linguistics work from prison. (75 RT 15674-15675.) She thought he was innocent of the Oklahoma crimes. (75 RT 15686.) In her opinion, Waldon was humanitarian, peaceful, generous, truthful, and courteous. (75 RT 15698.)

Janice Atkinson heard Waldon lecture on similarities between Cherokee and Esperanto and on Cherokee history and culture. (75 RT 156912.) She thought Waldon could continue his work as an Esperantist from prison and continue to work to further the goals of his organization. (75 RT 15696, 15700.)

Ralph Lewin testified that Esperantists believe in human fellowship and brotherhood. (75 RT 15717.)

Sam Preston was impressed by Waldon's ideals, his work towards world peace and his commitment to nonviolence. (75 RT 15724-15725.) According to Preston, Waldon's lectures on Cherokee language and culture could be of value to the community. (75 RT 15732-15733.)

Ruth Culbert testified that a sentence of life without parole would allow Waldon to continue his work as an Esperantist. (75 RT 15742-15743.) Sidney Culbert felt that Waldon's writings on Poliespo would be a humanitarian contribution and scientifically useful. (75 RT 15748.) He agreed that the goals of Waldon's organizations were good and that Waldon was motivated towards humanitarian work. (75 RT 15753.)

Sharon Colligan met Waldon on a European backpacking trip when she was 16. (76 RT 15679.) In her opinion, Waldon is kind and gentle with great integrity and a desire to aid humanity. (76 RT 15770.) She supports the organizations that he founded, and believes that Waldon could further the work of those organizations from prison. (76 RT 15771-15773.)

Erwin Spruth supported Poliespo and Waldon's organizations. (76 RT 15857-15858.) He thought Waldon could continue his work in prison and make a humanitarian contribution to the world. (76 RT 15861.)

Esperantist Beatrice Acers met Waldon in 1984. She attended a lecture by Waldon in 1985 on Cherokee culture and language. (76 RT 15875.) In her opinion, Waldon is gentle and scholarly. She did not feel the death penalty is ever justified, and that Waldon has a lot to offer society. (76 RT 15877.)

Correctional consultant James Park testified that if Waldon was sentenced to life in prison without the possibility of parole he would be assigned to a Level IV maximum security prison where he would be able to work, write and engage in religious activities. (76 RT 15802-15806.)

ARGUMENT

PART ONE: COMPETENCY ISSUES

I. THE COMPETENCY PROCEEDINGS

A. Events Leading up to the Competency Trial

In February 1987, Waldon submitted a handwritten motion to the trial court titled, "Notice of Motion to Dismiss Attorney(s) of Record and to Grant Representation in Propria Persona." (73 CT 15716.) On March 13, 1987, defense counsel Russell told the court that she objected to the "pro per" motion based on her client's "state of mind as well as his background and the seriousness of the charges that he's facing." (9A RT 8.) Advisory counsel was appointed to assist Waldon in deciding whether to represent himself. (10A RT 17; 1 CT 169.)

The motion for self-representation was assigned to Judge Elizabeth Zumwalt. (11A-1 RT 27.) On April 10, 1987, Judge Zumwalt requested a psychiatric examination to assist the court in determining whether Waldon was capable of voluntarily and knowingly waiving his right to counsel. (12A RT 20; 2 CT 389-390.) Waldon objected to the examination. (12A RT 23, 32-33.)

At an April 30, 1987 hearing on Waldon's motion to waive counsel, Dr. Mark Kalish gave his opinion as to whether Waldon was competent to waive counsel. Dr. Kalish indicated that nothing in the examination indicated that Waldon had any intellectual deficiency that would impair his intellectual or cognitive functioning. (14A RT 15.) Dr. Kalish suspected that a delusional thought disorder might be present. (14A RT 22.) He concluded that Waldon exhibited poor judgment and insight. (14A RT 22.) In his opinion, Waldon's desire to represent himself was based on his paranoid distrust of his attorney. (14A RT 27.)

In chambers, outside the presence of the prosecutor, defense counsel Russell told the court that Waldon had a history of psychological illness while serving in the military and had been diagnosed with a psychiatric disorder that "not only gravely affects his ability to represent himself, possibly to stand trial, but certainly to present a defense at trial." (14B RT 41.) Waldon attempted to object, but the court noted that he was represented at that time. (14B RT 43.)

When the hearing resumed with the prosecutor again present, Dr. Kalish told the court that Waldon did not want to be examined, and had refused to give any medical or psychiatric history, or other background information such as education or employment. (14A RT 64-66.) Waldon refused to discuss his ability to defend against the charges. (14A RT 82-83.) Dr. Kalish told the court that Waldon over-identified with persecuted individuals or groups and that his desire to represent himself was an attempt to further identify with groups that were persecuted or taken advantage of by the system. (14A RT 87.) According to Dr. Kalish, further testing might be helpful in evaluating Waldon's competency to represent himself. (14A RT 90-91.)

On May 22, 1987, Dr. Kalish told the court that he had returned to the jail on May 18 to reinterview Waldon, but that Waldon had refused to meet with him. (20A RT 24-25.) Dr. Kalish gave his opinion that there were deficiencies as noted in his written report that raised the issue of whether Waldon was competent to stand trial, separate and apart from his competency to self-represent. (20A RT 28.) Dr. Kalish expressed concern as to Waldon's ability to understand proceedings rationally and to assist counsel in his own defense. (20A RT 29.) Dr. Kalish indicated that he would like to reexamine Waldon to further develop his opinion on Waldon's competency to stand trial, but that he had "some very grave and significant doubts about his competency at this point." (20A RT 30.) The

trial court declared a doubt as to Waldon's competency and suspended proceedings under Penal Code section 1368. (20A RT 35-36.)

At a July 15, 1991 hearing, defense counsel Russell told the trial court that her position was that Waldon was not competent to stand trial. (24A RT 3.) A jury trial on the issue of Waldon's competency to stand trial was heard before Judge Jack Levitt. Jury selection for the competency proceeding began August 17, 1991, and testimony began the next day. (25A RT 23; 26A RT 256.)

B. Evidence Presented at the Competency Trial

In 1981, Waldon requested a discharge from the Navy based on a claim that the Navy had breached his enlistment contract. (26A RT 304.)

Waldon was prescribed antidepressants in February 1983. The dosage was increased in August 1983. (26A RT 321-322.)

A Navy psychiatrist examined Waldon in July 1983 in conjunction with Waldon's request to be discharged as a conscientious objector. (26A RT 301-302, 311.) At the time that Waldon sought to be discharged from the Navy as a conscientious objector, Navy regulations required that anyone applying for a conscientious objector discharge undergo a psychiatric evaluation. (30A RT 1044-1045.) The evaluating psychiatrist felt that Waldon was improving, and a medical or administrative discharge was not warranted. (26A RT 313-314.) His request for separation as a conscientious objector was denied. (26A RT 321.)

Dr. Mohammed Jarvaid testified that he came into contact with Waldon in the fall of 1983. (26A RT 260.) At that time, Waldon had been in the United States Navy for eleven years and had been referred to the regional Air Force hospital for evaluation and treatment. (26 A RT 260-261.) Dr. Jarvaid was the supervising psychiatrist for Waldon while he was undergoing treatment at Eglin Air Force Base. (26A RT 263.) He saw Waldon on his daily visit for rounds, for group therapy three times each

week, and individually as needed, during the four months Waldon was at the Air Force base, from September 1983 to January 1984. (26A RT 263-264.)

In November 1983, Dr. Jarvaid diagnosed Waldon as suffering from "major depression, chronic,[6] severe, with mood congruent psychotic features, and melancholy unresolved as manifested by disphoric mood, insomnia, loss of interest or pleasure in usual activities, loss of energy, feeling of worthlessness, diminished ability to concentrate, visual and auditory hallucinations, feelings of inadequacy, guilt, disease and preoccupation with somatic complaints." The evaluation also noted episodic pseudoephedrine abuse, which was resolved at the time of the evaluation. (26A RT 268, 270; see also 290-291.)

Dr. Jarvaid found that Waldon had a mixed personality disorder with features of avoidant-dependent and paranoid personality disorder. (26A RT 273.) In Dr. Jarvaid's opinion, Waldon was not malingering while under his care. (26A RT 276.)

At the time of Dr. Jarvaid's evaluation, Waldon was under investigation by the Navy for improperly claiming his ex-wife as a dependent, resulting in an overpayment of $9000. He was having marital problems with his second wife, and had recently lost his grandmother. (26A RT 305-306.)

Waldon was eventually discharged from military service due to a psychiatric illness. (26A RT 269.)

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[6] The term chronic used in his diagnosis means a duration of more than six months. Dr. Jarvaid felt that Waldon would deteriorate over time. (26A RT 291.)

Having reviewed some of Waldon's more current writings, Dr. Jarvaid opined that he was under severe stress, and such stress would worsen any existing mental illness. (26A RT 293.)

Clinical psychologist, Dr. Bruce Ebert, evaluated Waldon after Waldon was referred to him from Dr. Jarvaid in September 1983. (28A RT 519, 544.) He conducted psychological testing, including the Minnesota Multiphasic Personality Inventory (MMPI), the Shipley Institute of Living Scale (an intelligence test), the House-Tree-Person test (H.T.P.), a sentence completion test, a background data sheet and direct observation. (28A RT 522-525.) Waldon's responses on the MMPI led Dr. Ebert to conclude that Waldon was experiencing unusual symptoms consistent with mental illness. (28A RT 526-527.) It was "virtually impossible to measure his intellectual ability because his performance on the logic or conceptual reasoning portion of the test was so poor." (28A RT 528.) In Dr. Ebert's opinion, Waldon's mental disease was substantially interfering with his ability to think rationally and logically. (28A RT 529.) Ebert concluded that Waldon was mentally ill. (28A RT 533.) At the time, Waldon was in a state of utter hopelessness, and would have been difficult to treat with therapy while he was in that condition. (28A RT 539-540.) Such illness would not get better without treatment and the condition would worsen under stress. (28A RT 540-541.) Dr. Ebert was aware that, at the time of his assessment, Waldon had been trying to obtain a military discharge for the past two and a half years. (542.)

Dr. Mark Kalish told the jury that he was asked to evaluate Waldon in April 1987 to assess his competency to represent himself. (28A RT 340, 342.) Dr. Kalish concluded that Waldon had an affective, or mood, disorder. He was paranoid and had some thought disorder. (28A RT 346-347.) In his opinion, Waldon's depression, his paranoia, and his thought

disorder impaired his ability to relate to his attorney and to think clearly and assess the proceedings against him. (28A RT 347.)

When Dr. Kalish went to the jail to interview him, Waldon was uncooperative and had to be brought down by sheriff's deputies. After two visits, he refused to see Dr. Kalish. He refused to answer questions about his level of education. He was opposed to being examined by a psychiatrist. He would not discuss his military history. He did not respond to questions about current or past psychiatric treatment. (28A RT 348-352.)

Dr. Kalish suspected mental illness, and his suspicions were confirmed after reviewing Waldon's military psychiatric records. (28A RT 355-356.)

Dr. Kalish testified that the assessment of competency to represent one's self partially overlaps with an assessment of competency to stand trial in that the evaluator assesses some, but not all of the same criteria. (28 A RT 360-361.) Following his interviews with Waldon, Dr. Kalish told the court that he doubted Waldon's competence to stand trial, resulting in the initiation of these competency proceedings. (28A RT 361.) When he returned in June to evaluate Waldon's competency to stand trial, Waldon refused to speak with him. (28A RT 362.)

In Dr. Kalish's opinion, because of Waldon's mental illness, he was unable to cooperate with counsel and to prepare a defense. (28 A RT 362.) However, he was unable to provide a diagnosis of Waldon without a longer evaluation in a controlled hospital setting. (28A RT 368.)

Dr. Kalish testified that the ability to rationally cooperate with counsel was one of the criteria for competence to stand trial in California. (28A RT 380.) Waldon's distrust and paranoia impaired his ability to disclose to his attorney pertinent facts related to the case. (28A RT 382.)

Waldon made it clear during Dr. Kalish's first visit that he did not want to be examined by a psychiatrist. (28A RT 404.) Dr. Kalish's understanding from the beginning of his appointment was that Waldon wanted to get rid of his attorneys and represent himself. (28A RT 406.) Dr. Kalish's role was to assist the court in determining whether Waldon was making the decision to represent himself "with reason and rationality and with eyes wide-open." (28A RT 407.)

When asked whether he was aware that Waldon was charged with a number of crimes, including murder, and that he faced the possibility of the death penalty, Dr. Kalish answered that he was aware of the charges and possible penalties facing Waldon. (28A RT 407, 409.) He disagreed that he had a prejudice against capital defendants who represent themselves, but he believed that anyone who chose to represent themselves was acting very foolishly and not in their best interests. (28A RT 409-411.) He did not believe that this influenced his opinion as to whether Waldon was competent to waive counsel. (28A RT 411.)

Dr. Kalish noted Waldon's request to represent himself as an example of self-defeating behavior. (28A RT 411.) The fact that he wanted to represent himself was one piece of information that was used to assess his competency. (28A RT 412.) Dr. Kalish testified that the level of competency required to represent one's self was different based on the seriousness and the nature of the proceedings against the defendant. (28A RT 412-413.)

Dr. Kalish explained paranoia as a mistrust or fear not based in reality. (28A RT 414.) He agreed that it was not unusual for a defendant to be mistrustful or suspicious of his attorney, but in this case, he found that that distrust was greater than normal. (28A RT 416-417.) Although he agreed that some people without mental illness were also mistrustful of psychiatrists, Waldon's reluctance to talk to him was considered self-

defeating behavior and was a factor Dr. Kalish considered in determining Waldon's capacity to stand trial and to waive counsel. (28A RT 417.)

During the interview, Dr. Kalish asked Waldon about his relationship with his attorneys, but did not independently investigate to determine the basis for Waldon's dissatisfaction and distrust. (28A RT 425-428.) He reviewed some of Waldon's writings, including the letter he wrote to the prosecutor, and felt that the letter demonstrated a profound distrust and paranoia related to his defense counsel, Russell. (28A RT 429-431.)

Even though Dr. Kalish had not spoken to Waldon since April 17, and had not examined him further after his initial interview to determine his competency to waive counsel, he was now of the opinion that Waldon was not competent to stand trial. (28A RT 494, 496-497.)

Dr. Vance Norum, a staff psychiatrist at Patton State Hospital, attempted to interview Waldon twice, on August 4 and 17, 1987, but Waldon refused to speak to him. (30A RT 979, 983-984.) He observed Waldon in the courtroom on August 17 and 18, for about six and one-half hours. (30A RT 985.) According to Dr. Norum, Waldon appeared to be responding to internal stimuli and was mumbling to himself. (30A RT 985.)

Dr. Norum reviewed Waldon's past psychiatric records, his social history, and reports by Drs. Vargas, Meyers, and Kalish. Dr. Norum also reviewed several letters written by Waldon and various motions written and filed by Waldon. (30A RT 986-988.)

In Dr. Norum's opinion, Waldon was capable of understanding the nature and purpose of the proceedings against him. (30A RT 1020.) He believed that Waldon was unable to assist an attorney in conducting his defense in a rational manner. (30A RT 1021.) In Dr. Norum's opinion, Waldon was not competent to stand trial based on his inability to cooperate with counsel and to make rational decisions if he were allowed to represent

himself. (30A RT 989.) He based this opinion on Waldon's behavior, as he was unable to form a psychiatric diagnosis due to the limited amount of evaluative data. (30A RT 989.)

The prosecution called Waldon as a witness, but Waldon refused to answer questions. (29A RT 829-833.)

Dr. William Vargas, a forensic psychiatrist, explained that the standard for competency to stand trial in California is that the defendant must know the nature of the proceedings against him and be able to rationally assist his attorney in his defense. (29A RT 839-841.) Dr. Vargas tried to examine Waldon on June 2, 1987, but Waldon refused to speak to him or to answer any questions. (29A RT 841, 843-844.) Dr. Vargas reviewed Dr. Kalish's report, his testimony from the April 1987 hearing and the competency proceedings, and psychological evaluations from Waldon's time in the Navy, as well as police reports, a report by Dr. Norum, and social history notes prepared by a social worker. Dr. Vargas also observed Waldon when he was called to the witness stand earlier that day. (29A RT 845-847.) Despite having reviewed Kalish's report and testimony, Dr. Vargas could find no evidence of symptoms of paranoia. (29A RT 851.)

According to Dr. Vargas, if a person is found is incompetent, he will go to a mental hospital. However, if he is found competent, he will return to criminal court for trial and may be sent to prison. (29A RT 855.)

In Dr. Vargas's opinion, Waldon's description of hearing voices (as he reported to Dr. Jarvaid) did not seem to be genuine and was not consistent with the experiences reported by other patients experiencing visual or auditory hallucinations. (29A RT 859.)

Dr. Vargas noted that Waldon's unsuccessful attempts to get out of the Navy, his grandmother's recent death, and the fact that he had stopped his heavy use of pseudoephedrine were all factors that could have

contributed to his feelings of depression at the time of Dr. Jarvaid's evaluation. (29A RT 860-861.)

Having reviewed Waldon's February 24, 1987, and May 2, 1987 letters to the deputy district attorney, his motion for pro per status, and his August 24, 1987 petition for writ of mandamus, Dr. Vargas found nothing to suggest Waldon was irrational or incoherent. (29A RT 862.)

Dr. Vargas observed Waldon during the proceedings that morning while he was taking notes and again that afternoon when Waldon explained that he did not want to cooperate because he wanted effective counsel. (29A RT 874-875.) Dr. Vargas explained that there is a difference between whether a person is able to assist his or her attorney and whether he or she is willing to assist the attorney. (29A RT 875) In Dr. Vargas's opinion, Waldon was able to assist his attorney and was competent to stand trial. (29A RT 875.) He thought that Waldon might be malingering in an effort to delay trial. If Waldon was found incompetent, he would be sent to a hospital. If he were to be found competent, he would still benefit from the delay. (29A RT 875-876.) The quality of Waldon's written motions and papers, as well as the fact that he refused to talk to his attorneys or to psychiatrists, suggested that he was malingering. (29A RT 876.) Dr. Vargas based his conclusions in part on Waldon's IQ, reported to be 124, on the fact that he had graduated high school and attended college, and that he had learned several languages. (29A RT 876-877.)

Holly Evans was a deputy marshal assigned to the holding tank within the courthouse. She observed Waldon on several occasions, and spoke to him occasionally. (29A RT 891-892.) These interactions were normally routine interactions involving lunch or court schedules. On several occasions after returning from court, Waldon seemed agitated and made comments or asked questions about how to get rid of his attorney. (29A RT 893.) Waldon was coherent and understandable, appeared to be in full

possession of his faculties, was able to communicate with the deputy, and had no difficulty understanding what was requested of him. (29A RT 893.) During a break in court proceedings on June 10, 1987, Waldon told Deputy Evans that he never spoke to his attorneys. He told her that his attorneys thought he was crazy, but that he was not. He said that he just refused to speak to them because he did not want them to represent him. (29A RT 893, 895.)

San Diego Sheriff's Deputy Kevin Williams was working at the central detention facility on July 14, 1986, when several inmates, including Waldon, were taken out of their cells and brought into a crossover area, or holding area, to allow their facility to be exterminated. (29A RT 902-904.) Deputy Williams was delivering meals to other inmates when Deputy Palmer yelled that there was a fight in the crossover. When he got to the area, Williams saw Waldon lying in a pool of blood, unconscious. Waldon suffered facial injuries and was taken to the emergency room at UCSD hospital for sutures. (29A RT 905-906.) Photographs of Waldon's injuries were admitted into evidence. (29A RT 1046.)

Physician and psychiatrist Dr. Paul Strauss observed Waldon during his courtroom appearances in May and September 1987. (30A RT 927.) He also reviewed the written reports of Drs. Masangkay, Jarvaid, and Kalish, a police interview with Waldon's ex-wife, an employment application completed by Waldon, Navy performance evaluations, police reports concerning the charged crimes and other crimes he allegedly committed in Oklahoma, newspaper clippings, and writs and motions prepared and filed by Waldon. (30A RT 928-931.) He did not examine Waldon personally. (30A RT 931-932.)

When Dr. Strauss observed Waldon in court, he seemed alert, involved and very goal directed. (30A RT 933.) He was also present when Waldon was called to testify and heard him state that he would not speak

without adequate assistance of counsel. (30A RT 933-934.) Strauss noted that his behavior was direct and to the point and that he did not appear to be hallucinating, out of contact with reality, or disoriented. Strauss felt that Waldon was oppositional, that he was using passive resistance to express "a profound contempt" for the judicial system and its proceedings. (30A RT 934.)

Dr. Strauss noted several significant factors in Waldon's developmental history, including never knowing his father, living with his grandmother until age 5, then moving back and forth between his mother and grandmother, and having an alcoholic grandfather who was abusive towards both Waldon and his grandmother. In his opinion, Waldon would have been scarred and negatively shaped by those early experiences. (30A RT 935-937.)

Dr. Strauss noted that when he was admitted to the military hospital, Waldon diagnosed himself as suffering from "depression with psychotic features," and offered a seemingly contrived history and list of symptoms that Waldon said he recognized in himself after watching a television show about depression. (30A RT 938-940.) Strauss noted that Waldon reported no family history of mental illness other than alcoholism. (30A RT 940.) Strauss also noted that Waldon reported a history of abusing pseudoephedrine. Withdrawal from this drug can produce a form of physiological depression, as well as irritability, paranoia, and even hallucinations related to sleep deprivation. (30A RT 940-941.)

Dr. Strauss found Dr. Jarvaid's conclusions to be "highly suspect," pointing out that the observations and report of an occupational therapist that worked with Waldon during his hospitalization were inconsistent with a diagnosis of severe depression. (30A RT 942-943.) Dr. Strauss concluded that Waldon had been unhappy in the Navy, was facing the possibility of charges related to certain payments he had received that he

was not entitled to, and presented himself to military psychiatrists in whatever way necessary to achieve his goal of getting out of military service. (30A RT 943-944.)

Dr. Strauss disagreed with Dr. Kalish's conclusions, finding that although Waldon might be experiencing some degree of depression and paranoia, it did not rise to a level that would render him incompetent. (30A RT 944-945.) Dr. Strauss concluded that the appropriate diagnosis of Waldon would be a diagnosis of antisocial personality disorder with sadistic or violent features. (30A RT 946.) According to Dr. Strauss, the reliability of Dr. Kalish's report would have to be discounted due to Dr. Kalish's inability to make a diagnosis. (30A RT 951.) By itself, an antisocial personality disorder does not render a person incompetent to stand trial. (30A RT 953.) In Dr. Strauss's opinion, Waldon was capable of understanding the nature and purpose of the proceedings against him, and able to assist an attorney in preparing and participating in his defense in a rational manner, if he chose to do so. (30A RT 953.)

Deputy District Attorney (DDA) Michael Ebert testified that a defendant has a constitutional right to represent himself. That right applies in any type of case, regardless of the nature or seriousness of the charges. In DDA Ebert's opinion, the standard remains the same in all cases where someone seeks self-representation. (30A RT 1031.)

DDA Ebert explained that a defendant has the right to control fundamental decisions made in the presentation of his or her case, even when the defendant is represented by counsel. (30A RT 1031-1032.) Under California law, trial tactics are left to the control of the attorney, while fundamental decisions are to be made by the defendant. (30A RT 1033.) Two examples of fundamental decisions to be made by the defendant are whether to testify and whether to present a defense of mental deficiency. (30A RT 1033.)

DDA Ebert also told the jury that a defendant may seek a hearing before the judge claiming that his counsel is ineffective and asking to have new counsel appointed to represent the defendant. (30A RT 1032.) He told the jury that Waldon had made requests for such a hearing. (30A RT 1032.)

San Diego Sheriff's Office Captain Carroll Roache testified that Waldon was classified as a maximum-security high-risk inmate. As such, facility and departmental policy required that he be personally escorted throughout the facility at all times. (30A RT 1039-1040.)

The parties stipulated that on July 15, 1987, Waldon was asked whether he was seeking to inform the court that he was not seeking a finding of mental incompetence. The following exchange took place,

> Defendant Waldon: Your honor, I would be happy to make a decision on that as soon as the court would be kind enough to appoint an attorney for me. With an attorney, I can get counseling and come up with a decision on that. I haven't had an attorney now for months.
>
> The court: You don't --
>
> Defendant Waldon: Until I get an attorney, I can't make a decision on that.
>
> The court: In other words, you are not now seeking to inform the court that you are not seeking a finding?
>
> Defendant Waldon: I'm not making any decision on it at all since I don't have an attorney."

(30A RT 1040-1041.)

The parties stipulated that attorney Elliott Lande was originally appointed to represent Waldon, and attorney Geraldine Russell was appointed to represent him instead on July 2, 1986. (30A RT 1042-1043.) Attorney Charles Khoury was appointed to assist Russell on December 16, 1986. (30A RT 1044.) It was further stipulated that Waldon appeared in

court several times between June 1986 and May 1987 and there was no doubt raised as to Waldon's competence until May 22, 1987, following the testimony of Dr. Kalish. (30A RT 1042-1044.)

Letters that Waldon wrote to the district attorney, his motion for pro per status, his petition for writ of mandamus, and his rough draft of his motion for a fair trial were also admitted as evidence. (30A RT 1046.)

C. Motion for New Trial/Writ Proceedings Challenging the Competency Findings

On September 21, 1987, the jury found that Waldon was competent to stand trial. (31A RT 1193; 5 CT 882.)

On October 30, 1987, Waldon's counsel moved for judgment notwithstanding the verdict and for new trial, raising several of the same issues now raised on appeal. (6 CT 1230-1231; 7 CT 1232-1267, 1275-1288, 1297-1309.) The prosecution filed its written opposition. (7 CT 1310-1381, 1383-1386.) After hearing the motions, the trial court denied the motions for new trial and judgment notwithstanding the verdict. (MH5 RT 1-8; 7 CT 1423.)

Defense counsel filed a petition for writ of mandate in the Court of Appeal, case no. D007429, raising many of the same issues raised in this direct appeal, contending that the trial court abused its discretion in denying the motions for judgment notwithstanding the judgment and for a new trial. (56 CT 11918-11996.) After the Court of Appeal denied the petition (55 CT 11702), defense counsel filed a petition for review (55 CT 11638-11703). In May 1988, this Court granted the petition for review, case no. S004854, and directed the Court of Appeal to issue an alternative writ to be heard in that court. (7 CT 1399; 73 CT 15745; 73 CT 15747.)

While the matter was pending, the Court of Appeal granted defense counsel Russell's petition for writ of mandate in case no. D007850, seeking to be relieved as counsel. (10 CT 1920-1933.) After Russell was relieved,

Waldon again brought a *Faretta*[7] motion, and on November 3, 1989, was granted permission to represent himself at trial. (84A RT 64.) In February 1990, the Court of Appeal discharged the writ and dismissed the petition in D007429, concluding that the trial court's finding that Waldon was competent to represent himself rendered the petition challenging the competency finding moot. (62 CT 13783.)

II. THE JURY WAS PROPERLY INSTRUCTED ON THE DEFINITION OF COMPETENCY

Waldon claims in Argument I that during the competency proceedings the jury was improperly instructed on the definition of competency to stand trial. (AOB 75-140.) First, Waldon argues that instructing the jury in the language of Penal Code section 1367 violated his right to due process because the statute conflicts with federal constitutional standards by: (1) requiring proof the defendant suffers from a mental disorder or developmental disability as part of a finding of incompetence (AOB 81-97), and (2) omitting two key elements of the definition of competence as enunciated by the United States Supreme Court: (i) the instruction given did not tell the jury that Waldon must have "a rational as well as factual" understanding of the proceedings, and (ii) the instruction did not specify that Waldon must have a sufficient "present" ability to understand the proceedings and consult with counsel and assist in the defense. (AOB 97-103). Waldon also claims the trial court omitted the phrase "in a rational manner" from the instruction given to the jury in violation of his federal due process rights. (AOB 103-112.) Waldon claims the asserted errors constituted structural error under the federal constitution, requiring reversal of his conviction. (AOB 112-128.) Under a separate heading, in Argument

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[7] *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].

V.B.[8], Waldon alleges that even if prejudice must be shown, the alleged errors in the definition of competency given to the jury were not harmless beyond a reasonable doubt. (AOB 242-249.) First, Waldon has forfeited his claim of instructional error by failing to request clarification or amplifying language below. Second, there was no instructional error. Penal Code section 1367 (and the jury instruction as given) is entirely consistent with the federal constitutional standard. Even assuming error, it was harmless beyond a reasonable doubt. Finally, even if this Court were to find that the competency instruction given violated Waldon's due process rights, the appropriate remedy would be to remand the matter for a retrospective competency hearing rather that reversal of the verdict.

A. Waldon Has Forfeited His Claim of Instructional Error

As a preliminary matter, Waldon has forfeited his claims of instructional error by failing to object to the competency instruction at trial. "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024; see also *People v. Hart* (1999) 20 Cal.4th 546, 622 [appellant could not complain about ambiguity of jury instruction without having requested a clarifying instruction in the trial court]; *People v. Dennis* (1998) 17 Cal.4th 468, 514 [same].) Here, because Waldon did not object to the instruction or argue in the trial court that clarification was needed to prevent any misapplication of the

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[8] In Argument V.B., Waldon repeats his claims regarding the definition of competency, asserting that if the alleged errors do not constitute structural error, reversal is required based on demonstrable prejudice. (AOB 241-249.) For clarity, this claim is addressed with the related claim of structural error.

instruction by the jury, his claim of instructional error is forfeited on appeal.

"It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." (*Henderson v. Kibbe* (1977) 431 U.S. 145, 154 [97 S.Ct. 1730, 52 L.Ed.2d 203].) Although a failure to object will not bar a court from reviewing instructions that affect a defendant's substantial rights (see Pen. Code, § 1259; *People v. Croy* (1985) 41 Cal.3d 1, 13, fn. 6; *People v. Roehler* (1985) 167 Cal.App.3d 353, 394-395), such is not the situation in the present case. Therefore, Waldon's failure to raise the issue below precludes him from raising the claim on appeal.

B. Instructing the Jury Using the Definition of Competency Set Forth in Penal Code 1367 Comports with Due Process

Although cast as a claim of instructional error, Waldon claims that California's definition of competency as set forth in Penal Code section 1367 conflicts with the standard announced by the United States Supreme Court in *Dusky v. United States* (1960) 362 U.S. 402 [80 S.Ct.788, 4 L.Ed.2d 824], in violation of his rights to due process and a fair trial. (AOB 81-103.) He argues the conviction must be reversed in its entirety because the jury reached its verdict after being improperly instructed with the language of the statute rather than the exact language of *Dusky*.[9]

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[9] The trial court instructed the jury in the language of CALJIC No. 4.10 as follows:

> In deciding whether or not the defendant is mentally competent to be tried for a criminal offense, I instruct you as follows:
>
> Although on some subjects a person's mind may be deranged or unsound, such a person charged with a criminal

(continued...)

Compelling a defendant to stand trial while mentally incompetent is a denial of due process. (*Pate v. Robinson* (1966) 383 U.S. 375 [86 S.Ct. 836, 15 L.Ed.2d 815]; *People v. Lewis and Oliver* (2006) 39 Cal. 4th 970, 1047.) The test under the federal Constitution "is whether the defendant '"has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."' " (*People v. Taylor* (2009) 47 Cal.4th 850, 861, citing *Dusky v. United States, supra*, 362 U.S. 402.) Similarly, California law provides that,

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

(...continued)

> offense is deemed mentally competent to be tried for the crimes charged against such person:
>
> 1. If such person is capable of understanding the nature and purpose of the proceedings against that person; and
>
> 2. If such person comprehends that person's own status and condition in reference to such proceedings; and
>
> 3. If such person is able to assist an attorney in conducting that person's defense.
>
> In this proceeding, the defendant is presumed to be mentally competent and he has the burden of proving by a preponderance of the evidence that he is mentally incompetent as a result of mental disorder.
>
> Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.

(31A RT 1095-1096; see CALJIC No. 4.10.)

(Pen. Code, § 1367, subd. (a).) Although the wording of the two tests is not identical, the tests are the same. (*People v. Jablonski* (2006) 37 Cal.4th 774, 808.) This Court has repeatedly held that California's competency standard, as set forth in Penal Code section 1367, comports with due process and with *Dusky*. (*Id.* at p. 808; *People v. Dunkle* (2005) 36 Cal.4th 861, 893, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Stanley* (1995) 10 Cal.4th 764, 816 ["To anyone but a hairsplitting semanticist, the two tests are identical." (Internal quotes and citation omitted)].)

1. Requirement that incompetency result from mental disorder or developmental disability

Waldon first challenges the language of Penal Code section 1367 that defines a defendant's mental incompetence to stand trial "as a result of a mental disorder or a developmental disability." (AOB 56-69; Pen. Code, § 1367, subd. (a).) He contends that when the Legislature amended the statute in 1974 to add the above-quoted language, it added an element to the determination of incompetency and unconstitutionally narrowed the definition of incompetency because neither a "mental disorder" nor a "developmental disability" is the functional equivalent of legal incompetence. (AOB 69-78; see Stats. 1974, ch. 1511, § 2, p. 3316.) Waldon relies on the United States Supreme Court decision in *Dusky v. United States, supra*, 362 U.S. 402, and its progeny, in support of his contention. (AOB 61-65.) However, as this Court has stated, California law is consistent with these decisions.

In a per curiam opinion, the Court in *Dusky* announced that "the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,'" in addition to "a rational as well as factual understanding of the proceedings against him." (*Id.* at p. 402.) Waldon's argument is ill founded. While the *Dusky* test

does not explicitly mention a mental disorder or mental illness, some finding of mental illness is implicit in finding a defendant to be mentally incompetent to stand trial.[10]

In fact, the Supreme Court later explained the defendant's competence to stand trial in terms of the existence of a "mental condition." (*Drope v. Missouri* (1975) 420 U.S. 162, 171 [95 S.Ct. 896, 43 L.Ed.2d 103].) It is the existence of such a mental condition or disorder that limits a defendant's ability to understand the nature of the proceedings and to assist counsel, thus rendering him or her incompetent to stand trial. The *Dusky* test is grounded in the common law prohibition of commencing proceedings or continuing proceedings against one who is "mad." (*Drope v. Missouri , supra*, 420 U.S. at p. 171, citing 4 W. Blackstone Commentaries, 24.) The prohibition "is fundamental to an adversary system of justice" since a mentally incompetent defendant, although "physically present in the courtroom, is in reality afforded no opportunity to defend himself. [Citations.]" (*Ibid.*) As the Supreme Court later explained, "[t]he focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings." (*Godinez v. Moran* (1993) 509 U.S. 389, 401, fn. 12 [113 S.Ct. 2680, 125 L.Ed.2d 321].)

California's requirement of a mental disorder under Penal Code section 1367, subdivision (a), is not unconstitutional because the existence of a mental disorder is necessarily linked to legal incompetence. Contrary to Waldon's argument, the Legislature did not materially alter and unconstitutionally narrow the definition of incompetence to stand trial in defining incompetence in terms of a mental disorder or developmental

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[10] The jury was not instructed on incompetency based on developmental disability.

disability. The focus of the *Dusky* test is cognitive, "whether the defendant's mental condition is such that he or she lacks that degree of rationality required by law [citation]" meaning "the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense." (*Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 859.) The appellate court in *Timothy J.* concluded that unlike adults, a juvenile might be found incompetent to stand trial solely because of developmental immaturity, without a finding of mental disorder or developmental disability. (*Id* at p. 862.) The *Timothy J.* court noted that competency to stand trial was different with respect to adult defendants:

> [a]s a matter of law and logic, an adult's incompetence to stand trial must arise from a mental disorder or developmental disability that limits his or her ability to understand the nature of the proceedings and to assist counsel.

(*Id.* at p. 860, italics added.)

The court in *Timothy J.* was correct. The statute and its related jury instruction are not constitutionally infirm just because it makes explicit what is implicit in the *Dusky* formulation—that a defendant's inability to understand the proceedings or to assist counsel must result from a mental disorder or developmental disability.

2. Omission of elements from *Dusky*

Waldon further argues that the definition of competency contained in Penal Code section 1367, subdivision (a), omits two key elements from the definition of competence announced by the Supreme Court in *Dusky*. He argues that California's definition does not require "a rational as well as factual" understanding of the proceedings, and fails to indicate that a "present" ability to understand the proceedings and consult with defense counsel must exist. (AOB 97-102.) As stated above, this Court has made

clear that the language of Penal Code section 1367, from which CALJIC No. 4.10 is drawn, comports with due process and with the test set forth in *Dusky*. (*People v. Stanley, supra*, 10 Cal.4th at p. 816.)

The requirement that a defendant has a "rational as well as factual understanding of the proceedings against him" (*Dusky v. United States, supra*, 362 U.S. at p. 402) is encompassed by the language of Penal Code section 1367, subdivision (a), requiring that the defendant be "unable to understand the nature of the criminal proceedings" to support a finding of incompetence. Nevertheless, Waldon argues that the definition of competence contained in Penal Code section 1367, requiring the ability to understand the nature of the criminal proceedings against him, does not require a rational and factual understanding. Not so. To understand the nature of the proceedings, a defendant must necessarily have a rational and factual understanding of the proceedings. In other words, to stand trial, one's understanding of the facts and the defendant's relationship to them must be rationally based. CALJIC No. 4.10 explains this relationship using the following language:

> Although on some subjects a person's mind may be deranged or unsound, such a person charged with a criminal offense is deemed mentally competent to be tried for the crimes charged against such person:
>
> 1. If such person is capable of understanding the nature and purpose of the proceedings against that person; and
>
> 2. If such person comprehends that person's own status and condition in reference to such proceedings;

(31A RT 1095-1096; see CALJIC No. 4.10.)

The language of the instruction clearly encompasses the defendant's ability to understand on both a factual and rational basis. The first component, requiring the capability of understanding the nature and purpose of the proceedings, tells the jury to determine whether the

defendant is able to rationally understand the criminal proceedings, while the second component addresses the defendant's understanding of his own "status and condition" in relation to the proceedings, or in other words, his factual understanding of the proceedings. The language used was sufficient to convey to the jury that the defendant must be able to understand the nature of the proceedings.

Penal Code section 1367, subdivision (a), is also consistent with the *Dusky* requirement of a sufficient "present ability" to consult with one's lawyer. (*Dusky v. United States, supra*, 362 U.S. at p. 402.) California law requires that the defendant be able to "assist counsel in the conduct of a defense." (Pen. Code, § 1367, subd. (a); see CALJIC No. 4.10.) Waldon contends that the omission of the phrase "present ability" conflicts with the constitutional requirements set forth in *Dusky*. (AOB 102-103.) The argument is convoluted. Both *Dusky* and section 1367 require an existing ability to rationally interact with one's lawyer. "Present ability" to consult with one's lawyer and the ability to assist counsel in one's defense are entirely consistent.

In sum, Waldon's arguments that the factors for determining competence to stand trial in California are unconstitutional and not in conformity with United States Supreme Court precedent should be rejected.

C. The Omission of the Phrase "in a Rational Manner" from Standard Instruction Did Not Violate Due Process

Waldon next complains that the instruction as given to the jury improperly omitted the statutory language requiring that the jury find that he had the ability to assist counsel in the conduct of a defense in a rational manner. (AOB 103-112.) Waldon has forfeited this claim because he failed to request amplification or clarification of the instruction at trial. In any event, even assuming error, any error was harmless.

The standard instruction, CALJIC No. 4.10, provides that in addition to the two elements discussed above, the jury must also find that a defendant "is able to assist an attorney in conducting that person's defense in a rational manner." (CALJIC No. 4.10.) In the instruction given to the jury, the phrase "in a rational manner" was omitted. (See footnote 2, *supra*.) The record contains no explanation for the omission of the phrase in the instruction used. During competency proceedings, the trial court, prosecutor and defense counsel discussed CALJIC No. 4.10. The prosecutor suggested substituting "an attorney" for "his attorney," and striking the bracketed language dealing with a defendant who represented himself, as well as striking the language referring to a developmental disability. There was no discussion of striking the phrase "in a rational manner." (30A RT 1052-1053.) Nonetheless, the phrase was lined out in the written instruction provided to the jury and the phrase was omitted from the instruction when read to the jury. (31A RT 1095-1096; 5 CT 925.)

Nevertheless, because defense counsel failed to ask the trial court to include the omitted language, defendant cannot now complain about the omission of this phrase. (*People v. Valdez* (2004) 32 Cal.4th 73, 113 ["Defendant's failure to either object to the proposed instruction or request that the omitted language be given to the jury forfeits his claim on appeal"].) The instruction the trial court gave was correct in that the jury was required to find that Waldon had the ability to assist an attorney in conducting his defense. Where an instruction correctly although generally or incompletely states the pertinent legal principles, the defendant must request elaboration or amplification. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) Waldon did not request amplification of the jury instruction in question and therefore is precluded from challenging the instruction on appeal.

Even if his claim is not forfeited, the jury was properly instructed. Not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. (*People v. Huggins* (2006) 38 Cal.4th 175, 192, citing *Middleton v. McNeil* (2004) 541 U.S. 433, 437 [124 S.Ct. 1830, 158 L.Ed.2d 701].) In order to demonstrate jury instructions are misleading, a defendant must prove a reasonable likelihood the jury misunderstood the instructions construed as a whole. (*People v. Cain* (1995) 10 Cal.4th 1, 36, 40; *People v. Kelly* (1992) 1 Cal.4th 495, 525; *People v. Price* (1991) 1 Cal.4th 324, 446; *People v. Jenkins* (1994) 29 Cal.App.4th 287, 297.) "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 147.) The reviewing court must assume the jurors were intelligent persons and capable of understanding and correlating all jury admonitions and instructions which were given. (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.) As the United States Supreme Court has commented:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretations of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

(*Boyde v. California* (1990) 494 U.S. 370, 380-381 [110 S.Ct. 1190, 108 L.Ed.2d 316].) "*Boyde*. . . mandates that the whole context of the trial be considered." (*Brown v. Payton* (2005) 544 U.S. 133, 144 [125 S.Ct. 1432, 161 L.Ed.2d 334].)

Here, the jury was properly instructed that it must find that Waldon had the capacity to assist in his own defense. The omission of the phrase "in a rational manner" did not change the meaning of the instruction. In

order to be able to be of any *actual* assistance to defense counsel, a defendant must necessarily be able to provide such assistance in a rational manner. In order to interpret the jury's instructions as Waldon now suggests, the jury would have had to conclude that Waldon was able to assist counsel regardless of whether he had the ability to do so in a rational manner. But the jury would not have done so. (See *Brown v. Payton*, *supra*, 544 U.S. at pp. 144-145 [court concluded that jury would not have interpreted instructions as precluding the entire defense, notwithstanding prosecutor's express argument to the contrary].) "'[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" (*Boyde v. California, supra*, 494 U.S. at p. 378.)

First, although the phrase was omitted from the instructions given to the jury just before deliberation, when giving preliminary instruction to all the potential jurors, the trial court told the potential jurors that they must find that Waldon must be "able to assist his attorney conducting his defense in a rational manner." (25A RT 23-24.) In testimony, Dr. Kalish, Dr. Norum, and Dr. Strauss each discussed their views on Waldon's competency in terms of whether Waldon was able to assist an attorney in the preparation and participation of his defense in a rational manner. (27A RT 380 [Dr. Kalish testified that the ability to rationally cooperate with counsel was one of the criteria for competence to stand trial in California]; 29A RT 840-841[according to Dr. Vargas, the standard for competency to stand trial in California is that the defendant must know the nature of the proceedings against him and be able to rationally assist his attorney in his defense]; 30A RT 1021 [Dr. Norum believed that Waldon was unable to assist an attorney in conducting his defense in a rational manner]. In closing argument, both the prosecutor and defense counsel reminded the jury of Dr. Kalish's testimony regarding Waldon's ability to consult with

counsel in a rational manner. (31A RT 1136, 1186.) Given the context in which the instruction was given, it is not reasonably likely that the omission of the phrase "in a rational manner" caused the jury to misunderstand the standard for competency.

D. Error, if Any, in the Jury Instruction, Was Harmless

Waldon argues that "cumulative instructional errors" require automatic reversal of the entire judgment on a theory of structural error. (AOB 112-128.) Structural error refers to error that affects the framework within which the trial proceeds, rather than simply an error in the trial process itself. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [111 S.Ct. 1246, 113 L.Ed.2d 302].) The United States Supreme Court has found structural error only in a very limited class of cases. (*Johnson v. United States* (1997) 520 U.S. 461, 468-469 [117 S.Ct. 1544, 137 L.Ed.2d 718] and see cases cited in therein; *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799] [a total deprivation of the right to counsel]; *Tumey v. Ohio* (1927) 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] [lack of an impartial trial judge]; *Vasquez v. Hillery* (1986) 474 U.S. 254 [106 S.Ct. 617, 88 L.Ed.2d 598] [unlawful exclusion of grand jurors of defendant's race]; *McKaskle v. Wiggins* (1984) 465 U.S. 168 [104 S.Ct. 944, 79 L.Ed.2d 122] [the right to self-representation at trial]; *Waller v. Georgia* (1984) 467 U.S. 39 [104 S.Ct. 2210, 81 L.Ed.2d 31] [the right to a public trial]; *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] [erroneous reasonable-doubt instruction to jury].) When an instructional error either "improperly describes or omits an element of an offense," or "raises an improper presumption" or one that "directs a finding or a partial verdict upon a particular element," it is not generally "a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution." (*People v. Flood* (1998) 18 Cal.4th 470, 503.)

Here, the language of the instruction at issue did not amount to a total deprivation of Waldon's rights, resulting in an unreliable verdict. Waldon's arguments, largely based on semantics, do not demonstrate that the jury failed to receive constitutionally mandated instructions prior to reaching their competency determination. (Compare *Sullivan v. Louisiana, supra*, 508 U.S.at page 281, 113 S.Ct. 2078 [deficient reasonable doubt instruction "vitiates all the jury's findings"]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1315 [no instructions on "substantially all" of the elements of an offense]; *Harmon v. Marshall* (9th Cir. 1995) 69 F.3d 963, 966 [instructional error removing all elements of the crime from the jury's consideration].) Prejudice, if any, resulting from the use of one form of a jury instruction correctly stating the law, as opposed to another instruction also correctly stating the same legal principles, does not affect the framework within which the trial proceeds, but is simply an error in the trial process itself. (*People v. Thomas* (2007) 150 Cal.App.4th 461, 467; citing *Arizona v. Fulminante, supra*, 499 U.S. at pp. 309-310.)

Although Waldon relies on *People v. Aranda* (2012) 55 Cal.4th 342, to support his argument (see AOB 122-124), that case is distinguishable from the instant case and does not support his argument. In *People v. Aranda*, the trial court inadvertently failed to include the standard reasonable doubt instruction in its predeliberation instructions to the jury. (*People v. Aranda, supra*, 55 Cal.4th at p. 357.) Regarding the omission of the reasonable doubt instruction with respect to the defendant's gang offense conviction under section 186.22, subdivision (a), this Court in *Aranda* held, among other things, that: (1) the instructional omission deprived the defendant of his federal constitutional right to due process because the court's instructions did not otherwise cover the requirement that the prosecution prove the defendant's guilt of the gang offense beyond a reasonable doubt; (2) this instructional error is subject to harmless error

review under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]; and (3) the instructional error was harmless because there was no reasonable possibility that the jury failed to apply the reasonable doubt standard when it found the defendant guilty of the gang offense. (*People v. Aranda, supra*, 55 Cal.4th at pp. 358, 361-369.) *Aranda* is of no help to Waldon's argument that the competency instruction given amounted to structural error because unlike in *Aranda* where no reasonable doubt instruction was given, in this case, the jury was instructed as to the standard to apply to determine competency, and this court has repeatedly found that such an instruction comports with constitutional standards. But even in *Aranda*, where this Court found constitutional error, this Court went on to conclude that the instructional error was not structural, but instead was subject to *Chapman* harmless error review, and that the instructional error was ultimately harmless.

Waldon's reliance on the finding of structural error in *People v. Lightsey* (2012) 54 Cal.4th 668, is also unavailing. (See AOB 125-128.) In *Lightsey*, the trial court allowed the defendant to represent himself during competency proceedings. This Court held that self-representation at competency proceedings was structural error requiring reversal and remanded the matter to determine whether a retrospective competency determination was feasible. (*Id.* at pp. 690-711.) The *Lightsey* Court concluded "the error under section 1368 in failing to appoint counsel to represent defendant during the mental competency proceedings is 'analogous to' a structural error referred to in *Fulminante*: 'the total deprivation of the right to counsel at trial.'" (*Id.* at p. 700, citing *Arizona v. Fulminante, supra*, 499 U.S. at p. 309.) Unlike in *Lightsey*, Waldon was represented by counsel during the competency proceedings, thus there was no deprivation of his right to counsel.

This Court has not resolved whether the prejudice from instructional error in the definition of the competency standard is to be measured under *People v. Watson* (1956) 46 Cal.2d 818, 836 or *Chapman v. California, supra*, 386 U.S. 18. (*People v. Huggins, supra*, 38 Cal.4th at p. 193.) Here, if this Court were to determine that the jury was improperly instructed, it was harmless under either standard. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson, supra*,46 Cal.2d at p. 836.) The proper standard for instructional error involving federal constitutional error "is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Neder v. United States* (1999) 527 U.S. 1, 4, 13-15 [119 S.Ct. 1827, 144 L.Ed.2d 35], quoting *Chapman v. California, supra*, 386 U.S. at p. 24.) Even under the more stringent *Chapman* standard, any error was harmless beyond a reasonable doubt.

In this case, had the jury been instructed in the exact language of *Dusky* their verdict would not have been different. Similarly, as explained above, the omission of the phrase "in a rational manner" did not affect the jury's verdict. The record demonstrates that Waldon had the present ability to consult with trial counsel with a reasonable degree of rational understanding, and had a rational and factual understanding of the proceedings. If the trial court erred in instructing the jury in the language of CALJIC No. 4.10, the error was harmless beyond a reasonable doubt. (*People v. Huggins, supra*, 38 Cal.4th at pp. 193-194.)

This Court, in *Huggins*, explained that a reviewing court may also look to the later guilt trial to determine whether instructional error at the competency trial was prejudicial. (*People v. Huggins, supra*, 38 Cal.4th at pp. 193-194.) A review of the record of the subsequent guilt and penalty proceedings demonstrates conclusively that Waldon understood the nature of the proceedings and was able to assist in his own defense. Waldon represented himself from November 1989 through his sentencing in

February 1992. During this time, he hired investigators and law clerks, sought continuances, obtained funding for his defense, and filed and argued pretrial motions, as well as responded to prosecution motions. He represented himself at trial during the guilt and penalty phases from July 1991 through December 1991. He brought motions, made opening and closing statements, made objections, cross-examined witnesses, and presented evidence and testimony in his own defense. Waldon testified on his own behalf at trial, discussed his upbringing, and gave a detailed account of his version of events during the timeframe the charged crimes occurred. Waldon's actions during the trial demonstrated that he understood the nature of the proceedings and was able to not only assist in, but to present his own defense. Here, as in *Huggins*, any error was harmless beyond a reasonable doubt.

E. If the Court Erred, and the Error Was Not Harmless, the Case Should Be Remanded for a Retrospective Competency Hearing

When a reviewing court finds that the trial court deprived the defendant of due process by failing to hold a competency trial, the reviewing court must reverse the conviction, but in so doing, may remand the case "for a retrospective competency hearing to determine whether the procedural error can be cured . . . ." (*People v. Ary* (2011) 51 Cal.4th 510, 520.) Likewise, when the trial court in fact held a competency trial but committed some other reversible error in the competency proceedings, the reviewing court may also remand the case for a retrospective competency hearing. (*People v. Lightsey, supra*, 54 Cal.4th at pp. 691-692, 702, 706-707 [ordering retrospective competency hearing when trial court, after declaring doubt about defendant's competency, erroneously allowed him to represent himself in competency proceedings].)

If the reviewing court remands the case, the trial court must first determine whether a retrospective competency hearing is feasible. (*People v. Lightsey, supra*, 54 Cal.4th at p. 710; *People v. Ary, supra*, 51 Cal.4th at p. 520.) If the court finds that such a hearing is feasible and then finds that the defendant was competent, the judgment is reinstated. (*People v. Lightsey, supra*, 54 Cal.4th at pp. 732-733; *People v. Robinson* (2007) 151 Cal.App.4th 606, 618.) In determining feasibility, the factors to consider are "(1) the passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with the defendant before and during trial." (*People v. Ary, supra*, 51 Cal.4th at p. 520, fn. 3, internal quotation marks omitted; accord, *People v. Lightsey, supra*, 54 Cal.4th at p. 710.)

Here, a retrospective competency hearing might be feasible. Though substantial time has passed since the competency hearing, the record contains ample contemporaneous medical evidence and a wealth of oral and written statements by Waldon. Consequently, if this Court determines that the competency instruction given was reversible error, this Court should remand the case for a retrospective competency hearing.

III. THE DELAY IN HEARING WALDON'S *MARSDEN*[11] MOTION WAS NOT STRUCTURAL ERROR REQUIRING REVERSAL

In Argument II.B. and C., Waldon contends that the trial court's failure to hear his *Marsden* motion during the competency proceedings requires reversal of the verdicts. (AOB 140-178.) Waldon fails to show that he was prejudiced by the delay in hearing his motion. After being

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

found competent, he was given the opportunity to be heard as to his alleged conflict with counsel, even though the court denied the motion. Thereafter, defense counsel Russell was ultimately granted leave to withdraw as counsel, and Waldon was allowed to represent himself at trial, as he repeatedly insisted he be allowed to do. Moreover, his subsequent performance in conducting his own defense makes clear that there is no possibility that the failure to substitute counsel resulted in Waldon being tried while incompetent. Any delay in addressing Waldon's concerns regarding his counsel was harmless, as Waldon ultimately received everything he sought.

A. Proceedings

Geraldine Russell was appointed to represent Waldon on July 2, 1986. (1 CT 8, 33; 3A RT 2, 5.) Charles Khoury was appointed as second counsel to assist in Waldon's defense on December 16, 1986. (30 CT 6462.) As noted above, in February 1987, Waldon moved to have both counsel dismissed and to be allowed to represent himself. Although the motion referred to problems with his attorneys, he did not explicitly request a *Marsden* hearing. (73 CT 15716.)

On April 6, 1987, Waldon wrote a letter to Judge Gill complaining about his counsel's performance and asking for a *Marsden* hearing. (67 CT 14971-14972.) While Waldon's motion for self-representation was still pending before Judge Zumwalt, on April 21, 1987, Waldon again wrote to Judge Gill requesting a *Marsden* hearing be conducted before any further hearing on his motion to represent himself, and asking that Benjamin Sanchez be appointed as advisory counsel. (2 CT 402-413.) At the April 30 hearing on his motion to represent himself, Waldon verbally requested a *Marsden* hearing. (14A RT 37.)

During a May 8, 1987 scheduling discussion before Judge Haden, Waldon told the court that he was not receiving effective assistance from

his counsel. The court indicated that Judge Zumwalt would be hearing that issue. (15A RT 4.)

On May 13, Waldon filed a pro per notice of appeal purporting to appeal Judge Zumwalt's rulings related to his requests for a *Marsden* and/or a *Faretta* hearing. The Court of Appeal, in case no. D006251, treated it as a petition for writ of mandate and denied the writ for failure to allege factual grounds for relief. (3 CT 543-544; 8 CT 1425, 1449; 47 CT 10423, 10425-10426; 20A RT 11.)

On May 19, Judge Zumwalt received, but did not file, a document submitted by Waldon in which he discussed his motion to represent himself and again requested a *Marsden* hearing. (20A RT 12; 67 CT 14975-14979.)

On May 22, Waldon filed a pro per petition for writ of mandamus with the Court of Appeal, case no. D006292. In the petition, Waldon asked for, among other things, a *Marsden* hearing and a *Faretta* hearing. (3 CT 593-602) The petition was summarily denied. (8 CT 1426.)

At a May 29, 1987 hearing, Waldon again verbally renewed his *Marsden* motion. The prosecutor urged the trial court to consider appointment of new counsel for competency hearing purposes. (MH-1 RT 1-3.)

On July 15, 1991, Waldon again requested a *Marsden* hearing. (24A RT 1.) Defense counsel Russell told the trial court her position was that Waldon was not competent to stand trial. (24A RT 3.) When asked whether he himself was seeking a finding of incompetency, Waldon told the trial court he could not discuss the matter until he was appointed new counsel. (24A RT 5.)

Waldon submitted a handwritten "motion for a fair trial," dated July 17, but filed on August 17, 1987, asking to file criminal charges against

both of his defense counsel, Russell and Khoury, for appointment of advisory counsel, and for resources to represent himself. (5 CT 847-848.)

On August 24, 1987, Waldon filed a petition for writ of mandamus, case no. D006737, asking for the trial court to provide him with effective assistance of counsel and a hearing on alleged ineffective assistance of counsel. (5 CT 860-861.) The Court of Appeal denied the petition as premature. (5 CT 875.)

On September 16, 1987, while the competency proceedings were still ongoing, Waldon filed another writ petition, case no. D006849, asking for, among other things, a *Marsden* hearing and appointment of advisory counsel. (5 CT 856-873.)

During a September 16, 1987 discussion of the petition and ruling in D006737, the prosecutor asked the trial court to hold a hearing and rule on Waldon's claims of ineffective assistance. (29A RT 804.) Defense counsel Khoury objected, arguing that to do so would reinstate criminal proceedings. The trial court concluded that there was nothing pending before him with respect to ineffective assistance of counsel, and that it would take no action unless it was appropriately presented. (29A RT 804.) Waldon asked to be heard on the issue. (29A RT 807-808.) The trial court noted that the court's record reflected that there had been an oral request to be heard on the issue of ineffective assistance of counsel that had been denied. (29A RT 808.) Waldon referred the court to his motion of July 17, and the court indicated that motion had been denied. Waldon responded that he was never informed of that ruling. (29A RT 809.) Khoury reiterated that it would be error to address the issue while competency proceedings were pending. (29A RT 809.) The prosecutor reminded the court that Waldon was entitled to competent counsel in the competency proceedings, and that Waldon should have an opportunity to be heard. (29A RT 810.) After the trial court indicated that it had no record of

anything filed on July 17, the court asked Waldon to provide a copy of the motion. The trial court reviewed the document and determined that the motion sought to obtain permission to file criminal charges against Russell and Khoury and to have an advisory attorney appointed. (29A RT 816; see 5 CT 847-848.) The trial court found Waldon's request to permit the filing of criminal charges to be outside the scope of the court's authority, and the request for an advisory attorney to be inappropriate. (29A RT 816.) Waldon reiterated his request that he should be heard as to his claim of ineffective assistance of counsel. The motion was denied. (29A RT 817-818; 7 CT 1417.)

After Waldon was found competent to stand trial, defense counsel informed the court that Waldon was seeking the appointment of new counsel and a *Marsden* hearing. (31A RT 1200-1203.) On September 24, the prosecutor reminded the trial court that Waldon's pro per motion was pending at the time proceedings were suspended and that Waldon had requested a *Marsden* hearing (32A RT 4.) Waldon asked to be heard on his motion and verbally reiterated his request for a *Marsden* hearing. (32A RT 4.) Further proceedings were set for September 30. (32 A RT 2, 5.)

During a September 30 hearing before Judge Haden, Waldon again requested a *Marsden* hearing. Defense counsel Russell told the court that Waldon's *Faretta* motion was still pending before Judge Zumwalt and that Judge Zumwalt had ruled that the *Marsden* motion would not be heard until his motion for self-representation motion had been decided. (34A RT 3.) Russell asked the trial court to reassign the matter to Judge Zumwalt to decide the pending issues. (34A RT 3.) The prosecutor explained that the pro per motion was filed first, but that Waldon had repeatedly asked for a *Marsden* hearing. He suggested the court determine whether Waldon wanted a *Marsden* or a *Faretta* hearing. (34A RT 4-5.) Waldon told the court that his first request was for a *Marsden* hearing, and his second was

for pro per status. (34A RT 8.) Judge Haden assigned the case to Judge Levitt, having determined that Judge Zumwalt was not available. (34A RT 5.) At a hearing before Judge Levitt that same day, Waldon again requested a *Marsden* hearing and "appointment of effective assistance of counsel." (33A RT 9.)

On October 22, 1987, in case no. D007017, Waldon filed a handwritten appeal from the judgment finding him competent to stand trial. In it, he raised the issue of the denial of his requests for *Marsden* hearings and his requests for pro per status. (6 CT 1225-1227.) The court of appeal determined that this was not an appealable order and treated it as a petition for writ of mandate to be considered in conjunction with another petition for writ of mandate filed by Waldon in case no. D006996. (6 CT 1229.) In rejecting Waldon's petition, the court of appeal noted that in accordance with Waldon's wishes, the jury had found him competent to stand trial. The court of appeal directed that if Waldon still wished to represent himself, he should make that motion first to the trial court. (8 CT 1522.)

On February 11, 1988, Waldon again requested a *Marsden* hearing. (36A RT 1.) Defense counsel Russell asked the presiding judge to send the matter back to Judge Zumwalt for the limited purpose of resolving the pending motions. There was no objection by the People, and the court agreed. (36A RT 1-3.) The court appointed advisory counsel to advise Waldon as to his *Faretta* and *Marsden* motions. (36A RT 11; 37A RT 1-5.) After Waldon refused to meet with that attorney, the trial court found that Waldon was unwilling to cooperate with efforts to provide advisory counsel, and ordered matter to proceed. (38A RT 1-3.) Eventually, Judge Zumwalt appointed attorney Benjamin Sanchez as advisory counsel for purposes of the *Marsden* and *Faretta* motions. (39A RT 30-32.)

The *Marsden* hearing was held March 2, 1988, outside the presence of the prosecutor, with Waldon, defense counsel Russell and Khoury, and

advisory counsel Sanchez present. (42A RT 207.) Waldon told the trial court that he wanted counsel relieved, but withdrew the *Marsden* motion, telling the trial court

> And I do request they be relieved however, I hereby withdraw my *Marsden* hearing request, number one, on the advice of -- advice of counsel; number two, because of the -- because the court has neither championed nor cherished my constitutional right to the freedom of speech in these proceedings; and number three, because of the court's refusal to prevent Geraldine Russell from revealing to the court privileged information regarding defense strategy, et cetera, which in no way relates to the defendant's complaints.

(42A RT 212.)

Waldon went on to explain that he was still asking to have counsel relieved. (42A RT 212-214.) He argued that counsel should be relieved because he had not communicated with them or accepted any correspondence from them for several months. (42A RT 214-217.) Waldon chose not to tell the court about his complaints or what he believed his attorneys should have done. (42A RT 217.) Russell was heard as to Waldon's opportunity to be heard by the court and as to her own experience and expertise in criminal law. She explained the work that had been done so far on the case and her concern that Waldon refused to discuss any rational defense position. (42A RT 217-225.) Waldon complained that he was never informed or introduced to Khoury when he was appointed, but would not specify any complaints he had as to Khoury's performance. (42A RT 225-228.) Khoury explained his expertise in criminal law and the work he had done on the case to date. (42A RT 229-233.) Russell addressed the motions and pretrial preparation that had been done on Waldon's behalf. (42A RT 233-234.)

In a March 16, 1988 written decision, Judge Zumwalt denied the *Marsden* motion as follows:

> At the time of hearing, Waldon "withdrew" his *Marsden* motion, but went forward with a motion to dismiss his attorneys. Waldon's reasons to dismiss counsel given to this court in camera are totally inadequate -- at the most he shows his subjective dissatisfaction with counsel and a personality conflict. This court is convinced any other attorney would have a brief "honeymoon" period and because of Waldon's significant mental disability, reach the same impass [sic] as with his present counsel. He has demonstrated his refusal to cooperate and his intransigence in his relations with his defense team and in his disagreement with their strategy and tactics.
>
> A jury has found Waldon competent under Penal Code [section] 1368. This court has reviewed part of that testimony, which was admitted at this hearing, heard further testimony, and finds Waldon is mentally competent to cooperate with counsel should he chose [sic] to do so. The fact he voiced so little reason for discharging counsel leads the court to believe his refusal to cooperate is designed to delay proceedings.
>
> Waldon's statements to the court are not believable. His outrageous charges against counsel are unsupported and irrelevant. The court finds Attorneys Russell and Khoury have properly represented Waldon and will continue to do so; the breakdown in the attorney-client relationship will not make it impossible for Waldon to be properly represented by these able and experienced counsel. The court personally observed Waldon consult with counsel at the beginning of these proceedings and finds he can do so in the future if he chooses not to be willfully recalcitrant and defiant.

(8 CT 1572-1575.)

Following the denial of Waldon's *Marsden* and *Faretta* motions, defense counsel Russell moved to be relieved as counsel. (8 CT 183-1587.) On March 30, 1988, the trial court denied the motion, finding there was no conflict of interest that would prevent Russell from representing Waldon and that her representation had been and could continue to be more than adequate. (48A RT 530-534.) Both the prosecution and Waldon filed petitions for writs of mandate challenging the trial court's denial of

Waldon's *Marsden* and *Faretta* motions and asking the Court of Appeal to review the record for error. Russell filed a petition for writ of mandate challenging the denial of her motion to be relieved. The Court of Appeal issued an alternative writ and consolidated the proceedings. The Court of Appeal determined that independent review of the denial of the *Faretta/Marsden* motions was inappropriate and unnecessary, as any error could be raised on appeal. However, the Court of Appeal found the trial court abused its discretion in denying to motion to be relieved as counsel, as there had been a breakdown of communication of such magnitude that it would jeopardize Waldon's right to effective counsel going forward. The trial court was ordered to relieve Russell and to appoint new lead counsel. (See 10 CT 1920-1933.)

In December 1988, Waldon filed a petition for writ of habeas corpus, case no. D009282, challenging the trial court's denial of his *Faretta* motion. (52 CT 11025.241-11025.343.) In January 1988, the Court of Appeal denied the petition, noting that any issues not rendered moot by its earlier decision could be presented to the trial court by newly appointed counsel. (51 CT 11025.235.)

Eventually, a new attorney, Allen Bloom, was appointed to represent Waldon for the limited purpose of bringing a new *Faretta* motion. (66A RT 9-15.) In November 1989, the trial court granted Waldon's motion for self-representation (84A RT 64), and Waldon represented himself throughout the remainder of the proceedings.

B. The Delay in Hearing Waldon's *Marsden* Motion Was Harmless Beyond a Reasonable Doubt

> When a defendant seeks substitution of appointed counsel pursuant to *People v. Marsden*, [citation], 'the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. The defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or

> that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.' [Citation.]

(*People v. Taylor* (2010) 48 Cal.4th 574, 599.)

A criminal defendant undergoing competency proceedings does not lose the right to move for substitute counsel "when the right to effective assistance of 'would be substantially impaired' if his request were ignored." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 88.) In Waldon's case, where the competency proceedings predated this Court's guidance in *Stankewitz*, the trial court put off hearing the *Marsden* claims, apparently agreeing with defense counsel that it must first resolve the issue of Waldon's competency to stand trial before it could hear his claims regarding ineffective assistance of counsel. However, a trial court must conduct a *Marsden* hearing even when criminal proceedings have been suspended under Penal Code section 1368. (See *People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1069–1070; accord, *People v. Taylor, supra*, 48 Cal.4th at pp. 600-601 [trial court erred when it "brushed aside" defendant's requests for substitution of counsel in the belief that the question of defendant's competence had to be resolved first]; *People v. Govea* (2009) 175 Cal.App.4th 57, 61.) The trial court should have addressed Waldon's *Marsden* motion even though the criminal proceedings were suspended.

However, "*Marsden* does not establish a rule of per se reversible error." (*People v. Washington* (1994) 27 Cal.App.4th 940, 944.) Reversal is not required if the record shows beyond a reasonable doubt that the defendant was not prejudiced by the trial court's failure to hold a hearing. (*People v. Marsden, supra*, 2 Cal.3d at p. 126; *People v. Taylor, supra*, 48 Cal.4th at p. 601; *People v. Solorzano, supra*, 126 Cal.App.4th at p. 1071.)

First, any error in delaying the *Marsden* hearing was harmless because once he was given an opportunity to explain the basis for his claims of

ineffective assistance, he declined to do so. Waldon's failure to reassert his dissatisfaction with counsel when he was later given a chance to address his concerns forfeits any claim or error related to the earlier motions. Waldon was given the opportunity to be heard on his *Marsden* motion after being found competent but before the matter proceeded to trial. Instead of reasserting his claims, Waldon told the trial court that he was withdrawing his motion (although he still wanted counsel to be relieved). (42A RT 212-217.) Any error in failing to consider Waldon's earlier *Marsden* motions became harmless when Waldon failed to reassert the reasons underlying the motion at the later hearing. (*See People v. Lloyd* (1992) 4 Cal.App.4th 724, 732.)

Moreover, any error in delaying the *Marsden* hearing is harmless where, as here, the defendant ultimately received everything he wanted. In *People v. Solorzano*, the defendant sought a finding of incompetency and attempted to make a *Marsden* motion during trial of his competency proceedings. He claimed that he and his attorney suffered from a conflict of interest and that the attorney had failed to obtain school and medical records that would prove he had a learning and comprehending disorder and was thus incompetent to stand trial. (*People v. Solorzano, supra*, 126 Cal.App.4th at p. 1066.) The court refused to hold the hearing, stating, "I'm not going to hear a *Marsden* motion at this stage of the proceeding, this is a 1368 proceeding under different rules." *(Id.* at p. 1067.) The defendant was subsequently found competent and convicted of four counts of robbery. The appellate court reversed, finding that it could not conclude that the lower court's refusal to hold the hearing did not contribute to the finding that the defendant was competent to stand trial and that this, in turn, contributed to the possibility of an unjust guilty verdict. (See *id.* at p. 1071.) But the court there focused on the *trial*, and the possibility that due to counsel's unstated misdeeds, the defendant's criminal trial violated due

process because the defendant had actually been *tried* while incompetent. (See *ibid.*)

In contrast, failure to hold a *Marsden* hearing was held to be harmless in both *Govea* and *Taylor*. In *Govea*, the defendant's attorney declared a doubt as to his competency. The defendant requested a *Marsden* hearing while criminal proceedings were suspended, but the trial court refused to conduct a hearing. (*People v. Govea, supra*, 175 Cal.App.4th at p. 60.) After finding the defendant competent to stand trial, the trial court heard and denied the *Marsden* motion, but went on to appoint another attorney to represent the defendant at trial. (*Id.* at p. 61.) The Court of Appeal held that the trial court "should have conducted a *Marsden* hearing, notwithstanding the pending issue regarding defendant's competency," but that the error was harmless because the defendant eventually got a *Marsden* hearing, was found competent, and obtained a new attorney. In short, "the trial court gave defendant everything he sought." (*Id.* at p. 62.)

In *Taylor*, this Court followed the reasoning in *Govea* and found the failure to hold a *Marsden* hearing harmless. In that case, the defendant requested another attorney after counsel declared a doubt as to his competency. The trial court initially refused to hold a *Marsden* hearing, but ultimately held two *Marsden* hearings—one before the competency finding, and one afterwards. Before the criminal trial began, the trial court granted the defendant's request for a new attorney. (*People v. Taylor, supra*, 48 Cal.4th at p. 597.) Since, as in *Govea*, "the 'trial court gave defendant everything he sought,'" any error was harmless. (*Id.* at p. 601.)

Here, as in *Govea* and *Taylor*, Waldon was given everything he sought. Russell was relieved as counsel and Waldon was allowed to represent himself, rendering the failure to hold a hearing during the competency proceedings harmless.

C. There Was No Constructive Denial of Counsel

Waldon further argues that he was constructively denied counsel under the Sixth Amendment and Due Process Clause of the federal Constitution and that these claims should be evaluated under the standard set forth in *United States v. Cronic* (1984) 466 U.S. 648 [104 S.Ct. 2039, 80 L.Ed.2d 657]. (AOB 168-178.) He contends that this Court's decision in *People v. Lightsey, supra*, 54 Cal.4th 668, supports his conclusion. (See Argument II.E., AOB 190-191.) Waldon was not constructively denied counsel.

In *Cronic*, the United States Supreme Court held that there are certain particularly egregious situations in which a denial of the right to the effective assistance of counsel requires per se reversal of a defendant's conviction. (*Id.* at pp. 658- 659.) Those situations include a complete denial of counsel at a critical stage of the trial, or an entire failure to subject the prosecution's case to meaningful adversarial testing. (*Id.* at p. 659.) However, "[a]part from circumstances of that magnitude . . . there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. [Citations.]" (*Id.* at p. 659, fn. 26.)

In *People v. Dunkle, supra*, 36 Cal.4th at p. 885, this Court explained that the rule set forth in *Cronic* was a narrow one that should be applied only where the attorney's failure is complete. Where "defense counsel was present at and actively participating in" the trial, any purported ineffective assistance does "not reach the magnitude" of those circumstances "in which courts have concluded *Cronic* required reversal without a showing of prejudice." (*People v. Dunkle, supra*, at p. 931.)

Waldon's reliance on *People v. Lightsey, supra*, 54 Cal.4th 668, is misplaced. (See AOB 190-191.) Although this Court held the failure to appoint counsel during section 1368 proceedings was structural error (*id.* at

pp. 699-701), in this case, Waldon was represented by counsel throughout the competency proceedings. Under the circumstances of this case, the trial counsel's actions were not a "fail[ure] to function in any meaningful sense as the Government's adversary," requiring application of the *Cronic* standard. (*Florida v. Nixon* (2004) 543 U.S. 175, 190 [125 S.Ct. 551, 160 L.Ed.2d 565].) Nor was this a case in which defense counsel was not present at and actively participating in the trial. (See *People v. Dunkle*, *supra*, at p. 931.) Accordingly, there was no constructive denial of counsel. Waldon relies on several Ninth Circuit cases applying the constructive denial of counsel doctrine in cases where the defendant had an irreconcilable conflict with his counsel, and the trial court refused to grant a motion for substitution of counsel. (AOB 171-172.) These cases provide no support to Waldon, because the record here shows that there was no such irreconcilable conflict.

Not every conflict or disagreement between a defendant and counsel implicates the Sixth Amendment. (*Morris v. Slappy* (1983) 461 U.S. 1 [103 S.Ct. 1610, 75 L.Ed.2d 610].) On direct review of the refusal to substitute counsel, both California and federal courts consider three factors: "(1) timeliness of the motion; (2) adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense. [Citations.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 490.)

Waldon argues that there was a complete breakdown in communication between him and his counsel resulting in the constructive denial of counsel during the competency proceedings. As the trial court found below, any perceived conflict was attributable solely to Waldon's refusal to cooperate with counsel. This failure to even attempt to cooperate

with his lawyers more than justified the trial court's finding that no irreconcilable conflict existed. (8 CT 1572-1575.)

"A trial court is not required to conclude that an irreconcilable conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness." (*People v. Crandell* (1988) 46 Cal.3d 833, 860, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365; *People v. Smith* (2003) 30 Cal.4th 581, 606 [same].) If a defendant could compel substitution of counsel just by claiming that he does not trust or get along with his appointed attorney, "defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law." (*People v. Crandell, supra*, 46 Cal.3d at p. 860.) "[A] defendant may not force the substitution of counsel by his own conduct that manufactures a conflict." (*People v. Smith* (1993) 6 Cal.4th 684, 696.) A defendant "cannot simply refuse to cooperate with his appointed attorney and thereby compel the court to remove that attorney." (*People v. Michaels* (2002) 28 Cal.4th 486, 523.) A defendant's claimed "lack of trust in, or inability to get along with" counsel is insufficient to compel substitution. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) On this record, Waldon's refusal to communicate or to cooperate with counsel does not constitute an irreconcilable conflict, and he cannot show that the failure to substitute counsel was a constructive denial of counsel in violation of the Sixth Amendment.

D. Remedy

Finally, even if this Court concludes that the trial court's delay in conducting a *Marsden* hearing was not harmless, the appropriate remedy is for this Court to remand the case for the limited purpose of holding a *Marsden* hearing. (*People v. Minor* (1980) 104 Cal.App.3d 194, 197-200; *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1400-1401.)

> In its disposition of a criminal case the appellate court is not limited to the more common options of affirmance, reversal or modification of the judgment or order appealed from. The court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." (Pen. Code, § 1260.) Where the record on appeal discloses trial error affecting the fairness and reliability of the guilt determination process, the normal remedy is outright reversal; in that instance it would usually not be considered "just under the circumstances" to direct the trial court to take further proceedings aimed narrowly at the specific error. But when the trial is free of prejudicial error and the appeal prevails on a challenge which establishes only the existence of an unresolved question which may or may not vitiate the judgment, appellate courts have, in several instances, directed the trial court to take evidence, resolve the pending question, and take further proceedings giving effect to the determination thus made.

(*People v. Minor, supra*, 104 Cal.App.3d at p. 199.) Here, the record does not establish, as Waldon suggests, that the alleged conflict with counsel resulted in Waldon being tried while incompetent. There is at most an unresolved question whether substituted counsel should have been appointed prior to the determination of Waldon's competence. Thus, in the event this Court finds the trial court's error is not harmless beyond a reasonable doubt, the matter should be remanded for the limited purpose of holding a *Marsden* hearing.

IV. THE TESTIMONY OF A DEPUTY DISTRICT ATTORNEY AT THE COMPETENCY HEARING DOES NOT EQUATE TO ERRONEOUS JURY INSTRUCTION

Next, in Argument II.D., Waldon contends that the testimony of Deputy District Attorney Ebert at the competency trial constituted erroneous instruction on the roles of the defendant and counsel. He suggests the alleged error nullified the defense's position at the competency trial and deprived him of his right to counsel. (AOB 179-189.) In a separate argument, Argument V.C.[12], Waldon contends that it was reasonably likely that the jury misunderstood and misapplied the law because of this testimony. (AOB 249-253.) The claims are without merit because the testimony was (1) not an instruction; (2) not erroneous; and (3) not prejudicial. The testimony at issue was merely a brief explanation of a defendant's right to request substitution of counsel, the right to self-representation, and the decision-making authority of a defendant and his or her counsel. Nothing about the testimony interfered with Waldon's ability to present a defense or his right to counsel.

A. Proceedings

During the competency trial, the testimony of one of the defense competency experts, Dr. Kalish, repeatedly touched on issues related to Waldon's dissatisfaction with his attorneys and his desire to represent himself. Dr. Kalish told the jury that Waldon wanted to get rid of his attorneys and to represent himself. (28A RT 406.) Dr. Kalish believed that

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[12] In Argument V.C., Waldon repeats his claims regarding the testimony of DDA Ebert at the competency hearing, asserting that if the alleged claims do not constitute structural error, reversal is required based on demonstrable prejudice. (AOB 249-253.) For clarity, this claim is addressed with the related claim of structural error.

anyone who chose to represent themselves was acting very foolishly and not in their best interests. (28A RT 409-411.)

According to Dr. Kalish, Waldon's request to represent himself was an example of self-defeating behavior and was a factor used to assess his competency. (28A RT 411-412.) Dr. Kalish testified that different levels of competency were required based on the seriousness of the charges and the nature of the proceedings against the defendant. (28A RT 412-413.)

Thereafter, the prosecutor requested that the jury be instructed on *Faretta* and the test for evaluating whether a person was competent to waive his right to counsel. Defense counsel opposed such an instruction. The prosecutor suggested that as an alternative, he could put on a witness to testify that the standard was no different no matter what type of charges a defendant was facing. The trial court indicated that that would be preferable to instructing the jury on such a complex issue. The trial court also rejected proposed instructions based on *Marsden* and on *People v. Frierson* (1985) 39 Cal.3d 803.[13] (29A RT 915-917; 5 CT 888-891.)

When DDA Ebert was called to testify, defense counsel asked for an offer of proof. (30A RT 1025.) The prosecutor stated that, given the court's ruling that it would not instruct on *Faretta*, *Frierson*, and *Marsden*, he intended to introduce evidence through Ebert's testimony on a defendant's control of fundamental decisions of his case under *Frierson*, a defendant's right to represent himself under *Faretta*, and that the standard for self-representation was the same despite the nature and severity of the charges. (30A RT 1025.) Defense objected, arguing that he would have to bring in evidence regarding control over proceedings where a defendant is

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[13] In *Frierson*, this Court explained that a defendant retains the right to control fundamental decisions regarding his own case even when represented by an attorney. (*People v. Frierson, supra*, 39 Cal.3d at p. 814-816.)

incompetent under *People v. Bolden* (1979) 99 Cal.App.3d 375. (30A RT 1025-1026.) The prosecutor indicated that he would limit DDA Ebert's testimony to standards applicable to criminal proceedings and not competency proceedings. (30A RT 1026.) The court indicated that he would admit the testimony for that purpose. (30A RT 1027.) Defense counsel again objected, arguing that the evidence was compound and had already been covered through cross-examination of Dr. Kalish, and that it was likely to mislead the jury. (30A RT 1027.)

In his testimony, DDA Ebert told the jury that a defendant has a constitutional right to represent himself and that the right applies in any type of case, regardless of the nature or seriousness of the charges. In DDA Ebert's opinion, the standard remains the same in all cases where someone seeks self-representation. (30A RT 1031.)

DDA Ebert further explained that a criminal defendant has the right to control fundamental decisions in his case, even when the defendant is represented by counsel. (30A RT 1031-1033.) DDA Ebert testified that a criminal defendant may seek a hearing before a judge to show that his counsel is ineffective and that the court should appoint new counsel to represent him, and that Waldon had made requests for such a hearing. (30A RT 1032.)

B. There Was no Instructional Error

Waldon contends that the testimony of DDA Ebert on these relatively tangential points was somehow equivalent to giving the jury an erroneous instruction. To the contrary, the trial court properly explained that the jury was to follow the trial court's instructions, and the jury was further instructed that the trial court would explain the rules of law that apply to this case, and that the jury must accept and follow the rules of law as provided by the court. (31A RT 1088; 5 CT 911 [CALJIC 1.00].) The jury was also instructed that they were not bound to accept an expert opinion as

conclusive, but that the jury was to determine how much weight to give the opinion, and that they may disregard any such opinion if they find it to be unreasonable. (31A RT 1092-1093; 5 CT 919 [CALJIC No. 2.80].) Thus, the claim that the trial court "permitted the competency jury to receive erroneous instruction, from a district attorney testifying as an expert witness" (see AOB 141, 179) is entirely misplaced.

C. The Claim is Forfeited

To the extent that Waldon claims that the testimony of DDA Ebert should not have been admitted, the claim has been forfeited, as there was no objection below. Evidence Code section 353 states:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
>
> (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

In order to preserve a challenge to the admission of trial evidence for appeal purposes, a party must comply with Evidence Code section 353. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171.)

Although defense counsel objected to this evidence, the basis for the objection was that it was too time-consuming because the defense would have to bring in another expert to counter this testimony, and because it was compound, having already been covered through the cross-examination of Dr. Kalish. (30A RT 1025-1027.) He did not claim that the admission of this testimony would constitute impermissible and erroneous jury instruction, or that the testimony was inadmissible or irrelevant under

Evidence Code section 801. Because these objections were not made at trial, they are forfeited on appeal.

D. The Testimony Was Admissible

Forfeiture aside, the trial court did not abuse its discretion in allowing the testimony. Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. . ." (Evid. Code, § 801, subd. (a).) In general, to the extent an expert's opinion is in fact a conclusion of law, it is not to be considered. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal. 4th 990, 1017.) "[T]he calling of lawyers as 'expert witnesses' to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts ..." (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1598-1599.)

In this case, DDA Ebert's testimony was permissible because he gave no opinion on how the law should be applied to the facts of this case. Instead, he merely gave brief explanations of some of the concepts that had already been introduced through the testimony of the mental health experts regarding a defendant's right to represent himself, how conflicts with attorneys are addressed, and the extent of a defendant's control of his own case. Because these subjects may have been outside of the average juror's common experience, it assisted the trier of fact in understanding the other testimony presented. Thus, the trial court did not abuse its discretion in finding the evidence admissible under Evidence Code section 801.

Moreover, even if DDA Ebert's testimony can be considered the equivalent of a trial court's instruction on the law, Waldon's claim fails because the testimony was not erroneous or misleading. Ebert's testimony was relatively brief, and consisted of concise summaries of the holdings in *Marsden*, *Faretta*, and *Frierson*. To the extent that further explanation or

amplification was required, defense counsel had the opportunity either to elicit that testimony from DDA Ebert or to call a defense expert to provide the required testimony, but did not do so. The trial court's exercise of discretion in allowing the testimony of DDA Ebert did nothing to impair defense counsel's ability to present his case as to Waldon's competency or to deprive Waldon of his right to counsel.

For the same reasons, any error in admitting the testimony of DDA Ebert was harmless. There is no reasonable probability that Waldon would have received a more favorable result even if the testimony had been excluded. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

E. The Alleged Errors Do Not Constitute the Constructive Denial of Counsel

Waldon further contends that the admission of the deputy district attorney's testimony denied him the constructive assistance of counsel during competency proceedings, making it impossible for counsel to defend the case. (AOB 141, 186-191.) As with his claim regarding the delay in hearing his *Marsden* motion, he argues that these claims should be evaluated under the standard set forth in *United States v. Cronic, supra*, 466 U.S. 648. (AOB 189-191.) This is not a situation in which *Cronic* applies because Waldon was adequately represented by counsel throughout the competency proceedings. (*Id.* at pp. 658- 659.) As noted above, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." (*Id.* at p. 659, fn. 26.) Where, as here, "defense counsel was present at and actively participating in" the trial, any purported ineffective assistance does "not reach the magnitude" of those circumstances "in which courts have concluded *Cronic* required reversal without a showing of prejudice." (*People v. Dunkle, supra*, at p. 931.)

V. THE TRIAL COURT'S REMARKS REGARDING WALDON'S TESTIMONY WERE NOT PREJUDICIAL

In Argument IV.D., Waldon contends that the trial court undermined the fact-finding role of the competency jury by referring to him as a "competent witness," and by remarking in front of the competency jury that he "apparently chooses not to testify." (AOB 223-230.) First, Waldon forfeited any claim of judicial misconduct by failing to object to the trial court's remarks during the competency proceeding. Second, the record seems clear in context that the court was referring to Waldon's competence to testify as a witness and not to his competence to stand trial. Thus, it is unlikely that the jurors would have construed the remarks as the trial court's opinion on Waldon's competence to stand trial. Third, any prejudice was caused by Waldon's own behavior during the competency hearing and not by the trial court's response to Waldon's uncooperative behavior. Finally, even if the judge's comments could be construed as error, any error was harmless.

A. Proceedings

Waldon was called as a witness at the competency hearing, but refused to take an oath or affirmation, instead saying that he would be happy to answer that question "if I could first have effective assistance of counsel." (29A RT 829.) When asked his name, the following exchange occurred:

Q. Would you state your name, please?

A. (no response.)

Q. Is your name Billy Ray Waldon?

A. (no response.)

Q. Are you able to hear me, Mr. Waldon?

A. (no response.)

THE COURT: Could you hear Mr. Patrick's question, Mr. Waldon?

THE WITNESS: Sir, my answer remains the same. I will be happy to answer any of the court's questions or Mr. Patrick's questions if I were allowed to have effective assistance of counsel.

THE COURT: I appreciate that, sir. But my question is: can you hear Mr. Patrick?

THE WITNESS: My answer stands.

THE COURT: You may continue.

BY MR. PATRICK:

Q. Do you have any difficulty in understanding my questions, Mr. Waldon?

A. (no response.)

Q. Mr. Waldon, can you explain to us—assuming that I simply ask you questions such as I outlined in my opening statement, can you explain to us why it is you need the effective assistance of counsel in order to answer those questions?

A. (no response.)

MR. KHOURY: Objection, your honor. This goes beyond what Mr. Patrick stated he was going to ask.

THE COURT: Well, that may be, but I'll ask that question.

Mr. Waldon, you are a competent witness here and we want to receive the answers to the questions. How would effective counsel assist you in answering what your name is?

THE WITNESS: (no response.)

THE COURT: Mr. Waldon apparently chooses not to testify.

(29A RT 830-831.) Waldon made no objection to the trial court's remarks.

The prosecutor continued to ask Waldon questions as to whether he wished to be found competent or incompetent, and about several documents

Waldon filed in the trial court and the Court of Appeal, with no response. (29A RT 831-833.)

B. Waldon Forfeited This Claim by Failing to Object at Trial

In general, claims of judicial misconduct are not preserved for appellate review where no objection was lodged on that ground at trial. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237.) Only where an objection and admonition would not have cured the harm caused by the misconduct, or where objecting would have been futile, will a defendant's failure to object be excused on appeal. (*People v. Sturm, supra*, 37 Cal.4th at pp. 1218, 1237.) Where, as here, there was no objection, the futility exception should not apply. Moreover, nothing about the challenged remarks was incurably prejudicial, much less rendered the trial fundamentally unfair. As such, Waldon's failure to object and request an admonition should not be excused in this instance. (Cf. *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648 [failure to object excused where trial judge instructed prospective jurors to lie on voir dire, rendering defendant's trial fundamentally unfair].)

C. The Trial Court's Remarks Did Not Violate Waldon's Due Process Rights

Even if Waldon had not forfeited this claim, the trial court's remarks did not violate his due process rights. Criminal defendants have a federal due process right to a fair trial before a fair judge with no actual bias against the defendant or an interest in the outcome of the case. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905 [138 L.Ed.2d 97, 117 S.Ct. 1793].) When a trial judge conducts the proceedings in a manner strongly suggesting to the jury that the judge disbelieves the defendant's case or otherwise favors the prosecution's case, judicial misconduct has occurred. (See *Liteky v. United States* (1994) 510 U.S. 540, 555-556 [127 L.Ed.2d

474, 114 S.Ct. 1147].) To constitute a violation of a defendant's right to a fair trial, however, the judge's improper interventions must be significant and adverse to the defendant to a substantial degree. (See *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 740.)

The California Supreme Court has noted that the goal of a trial is to determine the facts and apply the relevant law to those facts in an effort to see that justice is done. (*People v. Sturm, supra*, 37 Cal.4th at p. 1237.) To achieve this goal, the trial court performs the function of ensuring that relevant facts are presented to the jury for consideration, and to this end, the trial court has a duty to control the trial proceedings, including the introduction of evidence. (*People v. Sturm, supra*, 37 Cal.4th at p. 1237.) The high court observed in *Sturm*:

> As provided by [Penal Code] section 1044, it is 'the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.' However, 'a judge should be careful not to throw the weight of his judicial position into a case, either for or against a defendant.' [Citation.]
>
> Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.' [Citation.] A trial court commits misconduct if it 'persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge.' [Citations.]

(*Id.* at pp. 1237-1238.)

Certainly, there will be occasions when a trial judge will express irritation, and not all such moments establish judicial misconduct, even if the comments are made in the jury's presence. (*People v. Carpenter* (1997) 15 Cal.4th 312, 353, overruled by statute on other grounds as discussed in

Verdin v. Superior Court (2008) 43 Cal.4th 1096, 1106-1107.) As this Court emphasized in *People v. Snow* (2003) 30 Cal.4th 43, 78:

> Indeed, 'our role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.' [Citation.]

In this case, it seems clear that the trial court's remarks were directed at Waldon's refusal to testify after being called as a witness, and were directed towards Waldon's competence as a witness rather than his competence to stand trial. "A witness is presumed competent absent a showing to the contrary." (*People v. Willard* (1983) 155 Cal.App.3d 237, 239; *People v. Knox* (1979) 95 Cal.App.3d 420, 431.) This presumption is codified in Evidence Code section 700, which sets forth the following rule for witness competency:

> Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter.

"A person is incompetent and disqualified to be a witness if he or she is '[i]ncapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him' (Evid. Code, § 701, subd. (a)(1)), or is '[i]ncapable of understanding the duty of a witness to tell the truth.' (Evid. Code, § 701, subd. (a)(2).)" (*People v. Lewis* (2001) 26 Cal.4th 334, 360.) "A witness's competency to testify is determined exclusively by the judge. [Citation.]" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1150.) "Whether a witness has the capacity to communicate and an understanding of the duty to testify truthfully is a preliminary fact to be determined exclusively by the trial court, whose determination will be upheld absent a clear abuse of discretion. [Citation.]" (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350,

1368.) In the present case, the trial court's remark was not a comment on his belief that Waldon was competent to stand trial, but was an expression of its finding that Waldon was competent to testify.

Waldon further suggests that the trial court's comment, that "Mr. Waldon apparently chooses not to testify," was sarcastic and "told the jury that appellant had full choice in (viz., control over) his conduct, belying that mental incapacity or disturbance factored in to appellant's actions, demeanor, statements, or silence." (AOB 230.) Even if the court's admonishments implied criticism of Waldon's behavior, the admonishments were brief, and did not create a pattern of disparagement of the defense or favoritism toward the prosecution. (See *People v. Bell* (2007) 40 Cal.4th 582, 605; cf. *People v. Sturm, supra*, 37 Cal.4th at pp. 1240-1241.)

Likewise, the court's comments did not evidence bias against the defense. Viewing the record as whole does not reveal that the trial judge repeatedly disparaged Waldon in front of the jury, unduly favored the prosecution, or created the impression that it was aligned with the prosecution. (Cf. *People v. Sturm, supra*, 37 Cal.4th at pp. 1233-1243.)

Finally, even if this Court were to conclude that the trial judge's comments constituted judicial misconduct, the comments amounted to harmless error even under the more stringent beyond-a-reasonable-doubt standard. (*Chapman v. California, supra*, 386 U.S. at p. 24.) In instructing the jury, the court told the jurors,

> I have not intended by anything I have said or done, or by any questions that I may have asked, or by any rulings that I made, to intimate or suggest what should find to be the facts on any questions submitted to you, or that I believe or disbelieve any witness."

(31A RT 1089; 5 CT 914.)

It is presumed the jury followed these instructions. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1326, 1328; *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Waldon has failed to show any partiality or unfairness in the manner that the trial judge presided over his case.

VI. INSTRUCTING THE JURY WITH BAJI NO. 2.02 WAS NOT ERROR AND NOT PREJUDICIAL

Waldon also contends in Argument IV.E. that the trial court erred in instructing the jury with BAJI No. 2.02 (Failure to Produce Available Stronger Evidence). (AOB 230-240.) Giving this instruction was not error, and considering the instructions as a whole, could not be considered prejudicial.

A. Proceedings

During the competency trial, the prosecutor requested an instruction on failure to produce available evidence. Defense counsel objected to the instruction. (30A RT 997.) The deputy district attorney argued the instruction was warranted based on Waldon's refusal to testify and his refusal to cooperate with the psychiatrists appointed to evaluate him. (30A RT 998-999.) The trial court agreed to instruct the jury with BAJI No. 2.02.

The jury was instructed that

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

(31A RT 1094; 5 CT 922.)

In closing argument, the prosecutor told the jury

> Now, one of the instructions the court read you a few moments ago deals with that particular situation. The instruction the court read to you said just that:

> *"If weaker and less satisfactory evidence is offered by a party when it was within his power to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."*
>
> Now, remember, this is in the context that it's the defendant's burden, Mr. Waldon's burden, to prove that he is incompetent. What has he offered in order to prove that incompetence?
>
> He has offered the evidence of Doctors Kalish and Norum operating in the dark because of his refusal and failure to cooperate with them rendering the opinions they were able to render, each admitting that they would have liked to have had that greater opportunity. and of course, ultimately, the defendant himself refused to talk to you or to tell you anything about his mental state and what he was thinking, what he was feeling, what he knew about what was going on here, anything else.
>
> So that instruction, I submit, is extremely applicable to that situation that the party, Mr. Waldon. That's why I distinguish we are not talking about a case between Mr. Khoury and Mr. Patrick. We are talking about a case between Billy Ray Waldon and the people of this state, the party, Mr. Waldon, had it within his power to talk to the psychiatrists, had it within his power to talk to you, refused to do so. So he's the one that bears the onus, that bears the burden of proving his incompetence and to enable the psychiatrists to present stronger evidence concerning that issue.

(31A RT 1102-1103.)

B. The Trial Court Did Not Err in Instructing the Jury Using BAJI No. 2.02

Waldon's claim fails because the instruction given was correct, nonargumentative, and supported by the evidence.

A competency trial under section 1369 is not a criminal proceeding. "Although it arises in the context of a criminal trial, a competency hearing is a special proceeding, governed generally by the rules applicable to civil proceedings." (*People v. Lawley* (2002) 27 Cal.4th 102, 131; *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 490-491.)

In civil proceedings, "'[a] party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence.' [Citation.] The judgment may not be reversed on the basis of instructional error unless the error caused a miscarriage of justice. [Citation.] 'When the error is one of state law only, it generally does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. [Citation.]' [Citation.] ' " 'A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented. [Citation.]' [Citation.]"' [Citation.]" (*Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1388.)

The instruction at issue is based on Evidence Code section 412 that provides: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." "Section 412 only applies when it can be shown that a party is in fact in possession of or has access to better and stronger evidence than was presented." (*People v. Taylor* (1977) 67 Cal.App.3d 403, 412; *People v. Marshall* (1996) 13 Cal.4th 799, 836-837, fn. 5.) BAJI No. 2.02 states the provisions of section 412. (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 480.)

In this case, the instruction with BAJI No. 2.02 was warranted. The instruction was requested by the prosecution based on Waldon's refusal to cooperate with the examining psychiatrists, and his refusal to respond to questions asked of him when he was called as a witness. Waldon's failure to cooperate with the court-ordered examination limited the experts in their assessment of his competence. Moreover, Waldon could have presented evidence of his own competence or incompetence through his own

testimony, but he declined to do so. Without contemporaneous psychological evaluations or Waldon's own testimony, both the experts and the jury were left to rely solely on outdated evaluations conducted years earlier while Waldon was in the Navy and the limited analysis and observations the experts relied on in forming their conclusions without the benefit of Waldon's cooperation. Neither the trial court nor the prosecution erred in pointing out to the jury the appropriate inferences to be drawn from Waldon's refusal to cooperate with the psychological evaluations. (See *Baqleh v. Superior Court, supra*, 100 Cal.App.4th at p. 506 [finding that where defendant refused to submit to mental examination in connection with competency hearing, court would be authorized, on motion of prosecution, to impose issue and evidence sanctions, including a disclosure to jury of defendant's refusal to comply with order].)

Waldon's cooperation or testimony would have led to stronger and more satisfactory evidence regarding Waldon's competence to stand trial, and the jury could properly infer that it was within Waldon's power to produce such evidence. Accordingly, the trial court properly instructed the jury with BAJI No. 2.02.

Even assuming that it was error to give the instruction, and that the error was constitutionally based, it was harmless beyond a reasonable doubt. The instruction told the jury that it should view evidence offered by a party with distrust only *if* it found that it was within the party's power to produce stronger and more satisfactory evidence. The jury was told that it was their duty to determine the facts of the case (see 31A RT 1088; 5 CT 911 [CALJIC No. 1.00 (Respective Duties of Judge and Jury)]) and that all instructions were not necessarily applicable (31A RT 1187-1188; 5 CT 926 [CALJIC No. 17.31]). Moreover, the jury was thoroughly instructed as to how to evaluate a witness's credibility (31A RT 1091-1092; 5 CT 917 [CALJIC No. 2.20]), expert testimony (31A RT 1092-1094; 5 CT 919

[CALJIC 2.80]); statements made by a defendant to a physician (31A RT 1094; 5 CT 921 [CALJIC No. 2.10]), and how to weigh conflicting testimony (31A RT 1094-1095; 5 CT 924 [CALJIC No. 2.22]). The jury was also instructed that neither side was required to produce all available evidence. (31A RT 1094; 5 CT 923 [CALJIC No. 2.11].) In light of the instructions as a whole, instructing the jury with BAJI No. 2.02 did not contribute to the verdict. As noted above, the remainder of the proceedings, during which Waldon ably represented himself, establish beyond a reasonable doubt that he was not tried while incompetent.

VII. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE COMPETENCY JURY AS TO THE CONSEQUENCES OF A FINDING OF INCOMPETENCE

In Argument V.D., Waldon argues the trial court erred in declining to instruct the jury with an adapted version of CALJIC No. 4.01 that would have told the jury that Waldon would not be released from custody if the jury determined that he was incompetent to stand trial. He argues that the failure to give such an instruction violated his state and federal rights to due process, requiring reversal of the competency verdict. (AOB 241, 253-259.) This Court has repeatedly rejected similar claims that such an instruction must be given during competency proceedings, and should do so again here. It is unreasonable to assume that jurors would vote for competency because they believed Waldon would otherwise be released from confinement.

A. Proceedings

Before the competency hearing, defense counsel filed a written motion asking that the jury be informed of the effect of a verdict of incompetence. (5 CT 849-852; 25A RT 4.) The proposed instruction would have told the jury:

> If the jury returns a verdict of "incompetence to stand trial" it does not mean the defendant will be released from custody as it would were he to be found "not guilty" of the criminal act itself. Instead, criminal proceedings shall remain suspended until the person becomes mentally competent and the court shall order that, in the meantime, the defendant be delivered by the Sheriff to a state hospital for the care and treatment of the mentally disordered which will promote the defendant's speedy restoration to mental competence. Upon restoration of competence, criminal proceedings shall resume.

(5 CT 852; see also 5 CT 884.)

The trial court declined to give the instruction. (26A RT 75-76; 5 CT 884.) Defense counsel filed a petition for writ of mandate, case no. D006718, requesting, among other things, that the trial court be directed to give the instruction. (54A CT 11482-11602.) The Court of Appeal denied the writ, finding as to the proposed instruction, that the instruction as proposed was incomplete, and that it was within the trial court's discretion whether to give such an instruction. (5 CT 877-881.)

During the competency trial, defense counsel again requested an instruction on the effect of a verdict of incompetence. The prosecutor objected that the proffered instruction was misleading. (30A RT 1001-1002.) The trial court again refused the instruction, explaining as follows:

> No. What I have concluded is that the proposed instruction by Mr. Khoury is not an appropriate instruction. It has a number of infirmities.
>
> First of all, it tells the jurors that the criteria for the indefinite commitment is not only that criminal charges remain outstanding, but that the defendant remains violently dangerous without explaining what violently dangerous means. Moreover, it doesn't go on to tell the jury what happens in the event the committing court finds not only the criminal charges remain outstanding, but the defendant doesn't remain violently dangerous. Therefore it is incomplete. It shows the vice of trying to tell the jury something that is understood and is to be handled by the court and is none of the jury's concern.

> Then the instruction goes on, after it tells them all of these confusing things about what may happen, it tells them they are to disregard all of them. I don't see the logic of that. I never have. And, therefore, I'm not going to give it.

(30A RT 1053-1054.) When defense counsel suggested the instruction was needed in light of Dr. Vargas's testimony about the potential for malingering, the trial court responded:

> Well, I think it's of benefit to the defendant that that testimony came in because the jury is less likely to then speculate that he would walk out the door behind them if they found that he was not competent to stand trial. I therefore think it's a benefit to him that they know that. and I think it would cause more harm to the defendant were I to go on and endeavor to fully explain it than if instructed them as I intend to, to tell them that during their deliberations they are not to discuss or consider what the result of their verdict shall be, that all proceedings that follow from their verdict are matters for the court to process and are to have no bearing on their verdict.
>
> That, I think, is the proper law. I believe that's what the appellate court in its denial of the writ said I had the discretion to do and it is logical.

(30A RT 1054-1055.)

The jury was specifically instructed that it was not to consider Waldon's guilt or innocence in determining competency:

> In this proceeding you are to decide whether or not the defendant is mentally competent to be tried for a criminal offense. This proceeding is not in any sense a criminal proceeding, and the innocence or guilt of the defendant of the criminal charges against him is not involved [nor is the question of his legal insanity at the time of the commission of the offense involved].

(31A RT 1089; 5 CT 925.)

The jury was also told that, "During your deliberations you shall not discuss or consider what the result of your verdict shall be. All proceedings

that follow from your verdict are matters for the Court to process and are to have no bearing on your verdict." (31A RT 1190; 5 CT 928.)

B. The Instruction Was Not Required

Waldon argues that the proposed instruction was required because of the risk that jurors would make a finding of competency even if they believed Waldon was incompetent, based upon the mistaken belief that a verdict of incompetence would result in his release from custody. (AOB 255-258.) Waldon bases his argument on the principles expressed in *People v. Moore* (1985) 166 Cal.App.3d 540, in which the court held that a defendant in a sanity proceeding is entitled upon request to an instruction that a finding of not guilty by reason of insanity does not entitle the defendant to immediate release as would an ordinary acquittal. Under those circumstances, such an instruction precludes the possibility that jurors would find the defendant sane simply because they perceived no other way to prevent him or her from returning to the community. (*Id.* at p. 556.) The court in *Moore* reasoned that because the consequence of an insanity verdict is not commonly known to jurors, they would speculate on what might happen if a defendant was found not guilty by reason of insanity. (*Id.* at. pp. 552-554.) Thus, the court concluded, "the danger of an erroneous assumption during jury deliberations overshadows any possible invitation to speculate on matters likely to be discussed anyway." (*People v. Moore*, *supra*, 166 Cal.App.3d at p. 554.)

CALJIC No. 4.01 [Effect of Verdict of Not Guilty by Reason of Insanity] was drafted in response to *Moore* and its progeny. That instruction was intended to assist the defense during sanity proceedings by informing the jury "not to find the defendant sane out of a concern that otherwise he would be improperly released from custody." (*People v. Kelly* (1992) 1 Cal.4th 495, 538.) The proposed instruction at issue here is based

on CALJIC No. 4.01, but purports to explain the consequences of a finding of incompetency rather than a verdict of not guilty by reason of insanity. This Court has repeatedly rejected arguments to extend *Moore* beyond its original context and should do so here again. (*People v. Dunkle, supra*, 36 Cal.4th at p. 896; *People v. Marks* (2003) 31 Cal.4th 197, 222; *People v. Thomas* (1992) 2 Cal.4th 489, 539.) This Court explained in *Dunkle* that given the uncertainty of when a defendant's competency might be restored, "an instruction patterned after *Moore* and CALJIC No. 4.01 is necessarily speculative." (*People v. Dunkle, supra*, 36 Cal.4th at p. 897; see also *People v. Marks, supra*, 31 Cal.4th at p. 271 [same].)

Even assuming the trial court erred when it refusing the proposed instruction on the consequences of an incompetency verdict, any error is harmless. "[B]ecause the proposed instruction is not constitutionally based, its erroneous omission does not warrant reversal unless a different result would have been reasonably probable." (*People v. Marks, supra*, 31 Cal.4th at p. 222.) The record demonstrates a different result is not reasonably probable.

The jurors here were expressly instructed that they were only to determine Waldon's competency to stand trial, and not whether he was innocent or guilty of the criminal charges. (5 CT 925, 928.) As set forth above, there was more than substantial evidence of Waldon's competency to stand trial. Thus, there is no reasonable likelihood that Waldon would have been found incompetent even if the proposed instruction had been given. Waldon's argument that the competency finding must be reversed because his state and federal constitutional rights have been violated should be rejected.

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.21

Waldon contends in Argument V.E. that the trial court erroneously instructed the jury with CALJIC No. 2.21 (Witness Willfully False—Discrepancies in Testimony) because the instruction suggested to the jury that key defense expert witnesses should be distrusted. (AOB 259-262.) The instruction was appropriately given, as it did not single out any particular witness or testimony, but gave the jury general guidance on how to evaluate credibility.

A. Proceedings

During the competency trial, the prosecution requested that the jury be instructed with CALJIC No. 2.21. Defense counsel objected. (29A RT 913.) The jury was instructed as follows:

> A witness willfully false in one material part of the witness's testimony is to be distrusted in others. You may reject the whole testimony of a witness who has willfully testified falsely to a material point, unless, from all of the evidence, you shall believe that the probability of truth favors the witness's testimony in other particulars.
>
> However, discrepancies in a witness's testimony or between the witness's testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

(31A RT 1092; 5 CT 918.)

B. The Trial Court Properly Instructed the Jury With CALJIC No. 2.21

CALJIC No. 2.21 is a correct statement of the law. (*People v. Beardslee* (1991) 53 Cal.3d 68, 94.) As a general matter, it is appropriate

to give the instruction when there is a direct conflict in the testimony of two or more witnesses that justifies the giving of the instruction as a guide to the jury in evaluating and comparing credibility. (*People v. Chue Vang* (2009) 171 Cal.App.4th 1120, 1130; *People v. Reyes* (1987) 195 Cal.App.3d 957, 965-966; *People v. Johnson* (1986) 190 Cal.App.3d 187, 192-194.)

In *People v. Allison* (1989) 48 Cal.3d 879, this Court rejected a similar contention regarding an instruction with CALJIC No. 2.21. The defendant argued the jury would conclude the instruction was directed primarily at his own exculpatory testimony. The Court noted "'[n]othing in the language of the instruction itself improperly singled out [defendant.] By its terms, the instruction referred only to a "witness" and not to anyone by name or legal status. The jury was also instructed that "every person" who testified under oath is a witness (CALJIC No. 2.20), and that no statement by the court was intended to suggest that the jury should believe or disbelieve "any" witness (CALJIC No. 17.30).'" (*Id.* at p. 895.) To the extent the instruction focused on the weaknesses in the defendant's testimony, "the instruction properly did its job." (*Id.* at p. 896, fn. 7.)

Here, the discrepancies between the testimony of the prosecution and defense expert witnesses justified giving CALJIC No. 2.21. And, as in *Allison*, the jury was instructed with CALJIC No. 2.20 which told the jury that every person who testifies is a witness and tells the jury how to evaluate a witness's credibility. (5 CT 917; 31A RT 1091-1092.) In this case, the jury was also instructed with CALJIC No. 2.80 (Expert Testimony) which advised the jurors as to how to resolve any conflict in the expert testimony as follows:

> In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and credibility of the expert witnesses, as

well as the reasons for each opinion and the facts and other matters upon which it was based.

You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

(5 CT 919; 31A RT 1092-1094.) When read in context with the other instructions given, nothing in the instruction given told the jury that it was to view the defense experts' testimony with distrust.

But even if the trial court erred by instructing the jury with CALJIC No. 2.21, such error was harmless, as it is not reasonably probable that Waldon would have received a more favorable result had the instruction not been given. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; *People v. Watson, supra*, 46 Cal.2d at p. 836.) "For the same reasons, any error was harmless beyond a reasonable doubt." (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) The instruction was not directed specifically at Waldon or his witnesses but instead could have been applied to any witness. The instruction also did not require the jury to reject any testimony but simply described the circumstances under which the jury was permitted to do so. The jury was also told that all instructions were not necessarily applicable (31A RT 1187-1188; 5 CT 926 [CALJIC No. 17.31]). It is presumed that the jurors understood and followed the court's instructions. (*People v. McKinnon* (2011) 52 Cal.4th 610, 670.) Any error was therefore harmless.

IX. OTHER COMPETENCY TRIAL ERRORS

In Argument VI, Waldon contends that other errors in the competency proceedings "together and separately, denied appellant his rights to confront witnesses, to counsel, to present his case, to confront witnesses [sic], and his due process right to a fair trial, as well as his state statutory rights under Penal Code section 1138. (U.S. Const., 5th, 6th & 14th

Amends; Cal. Const., art. I, §§ 7 & 15.) The errors also violated appellant's federal constitutional right and his state constitutional and statutory rights not to be tried while incompetent, and his federal constitutional right to an adequate state procedure protecting the right not to be tried while incompetent. (*Pate v. Robinson, supra,* 383 U.S. at p. 378; Pen. Code, § 1367, subd. (a).)" (AOB 263.) He contends that the trial court erred in: (1) denying his request for a continuance; (2) allowing the jury to hear the charges and potential penalty facing Waldon; (3) responding to the prosecutor's reference to his escape attempt; (4) limiting defense cross-examination of DDA Ebert and other experts; and (5) overruling a defense objection to an alleged misstatement by the prosecutor in closing argument. (AOB 263-290.)

These claims are without merit because the trial court acted within its discretion in each instance. To the extent Waldon maintains the alleged errors violate his state or federal constitutional rights, the claims have been forfeited because he never asserted them in the trial court. (See *People v. Williams* (1997)16 Cal.4th 153, 250; *People v. Jackson* (1996) 3 Cal.4th 1164, 1231, fn. 17; *People v. Raley* (1992) 2 Cal.4th 870, 892.)

A. The Trial Court Did Not Abuse its Discretion in Denying Defense Counsel's Request for a Continuance

Waldon contends in Argument VI.B. that the trial court erred in denying a request to continue the competency trial to ensure that his lead defense counsel, Geraldine Russell, was available. (AOB 263-272.) His claim that the trial court abused its discretion in denying the request for a continuance is without merit.

Geraldine Russell was appointed as Waldon's defense counsel in July 1986. (1 CT 8.) Charles Khoury was appointed as "second counsel" in December 1986. (30 CT 6462.) After criminal proceedings were suspended, the trial on the issue of Waldon's competency to stand trial was

initially set for July 15, 1987. (22A RT 3.) In June 1987, Waldon filed a challenge for cause seeking to disqualify the judge assigned to hear the competency trial, Judge Levitt. (4 CT 609-787.) In a declaration in support of that motion, defense counsel Khoury stated,

> WHEREFORE, as defense counsel who likely will have primary responsibility for any trial of the Penal Code section 1368 issues in this case in view of Ms. Russell's position as chief trial counsel in the presently ongoing death penalty trial of *People v. Troiani*, I respectfully request the disqualification and removal of Judge Jack Levitt from this case for cause pursuant to sections 170.1 and 170.3 of the Code of Civil Procedure.

(4 CT 626.)

On July 13, 1987, Waldon filed a motion to continue the competency trial based on a pending defense motion to disqualify Judge Levitt and because Russell was in trial representing another capital defendant and would not be available to work with Khoury until that matter was concluded. (4 CT 807-810.) Russell filed a supplemental declaration on July 15, further explaining the conflict and that Khoury, as "second counsel," was unprepared, and lacked the experience to try the competency issue alone. (4 CT 813-817.) The prosecution did not oppose the request. (24A RT 1-2.) Russell told the court that she had sought Khoury's appointment as second counsel to help with pretrial motions and appellate review, not trial matters. (24A RT 7-8.) The trial court observed that Khoury in his earlier declaration had stated that he would likely have primary responsibility for any section 1368 proceedings due to Russell's involvement in the Troiani case. Russell did not counter this assertion. (24A RT 8.) Russell indicated that she anticipated that she would be available August 14. The trial court continued the matter to August 17. (24A RT 11-12.)

On August 6, Waldon requested another continuance, citing Russell's continued unavailability due to the ongoing Troiani trial. (4 CT 829-831.)

At the August 17 hearing on the continuance, the trial court noted that the case was originally set for June, and had been continued to this date at defense request and that Khoury was available for trial. The trial court again pointed out Khoury's declaration in which he stated that he expected to have primary responsibility for any competency proceedings. The trial court denied the motion for a continuance and the matter proceeded as scheduled with Khoury representing Waldon at the competency proceedings. (25A RT 2-3.)

Continuances in a criminal case may only be granted for good cause. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118; *People v. Snow* (2003) 30 Cal.4th 43, 70, citing Pen. Code, § 1050, subd. (e).) A trial court enjoys broad discretion to determine whether good cause exists for a continuance. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 951; *People v. Cox* (1991) 53 Cal.3d 618, 700; see § 1044; Evid. Code, § 765.) What constitutes good cause for the delay of a criminal trial is a matter that lies within the discretion of the trial court. (*People v. Lomax* (2010) 49 Cal.4th 530, 554.)

While a court is not permitted to exercise its discretion in a manner that results in a defendant or his attorneys being deprived of a reasonable opportunity to prepare for trial (*People v. Snow, supra*, 30 Cal.4th at p. 70; *People v. Sakarias* (2000) 22 Cal.4th 596, 646), a showing of good cause requires demonstrating that "counsel and the defendant have prepared for trial with due diligence." (*People v. Jenkins, supra*, 22 Cal.4th at p. 1037.)

"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons

presented to the trial judge. . . ." (*People v. D'Arcy* (2010) 48 Cal.4th 257, 288 [internal quotation marks omitted].)

One factor to be considered is whether a continuance would have been useful. *(People v. Mungia, supra*, 44 Cal.4th at p. 1118.) In that regard, "[t]he court considers 'not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion." (*People v. Jenkins, supra*, 22 Cal.4th at p. 1037.)

Moreover, a court can properly exercise its discretion when denying a request for continuance based on its reasonable belief that the request was "based upon a desire to delay the proceedings" or in an effort to undermine the process such as affecting the composition of the jury or to cause a mistrial. (*People v. Jenkins, supra*, 22 Cal.4th at p. 1038.) The denial of a request for continuance is reviewed on appeal for an abuse of discretion. (*People v. Mungia, supra*, 44 Cal.4th at p. 1118.) The party challenging the ruling on a continuance bears the burden of establishing an abuse of discretion. (*People v. Beames* (2007) 40 Cal.4th 907, 920.) Challenges to an order denying a continuance rarely have merit or result in the reversal of judgment on appeal. (*People v. Garcia* (2011) 52 Cal.4th 706, 758.) Although unavoidable or excusable conflict with other trial commitments can be a proper ground for a continuance (see *People v. Manchetti* (1946) 29 Cal.2d 452, 458), in this case, there was no abuse of discretion in denying counsel's second request for a continuance of the competency trial where second counsel, Khoury, was available to represent Waldon during the competency proceedings. Moreover, the trial court acted within its discretion in considering the inconsistencies between Khoury's statement in his earlier declaration and Russell's position in her own declaration in support of the continuance and at the hearing on the motion that Khoury

was not prepared or capable of handling the competency proceedings. (See *People v. Ortini* (1924) 70 Cal.App. 172, 174 [finding that inconsistent averments in two motions justified an inference of bad faith and intent to delay].) The trial court's remarks at the July 1987 hearing on the earlier request for a continuance made clear that he expected Khoury to step in should Russell not be available. Khoury had been representing Waldon for eight months, and had told the court that he would have primary responsibility for any competency proceedings under section 1368. There was no abuse of discretion in denying the request for a second continuance. (*People v. Durrant* (1897) 119 Cal. 201, 206 [finding no error in denying continuance where defendant had two attorneys, but one attorney was absent from hearing].)

Moreover, even assuming the trial court abused its discretion in denying the motion for a continuance, reversal is unwarranted. "In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of a motion for a continuance does not require reversal of a conviction." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1126; see also *People v. Snow, supra*, 30 Cal. 4th at p. 74.) Here, Waldon has not demonstrated any prejudice from the trial court's denial of the motion for a continuance. Waldon points only to two alleged errors made by counsel during the competency proceeding to suggest that Khoury was unprepared. (AOB 271.) "Although defendant cites on appeal examples of counsel's asserted unpreparedness during the trial, defendant fails to relate them to the denial of the motion for a continuance. Moreover, defense counsel did not base his request for a continuance on grounds that he was unprepared in specific areas. Therefore the trial court cannot be faulted for failing to grant a continuance on those grounds. [Citations.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 650-651.).

B. The Trial Court Did Not Abuse Its Discretion in Allowing the Competency Jury to Learn of the Charges, Special Circumstances, and Potential Penalty Waldon Was Facing

In Argument VI.C., Waldon contends the trial court erred in allowing the jury to learn of the charges, special circumstances, and potential penalty Waldon was facing. (AOB 272-274.) There was no abuse of discretion and no violation of due process in admitting such evidence.

Before the competency trial began, the prosecutor raised the question of whether the jury should be told of the charges and penalty that Waldon was facing. (26A RT 76-77.) The prosecutor argued that the evidence should be admitted because one of the criteria used by Dr. Kalish in evaluating Waldon was whether he understood the charges and consequences he might face (26A RT 77-79), and because Dr. Kalish had admitted that a bias against finding someone competent to represent himself when facing the death penalty (26A RT 78-79). The prosecutor argued that the information was necessary to show whether Waldon understood the proceedings against him. (26A RT 79-80.) The trial court tentatively ruled that the jury was not to be informed of the charges. (26A RT 84.)

While the competency trial was ongoing, before he began his cross-examination of Dr. Kalish, the prosecutor renewed his request that he be allowed to ask Dr. Kalish about the charges facing Waldon. The deputy district attorney noted that in assessing Waldon's competency, Dr. Kalish found that Waldon was fully aware of the charges he was facing, as well as the potential punishment, and argued that the jury should be allowed to use this information in assessing competence. (27A RT 384.) The prosecutor pointed out that Dr. Kalish had testified at an earlier hearing that he was biased against allowing someone to represent himself in a capital case and that he believed the level of required competence increased depending on the seriousness of the charges. (27A RT 384-385.) Defense counsel

responded that the underlying charges were irrelevant and that any bias against self-representation was also irrelevant because Dr. Kalish was testifying as to Waldon's competency to stand trial, not his competency to represent himself. (27A RT 389-390.) The prosecutor responded that the charges were relevant to explain Waldon's paranoia, suspicion and distrust and that Dr. Kalish himself testified that assessment of competency to stand trial and competency to waive counsel were similar in many respects. (27A RT 390.) Defense counsel asked that the evidence be excluded under Evidence Code section 352 because of the danger it might influence the jury in making its competency determination. (27A RT 392.) The trial court ruled that it would allow the prosecutor to ask Dr. Kalish if he was aware that Waldon was facing a number of charges including murder, and that he faced the death penalty. (27 A RT 399-400.)

After the prosecutor asked Dr. Kalish if he was aware that Waldon was charged with a number of crimes, including murder, and that he faced the possibility of the death penalty, defense counsel objected. (27A RT 407.) In chambers, defense counsel reminded the court that the competency jury had not been voir dired on their views on the death penalty and asked the court to strike the question and admonish the jury to disregard it. (27A RT 408.) Counsel's objection was overruled and his motion for a mistrial was denied. (27A RT 408-409.) Dr. Kalish told the jury that he was aware of the charges and possible penalties facing Waldon. (27A RT 409.)

It is within the trial court's discretion to admit evidence of a defendant's confession or the factual details of the charged offenses in a competency trial. (See, e.g., *People v. Dunkle, supra*, 36 Cal.4th at pp. 882-885; *People v. Samuel* (1981) 29 Cal.3d 489, 504.)

In *People v. Dunkle*, the defendant confessed to a 1981 and a 1984 homicide. (*People v. Dunkle, supra*, 36 Cal.4th at pp. 870-874.) In his competency proceeding opening statement, the prosecutor summarized the

evidence of the offenses and later presented testimony from a police officer regarding the defendant's confession. The officer testified that the defendant said that he stabbed the first victim, who was 12 years old at the time, on a trail, in the throat, stomach, and chest, and dragged the body into some bushes. The defendant told police that he stabbed the second victim, age 15, in the back and throat, strangled him, hit him over the head with a rock, and then pushed the body off the side of a hill. He told police that he ran the surviving victim over with his car, drove him to an undeveloped area, and left him there. (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 884.)

On appeal, the defendant contended the facts of the offenses were irrelevant to the issues involved in the competency trial. (*Ibid.*) This Court rejected his claim of error, finding that the evidence of the charged crimes was relevant to the defendant's competency to stand trial, "to convey to the jurors the essence of the case against which defendant would have to defend himself, in order that they could assess his understanding of the charges and ability to assist counsel in his defense." (*Id.* at pp. 884-885.) The Court further explained that the evidence of his earlier confession, in contrast to his current refusal to discuss the case with mental health evaluators was relevant to show that he had the ability to cooperate with counsel if he chose to do so. The Court noted that the time spent on the charged offenses was minimal and that the jury was instructed against letting bias or prejudice influence its decision. The evidence, moreover, illuminated defendant's failure to discuss the facts of the offenses with the mental health professionals appointed or retained to evaluate him, as contrasted with his earlier, more forthcoming admissions to law enforcement officers. This, in turn, tended to support the prosecution's contention that defendant could rationally assist counsel, if he so chose. The *Dunkle* Court concluded that the trial court did not abuse its discretion and there was no denial of due process in permitting reference to the

homicides before the competency jury. (*People v. Dunkle*, *supra*, 36 Cal.4th at pp.884-885.)

In *People v. Jablonski*, a tape recording the defendant made before his arrest detailing the murders he committed was admitted at the competency hearing. The defendant argued, as Waldon does here, that the evidence created an emotional bias against him on the part of the jury and that the jury would be inclined "to punish defendant, presumably by finding him competent." (*People v. Jablonski, supra*, 37 Cal.4th at p. 806.) This court concluded that the trial court did not abuse its discretion under Evidence Code section 352 and that the evidence of the charged murders did not violate due process. (*Id.* at pp. 806-807.)

In this case, the prosecutor's reference to the charges and penalty facing Waldon was very brief and gave none of the inflammatory details of the crimes. The evidence was relevant to explain how Dr. Kalish could assess his understanding of the charges and ability to assist counsel in his defense. The evidence was more than minimally probative, and the jurors were instructed not to let bias, sympathy, or prejudice influence their decision, that the issue of guilt was not before them, and the limited purpose for which the evidence was being admitted. (*People v. Jablonski, supra*, 37 Cal.4th at pp. 806-807; *People v. Turner* (2004) 34 Cal.4th 406, 427.) As there was no abuse of discretion, it follows there was no violation of due process. (*People v. Dunkle, supra*, 36 Cal.4th at pp. 884-885.)

C. The Reference to Waldon's Escape Attempt Was Not Prosecutorial Misconduct and Not Prejudicial

Waldon contends in Argument VI.D. that the prosecutor's reference to his escape attempt during the competency trial was irrelevant and unduly inflammatory and constituted prosecutorial misconduct. (AOB 275-280.) This claim fails because the trial court ordered the question and answer stricken, and admonished the jury to disregard it. Moreover, Waldon

cannot show that the questions asked by the prosecutor were unduly prejudicial under Evidence Code section 352.

Dr. Kalish testified that when he first went to the jail to interview Waldon, he was uncooperative and had to be brought down by sheriff's deputies. He characterized this as "very unusual." (27A RT 348.)

When the prosecutor cross-examined Dr. Kalish, the following exchange occurred:

> Q I think you mentioned earlier that you found it quite unusual that Mr. Waldon, I think you used the term, had to be brought to you by two deputies?
>
> A Yes.
>
> Q: Are you aware of any policies at the county jail with regard to whether or not certain individuals must be accompanied at all times by deputies as they are moved within the jail?
>
> A No.
>
> Q Not aware of that?
>
> A No.
>
> Q Did you ever inquire to see whether or not such a regulation might have applied to Mr. Waldon?
>
> A No.
>
> Q Were you aware that Mr. Waldon was considered a security risk because of an attempt to escape from the jail?
>
> MR. KHOURY: Objection your honor.
>
> THE COURT: The basis of the objection?
>
> MR. KHOURY: Relevance, your honor.

(27A RT 449.)

At sidebar, defense counsel reiterated his objection and moved for a mistrial based on the prosecution's disclosure of Waldon's escape attempt.

(27A RT 450.) Defense counsel argued that it was much more prejudicial than probative under Evidence Code section 352 and could be used for improper purposes by the jury. (27A RT 450-451.) Counsel asked that there be no further references to any escape attempt and that the jury be admonished to disregard the prosecutor's question. (27A RT 451.) The prosecutor argued that his questions were relevant because the doctor relied, at least in part, on Waldon's reluctance to speak with him and the fact that Waldon had to be brought down by two deputies, in forming his opinion that Waldon was incompetent to stand trial. The prosecutor wanted to test Dr. Kalish's opinion to see if it remained the same if there was an alternate explanation for why Waldon had to be escorted by the two deputies. (27A RT 451.) Defense counsel responded that this was a minor point of the testimony and the prejudice far outweighed the probative value. (27A RT 451.) Ultimately, the trial court informed the jury that the question was disallowed and that they were to disregard the entire question. (27A RT 465.)

The prosecutor then asked if Dr. Kalish was aware that Waldon was escorted by two deputies at the time of his initial interview because he was considered to be a security risk. Dr. Kalish said no. There was no objection to the question or answer. (27A RT 465.)

The trial court sustained the objection to the prosecutor's reference to an escape attempt and the jury heard no answer. The trial court admonished the jury and told it to disregard the question. The jury was further instructed that if the court sustained an objection, the jury must ignore the question. They were told that if the witness was not permitted to answer they were not to guess what the answer might have been or why the court ruled as it did. If the court ordered the testimony stricken, the jury was to disregard it. They were not to consider it for any purpose. (31A RT 1090; 5 CT 915.)

The reviewing court presumes the jury followed the court's instruction when it sustained the objection and instructed the jury to disregard any questions to which an objection was sustained, and not to speculate about the answer a witness might have given to a sustained objection. (*People v. Doolin, supra,* 45 Cal.4th at p. 444.) Absent a showing otherwise, it is presumed the jury followed the trial court's cautionary instructions not to consider testimony that was the subject of a successful objection. (See *People v. Mills* (2010) 48 Cal.4th 158, 199; *People v. Smithey* (1999) 20 Cal.4th 936, 961, citing CALJIC No. 1.02.)

Further, a claim of prosecutorial misconduct must be raised by timely and specific objection on misconduct grounds followed by a request for an admonition that the jury disregard the impropriety. (*People v. Parson* (2008) 44 Cal.4th 332, 359; *People v. Gray* (2005) 37 Cal.4th 168, 215; *People v. McDermott* (2002) 28 Cal.4th 946, 1001.) To avoid forfeiture or waiver of prosecutorial misconduct, a defendant generally "must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury." (*People v. Brown* (2003) 31 Cal.4th 518, 553.) Although defense counsel objected that the evidence was unduly prejudicial under Evidence Code section 352, he did not allege that the questioning constituted misconduct by the prosecutor, thus he has forfeited the claim on appeal. Moreover, by failing to object to the renewed questioning, which referred only to a "security risk," Waldon has forfeited any claim that the question, as rephrased, was unduly prejudicial.

Even assuming that the claims are preserved on appeal and that the trial court's admonition and instruction were inadequate, Waldon's claim that the prosecutor's question was unduly inflammatory fails because there was no misconduct and because he cannot show prejudice.

In *People v. Chatman* (2006) 38 Cal.4th 344, the defendant claimed the prosecutor committed misconduct by repeatedly asking the defendant to

comment on the veracity of other witnesses by asking "were they lying questions." (*People v. Chatman, supra*, 38 Cal.4th at pp. 377-381.) This court, however, questioned whether the issue was properly considered one of misconduct. "Although it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation omitted], merely eliciting evidence is not misconduct." (*Id.* at pp. 379-380, italics in original.) There is no showing in this case that the prosecutor intentionally sought to elicit inadmissible testimony. Although the prosecutor in this case certainly asked the questions intentionally, nothing in the record suggests he sought to present evidence he knew was inadmissible. . ." (*Chatman, supra*, 38 Cal.4th at pp. 379-380; see also *People v. Campbell* (1976) 63 Cal.App.3d 599, 610-611 [finding no prosecutorial misconduct in introducing evidence of defendant's attempted escape from jail at competency proceedings].)

In *People v. Kipp* (2001) 26 Cal.4th 1100, the defendant claimed evidence of an attempt to escape during a pending trial should have been excluded because a previously imposed death penalty provided separate motivation to escape apart from the pending charges. This Court agreed the death sentence diminished the probative value of the escape attempt but concluded it was not "so diminished as to lack any practical significance." (*Id.* at p. 1126.) *Kipp* found the risk of undue prejudice was slight in that the escape attempt did not involve violence and the trial court "could reasonably conclude, in the exercise of its broad discretion, that this evidence would not so inflame the jurors' emotions as to interfere with their fair and dispassionate assessment of the evidence of defendant's guilt." (*Ibid.*)

Here, even if the jurors ignored the trial court's admonition, the very brief references to an escape attempt or to the security risk were unlikely to inflame the jurors. In light of the multiple murder and other charges facing Waldon, the jurors cannot have been surprised that Waldon was considered

a security risk, and the reference to the escape attempt was relatively innocuous and cannot be seen as unduly prejudicial. Further, in contrast to *Kipp*, the danger of undue prejudice was even less, as the evidence was presented at the competency hearing, and thus, there was no danger that the evidence could have been used as propensity evidence. (See *People v. Campbell, supra*, 63 Cal.App.3d at p. 611, fn. 7.) It cannot be said that the prosecutor's reference to the escape attempt prejudiced Waldon such that it is reasonably probable he would have received a more favorable outcome had the questions not been asked. (*People v. Parsons, supra*, 44 Cal.4th at p. 359.)

D. The Trial Court Did Not Abuse its Discretion in Limiting the Defense Cross-Examination of DDA Ebert

In Argument VI.D., Waldon contends that the trial court erred in limiting defense counsel's cross-examination of DDA Ebert. (AOB 280-282.) There was no error in sustaining objections to the complained of line of questions because the answers were irrelevant and called for speculation on the part of the witness.

During the defense cross examination, DDA Ebert testified that, in general, trial tactics are made by defense counsel, but a defendant retains the right to make fundamental decisions regarding his case such as whether or not to testify and whether or not to present a defense based on mental deficiency. When defense counsel asked Ebert what a defense attorney does if he believes his client is mentally ill, the trial court sustained an objection on the grounds that it was irrelevant and called for speculation. (30A RT 1033.)

Defense counsel then asked whether, in a situation where a defendant is "prima facie incompetent," that defendant should be allowed to decide whether or not to testify. The trial court sustained an objection on

relevancy grounds and because the question calls for conclusion and speculation. (30A RT 1034.)

When defense counsel tried to further explore the roles of defense attorney and a mentally ill defendant, the trial court sustained the prosecution's objection that the question was overbroad and speculative. (30A RT 1035.) Counsel then asked if *Frierson* dealt with a case in which the defendant wanted to present his psychiatric history and his defense counsel refused. DDA Ebert agreed that this was correct and counsel stated that he had no further questions. (30A RT 1036.)

"The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" (*People v. Brown, supra,* 31 Cal.4th at pp. 537-538.) "[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [93 S.Ct. 1038, 35 L.Ed.2d 297]; *People v. Cromer* (2001) 24 Cal.4th 889, 897 .) For example, an accused is not entitled to be confronted with the witnesses against him on an incidental or collateral issue in no way touching upon the accused's guilt. (*People v. Purcell* (1937) 22 Cal.App.2d 126, 133.)

Although the United States Supreme Court has held that a defendant is entitled to present relevant evidence in support of his defense (*California v. Trombetta* (1984) 467 U.S. 479, 485 [104 S.Ct. 2528, 81 L.Ed.2d 413]; *Chambers v. Mississippi, supra*, 410 U.S. at p. 302), that right is not unlimited (*United States v. Scheffer* (1998) 523 U.S. 303, 308 [118 S.Ct. 1261, 140 L.Ed.2d 413]; *Chambers v. Mississippi, supra*, 410 U.S. at pp. 302-303; *People v. Brown, supra*, 31 Cal.4th at p. 538; *People v. Cromer, supra*, 24 Cal.4th at p. 897.) "A defendant's right to present relevant

evidence is [] subject to reasonable restrictions." (*United States v. Scheffer, supra*, 523 U.S. at p. 308.)

The federal Constitution and the California Constitution both guarantee a criminal defendant the right to confront witnesses against him. (*People v. Cudjo* (1993) 6 Cal.4th 585, 622.) The guarantee does not encompass a cross-examination that is effective in whatever way and to whatever extent the defense might desire, however. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [106 S.Ct. 1431, 89 L.Ed.2d 674].) The confrontation clause permits trial courts to impose reasonable limits on cross-examination to address concerns about harassment, confusion of the issues, interrogation that is only of marginal relevance, and other issues. (*Ibid.*)

"'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.'" (*People v. Cudjo, supra*, 6 Cal.4th at p. 611, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834-835; see also *People v. Panah* (2005) 35 Cal.4th 395, 483 [a trial court is permitted to curtail cross-examination relating to irrelevant matters]; *People v. Frye* (1998) 18 Cal.4th 894, 946 ["not every restriction on a defendant's desired method of cross-examination is a constitutional violation . . . the trial court retains wide latitude in restricting cross-examination"], disapproved of on another ground by *People v. Doolin, supra,* 45 Cal.4th 390; *People v. Jones* (1998) 17 Cal.4th 279, 305.) Thus, "'[w]hile cross-examination to test the credibility of a prosecution witness is to be given wide latitude, its control is within the discretion of the trial court, and the trial court's exclusion of collateral matter offered for impeachment purposes has been consistently upheld.'" (*People v.*

Redmond (1981) 29 Cal.3d 904, 913; *People v. Quartermain* (1997) 16 Cal.4th 600, 625 [trial court did not abuse discretion by excluding impeachment on collateral matter].)

Here, the trial court limited the cross-examination at issue because it did not pertain to matters in dispute and was therefore irrelevant. The questions sought to elicit an explanation of the decision-making authority of defense counsel who represents a mentally incompetent defendant. But Waldon's competency was exactly what was at issue for the jury to determine. Thus the trial court's exclusion of this line of questions was appropriate because the questions were purely speculative until and unless Waldon had been found incompetent.

In short, the trial court reasonably limited cross-examination to the relevant issues. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 999 ["Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right.)

"[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis." (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684.) The inquiry depends upon various factors, including "the importance of the witness' testimony in the prosecution's 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." (*Ibid.*)

In this case, any limitation on cross-examination cannot be said to have prevented Waldon from presenting a viable defense or played a significant role in changing the impression of the witness's credibility. At

most, defense counsel was precluded from inquiring into a collateral matter regarding legal standards that had little to do with Waldon's understanding of the proceedings and ability to cooperate with counsel. Waldon's counsel made no attempt either to reword the question so that it did not require speculation on the part of the witness or to elicit additional testimony regarding the roles of defense counsel and the defendant in order to establish the connection he sought.

For these reasons, assuming error occurred, it was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. 18, 24.)

E. The Trial Court Did Not Abuse its Discretion in Refusing to Allow Defense Counsel to Read from Legal Opinions in Closing Argument

Waldon also contends in Argument VI.E., that the trial court erred in restricting defense counsel's closing argument. (AOB 281-282.) The trial court properly sustained the prosecution's objection that reading California case law regarding competency proceedings to the jury constituted improper argument.

A criminal defendant has a well-established constitutional right to have counsel present closing argument to the trier of fact. (*Herring v. New York* (1975) 422 U.S. 853, 856-862 [95 S.Ct. 2550, 45 L.Ed.2d 593]; *People v. Marshall, supra*, 13 Cal.4th at p. 854; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1184.) This right is not unlimited. The trial court retains discretion to impose reasonable time limits and to ensure that argument does not unduly stray from the mark or otherwise impede the fair and orderly conduct of the trial. (*Herring v. New York, supra*, 422 U.S. at p. 862; *People v. Marshall, supra*, 13 Cal.4th at pp. 854-855.)

Penal Code section 1044 states, in pertinent part, "It shall be the duty of the judge to control all proceedings during the trial, and to limit . . . the argument of counsel to relevant and material matters, with a view to the

expeditious and effective ascertainment of the truth regarding the matters involved." The trial court's decision is reviewed for an abuse of discretion. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1334.)

During closing argument, defense counsel attempted to read portions of (*People v. Samuel, supra,* 29 Cal.3d at p. 489), and *People v. Deere* (1991) 41 Cal.3d 353, during closing argument. The trial court sustained prosecution objections that this was improper argument. (31A RT 1171-1172.)

The trial judge may properly refuse to permit counsel to read from law books or law reports. (See *People v. Anderson* (1872) 44 C. 65, *People v. Chessman* (1951) 38 Cal.2d 166, 188, overruled on another point in *People v. Daniel* (1969) 71 Cal.2d 1119, 1139.) Whether to allow an attorney to argue the law to the jury is within the discretion of the trial court and the trial court may refuse to grant such permission. (See *People v. Sudduth* (1967) 65 Cal.2d 543, 548; *People v. Linden* (1959) 52 Cal.2d 1, 29); *People v. Baldwin* (1954) 42 Cal.2d 858, 871; *People v. Chessman, supra,* 38 Cal.2d at p. 188.)

It is for the trial court, not counsel, to instruct the jury as to questions of law. (*People v. Baldwin, supra*, 42 Cal.2d at p. 871.) The court did so here. In sustaining the objection to defense counsel's attempt to read portions of unrelated cases, the trial court determined that these cases were not related to the issues or evidence before the jury. (31A RT 1171-1172.) The trial court did not abuse its discretion in refusing to allow the argument.

In any event, any error was harmless because there is no reasonable probability that Waldon would have received a more favorable result even if the objection had been denied. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) After all, defense counsel was able to argue that Waldon was, because of his mental illness, unable to cooperate with counsel or to assist

in his own defense. There is no reasonable probability that the jury would have found Waldon competent if defense counsel had been allowed to hear the omitted quotes from *Samuel* or *Deere*.

F. The Trial Court Did Not Err in Limiting the Cross-Examination of Other Expert Witnesses

In Argument VI.F., Waldon contends the trial court impermissibly limited defense counsel's cross-examination of two of the military mental health experts who evaluated Waldon in 1983. (AOB 282-283.) The trial court did not abuse its discretion in excluding irrelevant testimony.

As noted above, in general, the ordinary applications of the rules of evidence do not infringe on the accused's right to present a defense. The trial court has the discretion to admit or exclude evidence "in the interests of orderly procedure and the avoidance of prejudice.'" (*People v. Cudjo, supra*, 6 Cal.4th at p. 611.) A trial court is permitted to limit cross-examination that relates only to irrelevant matters. (*People v. Panah, supra*, 35 Cal.4th at p. 483.)

Only relevant evidence is admissible, and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. (Evid. Code §§ 350, 351; *People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Hamilton* (2009) 45 Cal.4th 863, 913.) Trial courts have broad discretion in relevancy determinations, but lack "discretion to admit irrelevant evidence." (*Ibid.*)

In this case, Dr. Jarvaid's opinion of Waldon's competence to stand trial in 1983, or whether Waldon was still suffering from the same mental

illness, was simply not relevant to the jury's determination of Waldon's competency to stand trial in 1987. Similarly, Dr. Jarvaid's testimony as to similarities between his observations in 1983 and Dr. Kalish's observations in 1987 lacked relevance because Dr. Jarvaid did not treat or evaluate Waldon after January 1984, and his evaluations at that time did not assess his competency to stand trial. Thus, the elicited testimony had no relevance to show Waldon's competency at the time of the proceedings.

Likewise, any diagnosis Dr. Ebert may have made in 1983, whether or not it was included in his report, was also irrelevant to show Waldon's competency to stand trial in 1987, as was Dr. Ebert's opinion of whether Waldon would have been mentally competent to stand trial in 1983.

In any event, any error was harmless. Both Dr. Jarvaid and Dr. Ebert testified as to Waldon's history of mental illness. Defense counsel argued at length that Dr. Ebert and Dr. Jarvaid's testimony demonstrated that Waldon's mental condition predated the current proceedings and were not created by Waldon to delay or avoid trial. (31A RT 1159-1166.) It is not reasonably probable that the jury would have found Waldon competent to stand trial if the trial court had overruled the prosecutor's objections.

G. The Prosecutor Did Not Commit Misconduct in Telling the Jury That Trial Had Been Set for June 1

Waldon's final contention with respect to the competency proceedings is that the prosecutor committed misconduct in telling the jury that Waldon's criminal trial was set for June 1, 1987. (Argument VI.G., AOB 284-290.) There was no misconduct, as the evidence showed that trial was set for that date. In any event, there was no prejudice.

The parties stipulated that attorney Geraldine Russell was appointed to represent Waldon and appeared in court with him several times between June 1986 and May 1987. There was no doubt raised as to Waldon's competence until May 22, 1987, following the testimony of Dr. Kalish at a

pretrial hearing. The parties also stipulated that the matter had been set for trial on June 1, 1987. (30A RT 1042-1044.)

In closing, the prosecutor argued that the fact Waldon appeared in court on numerous occasions between June 1986 and May 1987 without any questions raised about his mental competence was significant, as was the fact that a doubt as to his competence was first raised only ten days before the date set for trial. (31A RT 1133-1134.) After prosecution's closing argument concluded, defense counsel argued that the prosecutor's remarks regarding an imminent trial date should be stricken because, although a date had been set, motions had not been heard and there was no possibility that the date would not have been continued. Alternatively, counsel sought to argue that the date was not imminent and the case would not have been going to trial at the time the competency issue was raised. (31A RT 1151-1153.) The trial court noted that the record reflected a June 1 trial date and declined to strike the prosecution's remarks. The court did not address defense counsel's request to be allowed to argue that the trial date was not realistic and that neither the prosecution nor the defense expected the trial to begin on June 1. (31A RT 1154.)

A prosecutor is given wide latitude and the argument may be vigorous as long as it amounts to fair comment on the evidence, including reasonable inferences or deductions drawn from it. (*People v. Gamache* (2010) 48 Cal.4th 347, 371.) "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct. [Citations.] A prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.' [Citation.]" (*People v. Hill, supra,* 17 Cal.4th at p. 823.) Referring to facts not in evidence is also considered misconduct. (*Id.* at pp. 827-828; *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1271.)

Thus, "[w]hen a claim of misconduct is based on the prosecutor's comments before the jury, " 'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " [Citations.]" (*People v. Friend* (2009) 47 Cal.4th 1, 29.) To prevail, Waldon must show a reasonable likelihood that the jury misunderstood or applied the prosecutor's remarks in the improper manner he suggests. (*People v. Gamache, supra*, 48 Cal.4th at p. 371.) A misconduct claim cannot be supported by singling out words, phrases or a few sentences; the prosecutor's argument is evaluated by examining the statements in the context of the argument as a whole. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 665-666, citing *People v. Lucas* (1995) 12 Cal.4th 415, 475.)

In this case, the prosecutor did not misstate the evidence. Waldon's criminal trial had been set for June 1, 1987, and yet, despite appearing in court several times in 1986 and 1987, there was never a doubt raised as to his competency to stand trial until May 22, 1987. The prosecutor's remarks were in no way misleading. Even assuming Waldon is correct in that the trial date was unrealistic, the prosecutions's larger point remains—that Waldon made several court appearances and was represented by counsel for several months leading up to trial, and never once did the trial court, defense counsel, or Waldon, himself, say or do anything to suggest that Waldon might be incompetent until May 1987.

The prosecutor's remarks were not misleading and certainly not prejudicial. There is no reasonable likelihood that the jury concluded that Waldon was malingering based on the prosecutor's remarks about the imminent trial date.

PART TWO: OTHER PRETRIAL ISSUES

X. THE TRIAL COURT PROPERLY CONSIDERED THE RENEWED *FARETTA* MOTION

Waldon contends in Argument VII, that the trial court erred in reconsidering his *Faretta* motion, in hearing the motion without first appointing new counsel, and in appointing second-chair counsel as co-counsel to assist him. (AOB 291-371.) As explained below, the trial court's consideration of the motion and the decision to allow Waldon to represent himself did not violate his rights to due process, a fair trial, or his right to counsel.

A. Proceedings

As set forth in more detail above (see Argument III.A., *supra*), in addition to his requests to have Russell relieved as counsel, Waldon sought to represent himself. After he was found competent, Waldon's *Faretta* motion was heard before Judge Zumwalt along with his *Marsden* motion. The hearing began on February 25, 1988, and continued over several days. (39A RT 1-38; 40A RT 39-47, 55-114; 41A RT 115-188.) Judge Zumwalt appointed Benjamin Sanchez as advisory counsel for purposes of Waldon's *Faretta* and *Marsden* motions. (40A RT 30-32.)

At the hearing, defense counsel again called Dr. Kalish as a defense expert witness. (40A RT 68-111; 41A RT 115-152.) He testified that in his opinion, Waldon was not competent to waive counsel. (40 A RT 85.) Waldon declined to ask any questions of Dr. Kalish. (41A RT 153.) Waldon asked that he be allowed to call his own witnesses. (41 A RT 154-171.) The court agreed to do so and gave Waldon additional time to subpoena and interview witnesses. (41A RT 172-188.) In the meantime, the trial court heard and took the *Marsden* motion under submission. (41A RT 189-190, see III.A.1., *supra*.)

When the *Faretta* hearing resumed, defense counsel Russell expressed concern that allowing Waldon to call witnesses to testify as to their opinions of his competence to waive counsel might compromise the defense's ability to present a psychiatric defense at trial. (43A RT 277-279.) Khoury expressed further concern that information that came out through the witnesses' testimony in the *Faretta* proceedings could be used against him at trial. (43A RT 289-290.) In order to move the process forward, the prosecutors agreed that the witnesses could testify outside their presence, and that the testimony would be sealed. (43A RT 306-312.) Waldon himself presented the testimony of five lay witnesses who gave their opinion that he was mentally competent to represent himself. (43A RT 314-380.) Waldon, through his advisory counsel, submitted a written waiver of his right to counsel. (8 CT 1564-1570.)

Waldon's defense counsel called their own witnesses. Counsel offered the testimony of Dr. Haig Koshkarian, a defense expert that had been hired to render an opinion as to Waldon's state of mind relative to the charged offenses, potential defenses, and penalty phase issues. Dr. Koshkarian had visited Waldon eight or nine times. In his opinion, Waldon's judgment was impaired to the extent that he could not adequately prepare a defense. (44A RT 395-398, 402, 409-410.) Dr. Katherine Di Francesca, a psychologist who interviewed Waldon and conducted psychological testing, also opined that Waldon was not competent to waive representation by counsel. (45A RT 427-439.) Based on her interaction with him a year earlier, Dr. Di Francesca also expressed concern regarding Waldon's ability to rationally assist his attorney in his own defense. (45A RT 447-449.)

In her written opinion denying both the *Marsden* and *Faretta* motions (8 CT 1572-1575), Judge Zumwalt found Waldon to be incapable of voluntarily exercising an informed choice to waive counsel, and that his

conditional request to represent himself suggested that he did not rationally perceive his situation. The trial court found

> that defendant has a mental disorder, illness or deficiency which impairs his free will to such a degree that his decision to request to represent himself is not voluntary; he has a mental disorder, illness or deficiency which has adversely affected his powers of reason, judgment and communication. He does not realize the probable risks and consequences of his action. His request to waive counsel is, therefore, not an exercise of his informed free will. While Waldon has the cognitive ability to understand the proceedings, he cannot formulate and present his defense with an appropriate awareness of all ramifications.

(8 CT 1574.)

Later, in a March 24 appearance before Judge Malkus, lead defense counsel Russell indicated that she intended to move to be relieved as counsel. (46A RT 3.) The matter was reassigned to Judge Zumwalt for the limited purpose of hearing that motion. (47A RT 1-3.) As noted above, the hearing on Russell's motion to be relieved as lead counsel was heard on March 30, 1988 (48A RT 514-519, 520-529; 8 CT 1583-1587 [motion]), and the trial court denied the motion (48A RT 530-534). The trial court agreed to continue Sanchez's appointment as advisory counsel so that Waldon could file a writ petition challenging the denial of the *Marsden* and *Faretta* motions. (48A-1 RT 6-9.)

On May 9, 1988, Waldon filed a pro per petition for writ of mandate, case number D008026, challenging the denial of the *Faretta* motion. After defense counsel Russell objected, the Court of Appeal ordered the petition stricken to ensure no privileged defense information was inadvertently revealed. (9 CT 1737; 10 CT 1950; 62 CT 13943, 13991-13992; 73 CT 15742; 50A RT 1-2.)

As explained above, both the prosecution and Waldon filed petitions for writs of mandate, in case number D007873, challenging the trial court's denial of Waldon's *Marsden* and *Faretta* motions and asking the Court of

Appeal to review the record for error. Russell filed a petition for writ of mandate regarding the denial of her motion to be relieved as counsel. In a September 12, 1988 order, the Court of Appeal declined to address the denial of the *Faretta/Marsden* motions, but ordered the trial court to relieve Russell and to appoint new lead counsel. (See 10 CT 1920-1933.) Meanwhile in the trial court, at a September 8, 1988 hearing, Waldon renewed his request to dismiss his counsel and to proceed pro per. (55A RT 1-5.) The trial court (Judge Malkus) declined to hear the motion because Waldon was represented by counsel. (55A RT 2.)

In December 1988, Waldon filed a petition for writ of habeas corpus, case no. D009282, challenging the trial court's denial of his *Faretta* motion. (52 CT 11025.241-11025.343.) In January 1989, the Court of Appeal denied the petition, stating

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

(51 CT 11025.235.)

On January 12, 1989, Sanchez (on behalf of Waldon) filed a petition for writ of mandate, case no. D009343, challenging the denial of the *Faretta* motion. (42 CT 9516-9534; 43 CT 9536-9685; 44 CT 9689-9866.) The Court of Appeal indicated that because Waldon had a second motion to represent himself pending in the trial court, the Court of Appeal would hold this petition in abeyance pending the disposition of that motion. (10 CT 2085; 42 CT 912.) After Waldon's motion to represent himself was granted (see below), the petition was dismissed as moot. (12 CT 2564.)

In January 1989, the matter was sent to another department so that new counsel could be appointed. (59A RT 5.) Ultimately, the trial court appointed Allen Bloom and Sanchez for the limited purpose of the pending motion for self-representation. The court indicated that if that motion was denied, another attorney, Mark Wolf, would be appointed to represent Waldon at trial. (66A RT 15.)

Bloom appeared for Waldon at the February 10 hearing before Judge Malkus on Waldon's motion to represent himself. Bloom told the court that he was appearing for limited purpose of Waldon's motion to represent himself. He referred the trial court to the Court of Appeal's January 6 order stating that the appellate court did not intend to preclude Waldon from proceeding on the pro per issue. (67A RT 1-2.) On February 15, the matter was assigned to Judge Kennedy for all purposes other than law and motion matters, which were to be heard by Judge Langford. (68A RT 1.)
On June 5, 1989, Bloom filed a motion asking the trial court to "1) assign counsel to defendant's case who will take direction from defendant; or if that motion denied, 2) allow defendant to act as own counsel and appoint advisory counsel to work under defendant's direction." (11 CT 2344-2354; 12 CT 2491-2501 [motion]; 11 CT 2367-2373 [prosecution's response to motion].)

A hearing on the motion was held on June 22. Charles Khoury was present at the hearing. The trial court agreed that the decision to relieve Russell as lead counsel had also terminated Khoury's responsibilities as second counsel. Judge Langford heard argument on the motion and denied the portion of the motion that requested the appointment of two attorneys who would be directed to follow Waldon's decisions and directions for all purposes. The hearing as to the remainder of the motion was continued and the matter was subsequently reassigned to Judge Boyle. (78A RT 26-35; 79A-2 RT 1-2.)

At the November 1989 hearing, attorney Bloom submitted the testimony of Gloria Renas, William Schwartz, and Joan Williams from the hearing on the previous *Faretta* motion, as well as copies of military evaluations and several declarations from lay witnesses. Bloom also submitted declarations from a psychiatrist and a psychologist who had discussed the decision to represent himself with Waldon and offered their opinion that Waldon was competent to represent himself. (84A RT 55-57; 38 CT 8230-8293; 12 CT 2507-2520; 2521-2531.)

The court explained that the only issue before him was whether Waldon was making an intelligent and knowing waiver of his right to counsel. (84A RT 60.) Waldon indicated that he understood that representing himself could be a detriment to the preparation of his defense, that he would not get special accommodations from the court and that he would have to follow the same rules and limitations as an attorney. (84A RT 61.) He understood that he would be facing prosecutors with much more experience and familiarity with the law and the Court. (84A RT 61-62.) The Court noted that Waldon was able to read, write, listen, be polite, and cooperate if he chose to do so. Waldon understood that he would have to cooperate with the court's rulings and agreed to do so. (84A RT 62.). Waldon provided the Court a written acknowledgment and waiver of his right to counsel. (84A RT 63; 12 CT 2404-2408.)

The trial court granted Waldon's motion for self-representation, stating, "The Court does find that the defendant has made an intelligent and knowing request to represent himself, and I find that he is competent to make that request...." (84A RT 64.) Waldon requested to have Sanchez and Wolf appointed as advisory counsel, or alternatively, if only one attorney was to be appointed, that Sanchez be appointed. (84A RT 71-72, 74.) Sanchez and Wolf were appointed as, "second-chair, advisory counsel" and attorney Bloom was relieved. (85A RT 87-88.) That same

day, the Court of Appeal dismissed Waldon's petition challenging the delay in hearing and the denial of the earlier *Faretta* motion as moot. (12 CT 2564.)

The next month, Wolf was allowed to withdraw as advisory counsel, and Bloom was appointed as advisory counsel. (86A RT 12-16, 22.) Bloom withdrew the following month, and Waldon asked for the appointment of Mark Chambers as advisory counsel. (88A RT 3-5; 13 CT 2721-2726.) By late January 1990, the matter was reassigned to Judge Gill for all purposes where it remained through the rest of the criminal proceedings. In April 1990, Judge Gill appointed Nancy Rosenfeld in place of Bloom as advisory counsel. (1 RT 27.) In July 1990, Sanchez was relieved as advisory counsel, and Chambers was appointed to replace him. (1 RT 171.)

B. Judge Boyle Did Not Impermissibly Overrule the Earlier Denial of Waldon's Motion to Represent Himself Because the Withdrawal of Counsel Constituted a Change in Circumstance

In Argument VII.B., Waldon contends the trial court erred in reconsidering the *Faretta* motion because the motion had been considered and denied by Judge Zumwalt, and there had been no change of circumstances. (AOB 351-364.) There was no error, as the removal of Russell as lead counsel constituted changed circumstances warranting the renewal and reconsideration of the *Faretta* motion. Moreover, the Court of Appeal's orders disposing of the various writ petitions challenging the delay in hearing and the denial of his *Faretta* motions made clear that Waldon could present such a renewed motion to the trial court. Having insisted on and received a new hearing, Waldon forfeited any claim that the trial court was without authority to hear the renewed motion.

"In criminal cases there are few limits on a court's power to reconsider interim rulings." (*People v. Castello* (1998) 65 Cal.App.4th

1242, 1246.) "A court's inherent powers are wide," and "include authority to rehear or reconsider rulings." (*Ibid.*) One of the powers historically recognized as inherent in the courts is the right to conduct and control the order of business in order to safeguard the rights of all of the parties. (*Ibid.*) That power is recognized as judicial in nature and as necessary to enforce rights and redress wrongs. (*Ibid.*)

However, in general, one trial judge may not review the ruling of another trial judge because the superior court, although comprised of many judges, is a single court. (*In re Alberto* (2002) 102 Cal.App.4th 421, 427; *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 712 [trial judge erred in relieving advisory counsel previously appointed by the arraigning judge].) There are exceptions to this rule when the prior judge is unavailable or when the previous ruling was a result of inadvertence, fraud or mistake. (*In re Alberto, supra*, 102 Cal.App.4th at p. 430.) Where the facts are not in dispute, a trial court's authority to reverse an interim ruling made by another superior court judge is a question of law that this Court reviews de novo. (*In re Alberto, supra*, 102 Cal.App.4th at p. 426.)

In *People v. Riva* (2003) 112 Cal.App.4th 981, the Court of Appeal explained that as

> a general rule one trial judge cannot reconsider and overrule an order of another trial judge. There are important public policy reasons behind this rule. 'For one superior court judge, no matter how well intentioned, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court.' The rule also discourages forum shopping, conserves judicial resources, prevents one judge from interfering with a case ongoing before another judge and prevents a second judge from ignoring or arbitrarily rejecting the order of the previous judge that can amount to a violation of due process. If the first judge's ruling is not reviewable on appeal or is so egregiously wrong and prejudicial the injured party cannot wait

> for an appeal, there is always the remedy of an extraordinary writ in this court.

(*People v. Riva, supra,* 112 Cal.App.4th at p. 991, fns. omitted.)

On the other hand, there are exceptions to the rule prohibiting one judge from overruling another judge's ruling. (*Ibid.*) As this Court has noted, "a ruling on a pretrial motion is not always binding on the trial court." (*People v. Clark* (1992) 3 Cal.4th 41, 119, overruled on other grounds in *People v. Pearson* (2013) 56 Cal.4th 393, 462.) A trial judge should not reverse or modify another trial judges' rulings without a highly persuasive reason for doing so. "[M]ere disagreement with the result of the order is not a persuasive reason for reversing it." (*People v. Riva, supra,* 112 Cal.App.4th at p. 992.) "Factors to consider include whether the first judge specifically agreed to reconsider her ruling at a later date, whether the party seeking reconsideration of the order has sought relief by way of appeal or writ petition, whether there has been a change in circumstances since the previous order was made, and whether the previous order is reasonably supportable under applicable statutory or case law regardless of whether the second judge agrees with the first judge's analysis of that law." (*Id.*)

"Trial court judges are independent judicial officers. They have both the right and the duty, consistent with their oaths of office, to exercise their best judgment, not to abandon it to previous trial court rulings." (*People v. Sons* (2008) 164 Cal.App.4th 90, 100.) Under the circumstances present when Waldon presented his renewed request for self-representation, the later ruling was not an act in excess of the court's authority. (See *Alberto, supra,* 102 Cal.App.4th at p. 426.)

Preliminarily, Waldon himself insisted on renewing his motion for self-representation and explicitly sought another hearing as to his ability to waive counsel. "A party forfeits his or her right to attack error by

implicitly agreeing or acquiescing at trial to the procedure objected to on appeal." (*People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1408; see also *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685-1686.) A party who requests the court to act as it did has invited error. (See *People v. Williams* (2008) 43 Cal.4th 584, 629; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49 [where defense counsel intentionally causes the trial court to err, acting for tactical reasons and not out of mistake, the claim is barred on appeal as invited error].) Waldon's insistence on and acquiescence in the trial court's decision to allow him to present a new *Faretta* motion should forfeit any claim on appeal that the trial court erred in doing so.

In any event, although Judge Zumwalt heard and denied Waldon's *Faretta* motion in March 1988, by January 1989, when Waldon again insisted on bringing a motion to represent himself, his circumstances had changed. Not only had his counsel been relieved, but also the Court of Appeal, in its order denying Waldon's petition for writ of habeas corpus, had specified that any issues not rendered moot by its order directing Russell to be relieved as counsel could be presented to the trial court by new counsel. (51 CT 11025.235.) It reiterated this position in its decision to hold his later petition in abeyance pending the outcome of Waldon's second hearing. (10 CT 2085; 42 CT 912.) Waldon's attorney specifically directed the trial court's attention to the Court of Appeal's January 6 order stating that the appellate court did not intend to preclude Waldon from proceeding on the pro per issue. (67A RT 1-2.) Based on this chain of events, it was not error for the trial court to consider Waldon's renewed motion for self-representation. Under these circumstances, the trial court was not "reconsidering" Judge Zumwalt's order but was hearing a new *Faretta* motion based on new circumstances not present when the earlier motion was denied.

Waldon further contends the decision to consider and grant the *Faretta* motion violated his due process rights to a fair trial, citing *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098. (AOB 363.) In *Bradley*, the trial court instructed the jury on entrapment at the defendant's first trial. The jury did not reach a verdict, and the court declared a mistrial. On retrial, defendant's prior testimony was read to the jury, but the new trial judge refused to give the entrapment instruction. The Ninth Circuit concluded an instruction on the defense was warranted, noting the unfairness that "the trial judge essentially left the jury with petitioner's confession to the offense, without ever allowing them to consider petitioner's preclusive defense." (*Id.* at p. 1098.) The Court found the failure to instruct the jury on entrapment deprived him of his due process right to present a full defense.

The *Bradley* majority went on to conclude that California's law of the case doctrine applied and prohibited the second judge from declining to give the instruction: "In the instant case, the second judge simply ignored the findings of the previous judge, without even bothering to assert that the earlier decision was erroneous or that the circumstances of the case had changed. This kind of unauthorized second-guessing is impermissibly arbitrary and can amount to a violation of Due Process." (*Bradley v. Duncan, supra*, 315 F.3d at p. 1098.)

But the *Bradley* majority misapplied California's law of the case doctrine in finding that it applied to subsequent rulings by the trial court.

> The doctrine of the law of the case is this: That where, upon an appeal, the [reviewing] court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and as here assumes, in any subsequent suit for the same cause of action, and this although in

> its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular.

(*People v. Stanley, supra*, 10 Cal.4th at p. 786, quoting *People v. Shuey* (1975) 13 Cal.3d 835, 841.)

The doctrine of the law of the case only applies after the "law" is declared in the case by an appellate court; it does not apply to prior rulings by a trial court. (*People v. Sons, supra*, 164 Cal.App.4th at p. 100; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn.3 [California courts are not bound by decisions of the lower federal courts].) Moreover, as explained above, the trial court did not act arbitrarily in allowing Waldon to be heard as to his renewed *Faretta* motion. And as explained below, the trial court properly found that Waldon was competent to waive his right to counsel and represent himself at trial. Accordingly, there was no due process violation.

Finally, Waldon contends that the alleged error in considering Waldon's *Faretta* motion is reversible per se without a showing of prejudice. (AOB 363-364.) None of the authority cited by Waldon suggests that the trial court's decision to allow him to be heard as to his own repeated request to waive counsel requires per se reversal.
In *People v. Goodwillie, supra*, 147 Cal.App.4th at page 700, the defendant at arraignment chose to represent himself. The judge who conducted the arraignment appointed advisory counsel to assist the defendant. On the day the trial was set to commence, the defendant appeared in court with his advisory counsel. The trial judge then relieved advisory counsel, over the defendant's objection. The Court of Appeal held that it was error for the second judge to relieve advisory counsel after such counsel had been appointed previously, but found that per se reversal was not appropriate, instead applying the standard articulated in *People v. Watson, supra*, 46 Cal.2d at p. 836. In *Goodwillie*, the court held that it was not reasonably

probable that the defendant would have received a more favorable verdict had the defendant had the assistance of advisory counsel at trial. (*People v. Goodwillie, supra*, 147 Cal.App.4th at p. 718.)

Had the trial court refused to consider the *Faretta* motion at all, Waldon would no doubt claim that the denial of his *Faretta* motion required reversal. (*People v. Joseph* (1983) 34 Cal.3d 936, 939 [erroneous denial of a timely motion for self-representation is reversible per se].) Instead, he claims that reversal is required because the trial court should not have granted the motion. As addressed more fully below, Waldon's waiver of counsel was knowing, intelligent, and voluntary as required under *Faretta*. Waldon's claim that he was prejudiced by the grant of his *Faretta* motion, because it resulted in his conviction and sentence without the benefit of counsel or that it resulted in the constructive denial of counsel is the equivalent of claiming that the quality of his own defense amounted to the denial of effective assistance of counsel. "Defendants who have elected self-representation may not thereafter seek reversal of their convictions on the ground that their own efforts were inadequate and amounted to a denial of effective assistance of counsel." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1226; see also *Faretta v. California, supra*, 422 U.S. at p. 834, fn. 46.)

C. There Was No Deprivation of Waldon's Right to Counsel, as He Was Represented by Counsel During the *Faretta* Proceedings

In Argument VII.D., Waldon contends the trial court violated his right to counsel under *Cronic* and the Sixth Amendment by granting his *Faretta* motion without first appointing counsel to replace attorney Russell. (AOB 368-371.) There was no violation of the right to counsel because the trial court appointed counsel for purposes of the *Faretta* hearing.

A criminal defendant is entitled to the assistance of counsel at all critical stages of the proceedings. (U.S. Const., Sixth Amend.; Cal. Const, art. I, § 15; Pen. Code, §§ 686, 859 & 987; *Gideon v. Wainwright, supra*, 372 U.S. at pp. 344-345.) As explained above, a denial of the right to the effective assistance of counsel at a critical stage of the criminal trial requires per se reversal of a defendant's conviction. (*U.S. v. Cronic, supra*, 466 U.S. at pp. 658- 659.) "In deciding whether a particular attorney should be appointed to represent an indigent defendant, a trial court considers subjective factors such as a defendant's preference for, and trust and confidence in, that attorney, as well as objective factors such as the attorney's special familiarity with the case and any efficiencies of time and expense the attorney's appointment would create." (*People v. Alexander* (2010) 49 Cal.4th 846, 871.)

In this case, the Court of Appeal ordered the trial court to relieve Russell and to appoint new lead counsel. (See 10 CT 1920-1933.) The trial court appointed attorney John Cotsirilos, who declared a conflict and was subsequently relieved. (62A RT 3-4; 6-7, 11.) At that time, Attorney Allen Bloom informed the trial court that he was willing to accept an appointment for the limited purpose of dealing with the question of Waldon's request for self-representation. (62A RT 8-9.) The trial court declined the suggestion, stating that the court intended to appoint counsel for all purposes. (62A RT 10.) Another attorney was contacted regarding the appointment, but was unavailable to represent Waldon. (64A RT 1-2.) Waldon objected to the appointment of counsel and renewed his request for pro per status. (64A RT 3.) The next day, Waldon requested a *Marsden* hearing as to Sanchez and requested that Bloom be substituted as advisory counsel, and that Bloom be appointed as counsel as to his felony capital case. (65A RT 5, 8.)

Both Bloom and attorney Mark Wolf appeared the next day to discuss Waldon's representation. (66A RT 9.) Bloom noted that the Court of

Appeal's decisions to date left open for reconsideration Waldon's motion for self-representation and that he was willing to accept an appointment to represent Waldon for the limited purpose of addressing that motion. (66A RT 9-10.) Sanchez told the trial court that he had been appointed to advise Waldon as to that motion, which was set to be heard February 10 before Judge Malkus. (66 A RT 10.) Waldon corrected Sanchez, stating that Sanchez had been appointed as advisory counsel to address his writ petitions to the Court of Appeal, but that he was asking to have Bloom appointed to represent him in presenting the motion to the trial court. (66A RT 10.) The trial court determined that it would appoint Bloom and Sanchez for purposes of the pending motion for self-representation, and if that motion was denied, Mark Wolf would be appointed to represent Waldon at trial. (66A RT 15.)

Bloom appeared for Waldon at the February 10 hearing before Judge Malkus on Waldon's motion to represent himself.

At the hearing, Bloom indicated that he was appearing on behalf of Waldon. (67A RT 1.) When the trial court asked what Bloom's status was with respect to Waldon, Bloom explained

> I'm going to state that on the record. I'm appearing for the specialized purpose regarding the motion for -- by Mr. Waldon so that he may be named his own counsel. I was appointed for that purpose, and that would be the first order of business. I won't go through the long history. The court knows better than I, but right now it is a status where they have put the question of pro per status back to the court to be decided, and Judge Revak felt that rather – we had general counsel waiting in the person of Mark Wolf.
>
> But rather than get into the same situation which caused the conflict between former counsel and Mr. Waldon ultimately leading to the district court opinion that he should be removed from the court, that special counsel should be appointed for this first order of business to proceed on the question of Mr. Waldon obtaining -- of being his own lawyer. If that motion is granted,

then he will also be requesting because it is a capital case to have second chair; and Mr. Wolf is available for that purpose. He will step into that role. If the motion is denied then Mr. Wolf will come in as general counsel.

THE COURT: Why is Mr. Wolf not here on the case now?

MR. BLOOM: Mr. Wolf was directed by the court that his task would not commence until this motion had been incurred because, frankly, the feeling was that this would be the first order of business, and his task is going to change depending upon the outcome of this motion.

(67A RT 1-1.)

On February 15, the matter was assigned to Judge Kennedy for all purposes other than law and motion matters, which were to be heard by Judge Langford. (68A RT 1.) Both Bloom and Sanchez made a special appearance on Waldon's behalf before Judge Kennedy on February 17. (69A RT 1.) Thereafter, both Bloom and Sanchez formally entered their appearance as counsel on Waldon's behalf on several occasions before the trial court. (70A RT 8-17 [March 17, 1989]; 71A RT 1-8 [March 22, 1989]; 72A RT 1-14 [April 10, 1989]; 73A RT 1-3 [April 10, 1989]; 75A RT 1-4 [April 21, 1989]; 76A RT 1-10 [appearing as "special counsel" on April 28, 1989; 77A RT 1-8 [May 31, 1989]; 79A RT 1-5; 79A-1 RT 1-9;79A-2 RT 1-2; [June 22, 1989]79A-3 RT 3-4 [June 26, 1989]; 80A RT 12 [July14, 1989]; 81A RT 25 [July 21, 1985]; 82 A RT 40 [August 18, 1989]; 83A RT 45 [September 14, 1989]; 84 A RT 52 [November 3, 1989].)

Sanchez is listed as attorney for Waldon on a March 17, 1989 order directing the jail to admit a defense psychiatric evaluator, as well as an April 3 order to allow a defense paralegal entrance to the jail. (10 CT 2086, 2093.) Bloom, as "the attorney representing the defendant," submitted a declaration in support of the order to admit psychologists to evaluate

Waldon. (10 CT 2092, 2287.) Sanchez, as Waldon's attorney, issued an April 7, 1989, subpoena seeking records from the superior court clerk. (10 CT 2094-2095.)

In an April 20, 1989 declaration regarding Waldon's challenge to Judge Kennedy, Sanchez described his status as follows: "I am not Mr. Waldon's attorney of record. I was assigned only to assist Mr. Waldon in the preparation of his pro per motion and proceedings related to that end. (11 CT 2246.) Bloom's declaration indicates that he is "an attorney licensed to practice in the State of California, and in that capacity do represent the defendant above named [Waldon] for a limited purpose." (11 CT 2247.) In a May 10, 1989 declaration seeking reimbursement for expenses incurred, Bloom indicated that he had been "appointed to represent the above named defendant in his effort to present his pro per motion" and set forth an itemized list of the time and resources expended representing Waldon. (10 CT 2290-2299.)

On June 5, 1989, Bloom filed a motion, as Waldon's attorney, asking the trial court to assign counsel to defendant's case who would take direction from defendant; or if that motion denied, to allow defendant to act as his own counsel and to appoint advisory counsel to work under defendant's direction. (11 CT 2234-2354; 12 CT 2491-2501.) At the subsequent July 21 hearing, the trial court made clear that Bloom and Sanchez were acting as counsel for Waldon for purposes of the pending *Faretta* motion. (81A RT 29.) In September 1989, the trial court reiterated that Bloom and Sanchez were representing Waldon "fully, but for a limited purpose, which is to assist the Court and the defendant in a serious matter in determining whether or not you should be allowed to proceed without counsel." (83A RT 50.) Bloom presented and argued the motion on Waldon's behalf at the November 3, 1989 hearing on the *Faretta* motion. (84A RT 52-83.)

In short, the record is clear that Waldon was represented by counsel for purposes of the *Faretta* motion and hearing. Although the trial court did not appoint counsel for all purposes, it did appoint the counsel that Waldon requested, and followed the proposal that the representation should be limited to the *Faretta* motion as requested by both Bloom and Waldon. As with his claim above that the court should not have considered the motion, Waldon's agreement and acquiescence in both the counsel appointed and the process used to appoint counsel has forfeited his claim on appeal that the court should not have appointed Bloom only for the limited purpose of hearing his motion for self-representation instead of appointing counsel for all purposes. (*People v. Reynolds, supra*, 181 Cal.App.4th at p. 1408; *People v. Williams, supra*, 43 Cal.4th at p. 629; *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 49].)

In any event, Waldon's claim is without merit, as he was represented by counsel for purposes of the *Faretta* motion, and there was no deprivation of counsel.

D. There Was No Error in Appointing Attorneys to Assist Waldon

In Argument VII.C., Waldon contends the trial court lacked discretion to appoint a second chair attorney as co-counsel to a self-represented defendant. (AOB 364-368.) The trial court retained discretion to appoint counsel to assist Waldon whether it referred to counsel as advisory counsel, co-counsel, or second chair counsel.

1. Proceedings

In addressing Waldon's request for advisory counsel, the trial court explained,

> The connected problem will be the kind of assistance, the degree of it, that will be provided, if any, for the defendant. The primary right—well, the court has no discretion if the waiver is intelligent and knowing—is to represent himself, and the Court's

discretion does come into existence regarding whether or not to appoint stand-by or advisory counsel, although the definitions and meaning of those words is somewhat muddled in the cases.

The stand-by counsel is, as my understanding, is a counsel that stand by, literally, and would not even necessarily be present with the defendant in court, let alone at counsel table, but is available to step in should the defendant change his mind and wish to proceed with counsel or be prevented from proceeding because of obstructionism and outbursts and failure to cooperate with the Court when he is functioning as his own attorney.

Advisory counsel appears to be a somewhat stronger relationship wherein the counsel does advise the defendant and is available, in effect, to assist him throughout the course of the trial based on his own legal knowledge and ability to get things done the defendant might otherwise not be able to get done because he is in custody.

(84A RT 60.)

After granting the Faretta motion, the trial court returned to the issue of whether to appoint counsel to assist Waldon in presenting his defense:

THE COURT: Now, I understand now, just so we can agree what the law is now, is that I have discretion to say no assistance, I have discretion to order that two attorneys be appointed as advisory counsel, or, since he is his own lawyer, to appoint one as advisory counsel or stand-by.

Do you agree that that's the state of the law?

MR. BLOOM: You also—I agree you have discretion in that area and I believe you have discretion in one other area. There is a difference between stand-by and advisory and second chair. Because this is a capital case, the Keenan case says that the Court has discretion in any case which is deemed to be complicated where the balance would be the District Attorney would have several attorneys working on their side and many issues could come up that the defense should have not just one counsel but a second counsel, as well.

Mr. Waldon now, as I understand it by the Court's if you haven't quite promulgated it, but, anyway, your intention is to make him lead counsel on his own case. He has two cases, one

noncapital and one capital. In the capital case, the court has a third option, namely, to name a second chair as any other lead counsel in any capital case would have the right to request and, frankly, a request that has been granted in every-single circumstance in San Diego County. By their nature, capital cases are extremely complicated, and I have yet to see a circumstance in this county where a request for second chair has ever been denied. In fact, the appointments are made automatically at the initial stages. It's just the Court automatically appoints two attorneys at the beginning.

THE COURT: When he is not pro per?

MR. BLOOM: Yes. When he is not pro per.

THE COURT: That's the State law. I am trying to get the law down. But I have discretion to say I thought I said this—no lawyer, he is on his own. The cases are very tough in this area, as you know, and I am not telling you what I am inclined to do yet, but I could say you are on your own, no lawyer, see you in trial, I can appoint two advisory counsel, which you are calling first and second chair, so, in effect, there is three lawyers; he is his own lawyer.

MR. BLOOM: No. Here is what the Court can do. Maybe we are saying the same thing. I think we are saying 90 percent the same and ten percent different. The Court has, in my opinion, discretion to say no lawyer at all. The Court has discretion to say only a stand-by lawyer, as the Court has defined it already. The Court has discretion to say, you have the right to have advisory counsel only, as the Court has defined that. And the Court has the right to say you have the right to have second chair, which is--

THE COURT: What is the difference?

MR. BLOOM: Difference between second chair-- there is a difference between second chair and advisory counsel.

THE COURT: What is it?

MR. BLOOM: And, again, I think it is a very subtle difference, but it has to do with the initial, defined status of the second chair. Advisory counsel, as I understand it, has the right only to

do all the legal research, present everything to the person, and the person himself must sign the documents and say, "I am the attorney, this person is my legal source, he is my legal background."

THE COURT: I understand. He is his law clerk.

MR. BLOOM: Where a second counsel in the chair does take the direction from the lead counsel, but technically has the right, I think, to make certain appearances if the lead counsel authorizes him to do so, sign certain documents.

THE COURT: I think what you have defined, if I may say so, and it is not a criticism, because anybody who reads all these cases realizes with the different Circuits and some Court of Appeals do and the Supreme Court, everybody is using labels in an area of law that didn't develop in an organized fashion, and what a judge in Marin County calls advisory counsel, using that, quote, term, he may mean or she may mean second attorney, and so on and so forth.

My concept—and I am not trying to create the label, some Court up north is going to create the label maybe some day—my concept when I say advisory counsel is a lawyer who is much more than a law clerk, subject to the direction of the pro per, of course. If we get a lawyer, of course, that's in that situation, the lawyer must concur in that role and may question witnesses, may argue points, but the defendant, then, has been given his right under *Faretta*, et cetera, to not have the lawyer run the show in a way that the defendant then feels he is not getting his defense presented to the jury.

But that's what I mean, the way you call it second chair. and I think—but it is nice to discuss this because I think that should be clear. So I still see it—I am not trying to make any law here, but I am a simple person and I don't understand some of these complex things that they write in other jurisdictions. You want advisory counsel or stand-by. What I call advisory, you may call second chair, but he is a lawyer, he or she has consented to work with the defendant. The defendant may say, I want you to cross-examine this witness, I want you to argue this, or whatever, so it's a concept. Stand-by is the person in the back room that, if the defendant gets ill or whatever, changes his mind, we don't have too much of a delay. So I think we are kind

of talking about the same things, but we have been trapped by the labels put on these people by different courts.

(84A RT 66-70.)

In response to attorney Bloom's characterization of Waldon's request as a request for second chair counsel, the trial court clarified saying, "I understand. So second chair is requested and, to me, that's the full, advisory counsel, if he were as much of a lawyer without being boss as you can be." (84 A RT 74.)

Bloom further explained:

MR. BLOOM: Yes, your Honor. With regards to whether or not it should be a lower advisory or the second chair, strong, advisory status, I would strongly urge the stronger, more involved person, because discovery in this case is not necessarily larger than any other capital case, it's simply four or 5,000 pages or something. I mean it is an enormous amount of material.

THE COURT: I understand what you are requesting. That's clear.

MR. BLOOM: You asked me if I wanted to put anything else on the record. The complexity of the case is what I am trying to address now. This is clearly, in my mind, at the level of Joaquin that the Supreme Court evaluated as a complex capital case, many issues, many legal issues, discovery, and I have handled three capital cases to trial and this one is as involved as any of those. Each of those were considered complex cases, and I believe in terms of factoring of whether or not Keenan comes into effect, I think the Court should exercise its discretion towards determining that a second chair or a second-chair, advisory counsel, whatever label the Court wants to put on it, should be accorded in this case.

(84A RT 75-76.)

The trial court ultimately decided to appoint two attorneys to assist Waldon:

It's obvious to me, just from the flavor of the presentations by attorneys, without my having reviewed the history of the case.

> the fact it's gone through many, many judges with complex legal issues convinces me that this is not an ordinary, first-degree, special-circumstances case, and, therefore, I am going to appoint two attorneys to assist the defendant. Whether we label them advisory, second chair, co-counsel, whatever, they will be more than law clerks; they will work with the defendant, subject to his control, because he represents himself, and that is the ruling of the Court.

(84A RT 79-80.) In appointing Sanchez and Wolf to assist Waldon, the trial court referred to them as "second-chair, advisory counsel". (85A RT 87.)

2. There was no abuse of discretion

In *Faretta v. California, supra*, 422 U.S. at pp. 820-821, the Supreme Court held that a defendant has the right to present his or her own case, and that a court may not compel a defendant to accept court-appointed counsel. *Faretta* does not entitle the defendant to the appointment of co-counsel, advisory counsel, or counsel to assist in the preparation of a defense. (*McKaskle v. Wiggins, supra*, 465 U.S. 168 ["*Faretta* does not require a trial judge to permit 'hybrid' representation."].) A defendant has no right to "hybrid representation," as the Sixth Amendment right to counsel and the right to represent oneself are mutually exclusive rights. (*People v. Moore* (2011) 51 Cal.4th 1104, 1119-1120; *People v. D'Arcy, supra*, 48 Cal.4th at p. 282; *People v. Lawley* (2002) 27 Cal.4th 102, 145; *People v. Clark, supra*, 3 Cal.4th at p. 111; *People v. Barnett, supra*,17 Cal.4th at p. 1106 [defendant has no right to be represented by counsel and to also participate in the presentation of his own case].)

Waldon contends that this Court has determined that the appointment of co-counsel to a self-represented capital defendant is improper. (AOB 367, citing *People v. Moore, supra*, 51 Cal. 4th 1104, 1122-1123.) But *Moore* established no such rule. In *Moore*, this Court reiterated that a capital defendant has no right to co-counsel under the federal or state

Constitutions or under Penal Code section 987. But as this Court explained, even though a defendant may have no right to such representation, the trial court retains discretion to appoint counsel to assist a self-represented defendant where appropriate. Such an appointment is within the discretion of the trial court and is not mandated by law. (*People v. Moore, supra*, 51 Cal.4th at pp. 1119-1120.) "Although there is no constitutional right to hybrid representation, we have long recognized that trial courts retain the discretion to permit the sharing of responsibilities between a defendant and a defense attorney when the interests of justice support such an arrangement. (*Id.* at p. 1120, citing *People v. Mattson* (1959) 51 Cal.2d 777, 797.)

"[T]he role and duties of advisory and/or standby counsel are not clearly established or defined." (*Brookner v. Superior Court* (1998) 64 Cal.App.4th 1390, 1395.) "The cases have loosely used such terms as 'cocounsel,' 'advisory counsel,' 'standby counsel,' and 'hybrid representation' to describe a multitude of situations in which both the accused and professional counsel are involved in the presentation of the defense case." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1165, fn. 14; see also *Brookner v. Superior Court, supra*, at p. 1393.)

This Court explained the different types of hybrid representation as follows:

> [B]y hybrid representation we mean one of three arrangements involving the presence of both a self-represented defendant and a defense attorney: (1) standby counsel, in which the attorney takes no active role in the defense, but attends the proceedings so as to be familiar with the case in the event that the defendant gives up or loses his or her right to self-representation; (2) advisory counsel, in which the attorney actively assists the defendant in preparing the defense case by performing tasks and providing advice pursuant to the defendant's requests, but does not participate on behalf of the defense in court proceedings; and (3) cocounsel, in which the attorney shares responsibilities with

> the defendant and actively participates in both the preparation of the defense case and its presentation to a degree acceptable to both the defendant and the attorney and permitted by the court.

(*People v. Moore, supra*, 51 Cal.4th at p. 1120, fn7.)

As *Moore* makes clear, the trial court had discretion to appoint counsel to assist Waldon, regardless of the terminology used to describe the appointment. Waldon's contention should be rejected.

XI. THE TRIAL COURT PROPERLY GRANTED WALDON'S REQUEST FOR SELF-REPRESENTATION

Waldon contends in Argument VIII. that the trial court violated his constitutional rights by granting his request for self-representation. He argues that the court erroneously found that his request was unequivocal, and that his waiver of counsel was knowing and intelligent. (AOB 372-403.) Waldon repeatedly and unequivocally sought to represent himself and his decision was made knowingly and intelligently.

A criminal defendant has the right under the Sixth and Fourteenth Amendments to the United States Constitution to waive his right to counsel and to represent himself. (*Faretta v. California, supra*, 422 U.S. 806, 819 ["[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense"].)

> A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time ... because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself.

(*People v. Koontz* (2002) 27 Cal.4th 1041, 1069.)

"A trial court must grant a defendant's request for self-representation if the defendant unequivocally asserts that right within a reasonable time

prior to the commencement of trial, and makes his request voluntarily, knowingly, and intelligently." (*People v. Lynch* (2010) 50 Cal.4th 693, 721, abrogated in part on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637–638; *People v. Windham* (1977) 19 Cal.3d 121, 128 [a trial court must grant a defendant's *Faretta* motion "upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be"].) The failure to grant a timely *Faretta* motion results in appellate reversal of a resulting judgment of conviction even if the defendant is unable to show that the ensuing trial was unfair. (*McKaskle v. Wiggins, supra*, 465 U.S. at p. 177, fn. 8.)

A. Waldon's Waiver of Counsel Was Unequivocal

In Argument VIII.B., Waldon contends his waiver of counsel was invalid because it was equivocal. (AOB 376-380.) This claim should be rejected as Waldon repeatedly and consistently made unequivocal requests to be allowed to represent himself.

To determine if a defendant's request to represent himself is unequivocal, the court must look to the totality of the defendant's words and conduct. Stating the motion clearly is not, by itself, sufficient, to determine the request is unequivocal. (*People v. Roldan* (2005) 35 Cal.4th 646, 683, disapproved on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421.)

> Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied.

(*Ibid.*, internal quotations and citations omitted.)

If a defendant in a criminal case wishes to represent himself or herself and makes an unequivocal assertion of that right within a reasonable time prior to the commencement of trial, the request must be granted. (*People v. Marshall* (1997) 15 Cal.4th 1, 20-21; *People v. Marlow* (2004) 34 Cal.4th 131, 146.)

When assessing a defendant's request to represent himself, "courts must determine whether the defendant truly desires to represent himself... Thus, an insincere request or one made under the cloud of emotion may be denied." (*People v. Tena* (2007) 156 Cal.App.4th 598, 607, internal quotations and citations omitted; *People v. Marshall, supra*, 15 Cal.4th at pp. 25-26.) "Applying these principles, courts have concluded that under some circumstances, remarks facially resembling requests for self-representation were equivocal, insincere, or the transitory product of emotion." (*People v. Tena, supra*, 156 Cal.App.4th at p. 607.)

Unlike the right to representation by counsel, the right to self-representation is waived unless a defendant articulately and unmistakably demands to proceed pro se. (*People v. Danks* (2004) 32 Cal.4th 269, 295.) A motion for self-representation "made out of a temporary whim, or out of annoyance or frustration, is not unequivocal." (*People v. Stanley* (2006) 39 Cal. 4th 913, 932.) "*Faretta's* emphasis 'on the defendant's knowing, voluntary, unequivocal, and competent invocation of the right suggests that an insincere request or one made under the cloud of emotion may be denied.'" (*People v. Danks, supra*, 32 Cal.4th at p. 295, quoting *People v. Marshall, supra*, 15 Cal.4th at p. 32.)

Waldon contends that his request to represent himself was not unequivocal because Waldon sought "a hybrid arrangement where he would be "lead counsel" assisted by "second chair counsel." (AOB 377.) This Court has found requests for self-representation to be equivocal when it is conditioned on a request for co-counsel or advisory counsel. (*People v.*

Stanley, supra, 39 Cal.4th 913 at p. 932 ["defendant's request to represent himself was not knowingly and intelligently made in that he did not fully understand or appreciate that the court would be under no further obligation to appoint counsel for him if his *Faretta* motion for self-representation was granted"]; *People v. Marlow, supra,* 34 Cal.4th at p. 147.)

Here, unlike in *Stanley* and *Marlow*, Waldon persisted in his requests to waive counsel and represent himself even after the court made clear that Waldon had no right to advisory counsel and that if Waldon chose to represent himself, the trial court was under no obligation to provide counsel to assist him. In this case, Waldon consistently and unequivocally sought to represent himself from February 1987 until November 1989 when the trial court found him competent to waive counsel.

At the hearing on his earlier *Faretta* motion before Judge Zumwalt, the trial court advised Waldon of his right to counsel and his rights and responsibilities should he choose to represent himself. Waldon indicated that he understood the rights he would be giving up should he waive his right to counsel. (45A RT 474-488.) In a written waiver, he acknowledged that if he chose to represent himself, he would be responsible for preparing and presenting his defense, and that the Court could refuse to appoint co-counsel or advisory counsel. (8 CT 1564-1570 [written waiver].)

After Waldon's counsel was relieved, Waldon filed a motion asking the trial court to "1) assign counsel to defendant's case who will take direction from defendant; or if that motion denied, 2) allow defendant to act as own counsel and appoint advisory counsel to work under defendant's direction." (11 CT 2344-2354; 12 CT 2491-2501 [motion]; 11 CT 2367-2373 [prosecution's response to motion].) Judge Langford denied the request for appointment of counsel that would be directed to follow Waldon's decisions and directions for all purposes. (78A RT 26-35.)

At the hearing on the *Faretta* motion, Judge Boyle explained that the court had discretion as to whether or not advisory counsel would be appointed. (84A RT 60.) The trial court made clear, and defense counsel agreed, that the court was under no obligation to provide advisory counsel or co-counsel to Waldon, if he chose to represent himself. (84A RT 66-70.)

In this case, Waldon repeatedly made articulate and unmistakable demands to represent himself over a period of more than two years. Because his request was unequivocal, there was no error in granting the request. (*People v. Danks, supra*, 32 Cal.4th at p. 295.)

B. Waldon Knowingly and Intelligently Waived His Right to Counsel

Waldon contends in Argument VIII.C. that his waiver of counsel was invalid because it was not knowing and intelligent. (AOB 380-403.) The record below shows that Waldon understood the risks and disadvantages of representing himself, but made a knowing and intelligent decision to do so anyway.

A criminal defendant has the right under the Sixth Amendment of the United States Constitution to conduct his own defense if he first knowingly and intelligently waives his Sixth Amendment right to the assistance of counsel. (*Faretta v. California, supra*, 422 U.S. at pp. 835-836; *People v. Blair* (2005) 36 Cal.4th 686, 708, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919.) A defendant seeking to represent himself "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (*Faretta v. California, supra*, 422 U.S. at p.835.)

No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation. (*People v. Blair, supra*, 36 Cal.4th at p. 708; *People v. Koontz* (2002) 27 Cal.4th 1041,

1070.) The test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case. (*Ibid.; People v. Lawley, supra,* 27 Cal.4th at p. 140.)

The trial court is

> not required to ensure that the defendant is aware of legal concepts such as the various burdens of proof, the rules of evidence, or the fact that the pursuit of one avenue of defense might foreclose another before the trial court can determine that a defendant has been made aware of the pitfalls of self-representation, such that he or she can make a knowing and intelligent decision whether to waive the right to counsel.

(*People v. Riggs* (2008) 44 Cal.4th 248, 277.)

Waldon's "technical legal knowledge" was irrelevant to the court's assessment of his "knowing exercise of the right to defend himself." (*Faretta v. California, supra*, 422 U.S. at p. 836].) "The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*People v. Riggs, supra,* 44 Cal. 4th at pp. 248, 276.) Thus, "[a]s long as the record as a whole shows that the defendant understood the dangers of self-representation, no particular form of warning is required." (*People v. Pinholster* (1992) 1 Cal.4th 865, 928-929; accord, *U.S. v. Lopez-Osuna* (9th Cir. 2001) 242 F.3d 1191, 1199 ["the focus should be on what the defendant understood, rather than on what the court said or understood"].)

This Court will review whether the waiver was knowing and intelligent de novo. (*People v. Marshall, supra*, 15 Cal.4th at p. 24.) In doing so, the Court will review the entire record, including the proceedings after pro per status is granted, to determine whether the waiver was

voluntary and intelligent. (*Ibid.*) A review of the record reveals that Waldon's waiver was knowing and intelligent.

At the earlier *Faretta* hearing before Judge Zumwalt, the trial court advised Waldon of his right to counsel and his rights and responsibilities should he choose to represent himself. Waldon indicated that he understood the rights he would be giving up should he waive his right to counsel. (45A RT 474-488; see also 8 CT 1564-1570 [written waiver].) Advisory counsel Sanchez testified that in his opinion based on his own interactions with Waldon, he was competent to waive counsel and to represent himself. (45A RT 495-498.)

In denying Waldon's initial motion to appoint counsel who would work under Waldon's direction, the trial court made clear that Waldon had the right to appointed counsel, or to represent himself, but that he was not entitled to the assistance of lawyers who would work under his direction. (78A RT 32-35.)

In conjunction with his subsequent *Faretta* motion, Waldon submitted a written acknowledgement and waiver as follows:

> I am the defendant in the above-entitled criminal cases. I make this acknowledgement and waiver only if my first motion (to proceed "in propria persona" with full assistance of two counsel with the restriction that counsel be prohibited from acting or speaking against the wishes of the defendant and that counsel be required to follow the directions of the defendant) has been denied.
>
> 1. I am 37 years of age. I have completed over sixteen years of school, including High School and over four years in Colleges, Universities, and technical schools.
>
> 2. I have prepared a series of Writs to various courts regarding issues in this case, primarily focusing on my right to self-representation.
>
> 3. I have been a full time criminal investigator, policeman, and legal counselor. In this capacity, I supervised, instructed, and/or

advised the accused and witnesses at over a hundred judicial hearings.

4. I am an experienced public speaker. I was an instructor at the Navy's electronic intelligence (ELINT) school in Naples, Italy and with the Navy's Combat Systems Training Unit over a period of two years. I have given over a hundred lectures on a variety of subjects before groups and at Colleges and Universities in Europe, Asia, Africa, Australia, and North America. For example, I lectured at California State University at Long Beach, and at San Francisco State University at the request of both Universities.

5. I am a voluminous reader of many legal and non legal subjects.

6. I have been advised and comprehend that I have many legal rights including, but not limited to:

a. Right to the effective assistance of a lawyer at all stages of this case, and if I cannot afford a lawyer, the court will continue to provide an appointed lawyer to represent me;

b. Right to a speedy and public trial by a jury of twelve citizens;

c. Right to use subpoenas to bring witnesses and documents to court in presenting my defense;

d. Right to see, hear, and question in court all witnesses who testify for or against me;

e. Right to testify myself at trial, or not to testify if I do not want to testify.

7. I have been advised that if I had a lead attorney to represent me, the lawyer would be trained and experienced in legal proceedings and would perform legal services for me which may include:

a. filing and arguing various motions including motions to dismiss the case, suppress evidence, requesting disqualification of assigned judges;

b. selecting a jury to try the case;

c. giving an opening statement to the jury;

d. questioning witnesses against me, and presenting and questioning witnesses for me, and presenting physical and documentary evidence;

e. responding to the prosecutor's objections;

f. arguing my side to the jury;

g. preparing legal jury instructions;

h. if I am convicted of first degree murder and at least one special circumstance is found true, then this attorney would present mitigating evidence at the penalty phase of my trial;

i. if I am convicted, moving for a new trial and arguing for leniency at sentencing.

8. I understand that if I am named lead counsel I will not have the benefit of a lead counsel to do all the forementioned things.

9. I understand that I must follow all the rules of law governing jury selection, presentation of evidence, objections, arguments, etc., even though I have had no formal legal training as an attorney.

10. I have been advised that the prosecution is represented by a lawyer, who is trained and experienced in legal proceedings and that he will not help me in any way and that he is my adversary who will be attempting to gain my conviction and to gain a verdict ordering my death.

11. I have been advised that the prosecution lawyer's experience and training may give him a great advantage over me.

12. I have been advised that I will remain in jail custody and that this may impair my ability to investigate, research, and prepare my defense.

13. I have been advised that if I act in a disorderly or disruptive manner in court, the judge may take away my right to represent

myself and may require that an attorney take over as lead counsel.

14. I have been advised that statistically a person who represents himself is making the likelihood of his conviction and punishment greater.

15. I have been advised that if I am convicted any complaint on my appeal that I did not effectively represent myself will be denied if the appellate courts rule in accordance with the current state of the law.

16. I have received a copy of the charging document and I have read and comprehend it.

17. I have been advised of the possible penalties in this case include imprisonment for life without the possibility of parole, or death by execution in the gas chamber.

If my aforementioned first request has been denied, I hereby waive and give up my constitutional right to have a lead counsel appointed on my behalf.

I make this waiver freely and voluntarily. I have not been promised any benefit in exchange for this waiver, nor have I been threatened, or coerced to make this waiver.

I am in complete possession and control of my mental faculties, and I am not acting under the influence of any drug.

(12 CT 2404-2408.)

At the hearing on the motion, the trial court explained its understanding of the pending motion, and admonished Waldon as follows:

[COURT]: Just summarizing here the law, which I am sure counsel is well aware of, and I will give you after my preliminaries a chance for each side to assist me by making whatever comments you deem appropriate, the law is very clear. The only issue before me, the matter being timely, on the motion to represent himself, the only issue is whether the defendant's making an intelligent and knowing waiver of his right to counsel. The wisdom of the move is absolutely irrelevant.

The connected problem will be the kind of assistance, the degree of it, that will be provided, if any, for the defendant. The primary right -- well, the court has no discretion if the waiver is intelligent and knowing – is to represent himself, and the Court's discretion does come into existence regarding whether or not to appoint stand-by or advisory counsel, although the definitions and meaning of those words is somewhat muddled in the cases.

The stand-by counsel is, as my understanding, is a counsel that stand by, literally, and would not even necessarily be present with the defendant in court, let alone at counsel table, but is available to step in should the defendant change his mind and wish to proceed with counsel or be prevented from proceeding because of obstructionism and outbursts and failure to cooperate with the Court when he is functioning as his own attorney.

Advisory counsel appears to be a somewhat stronger relationship wherein the counsel does advise the defendant and is available, in effect, to assist him throughout the course of the trial based on his own legal knowledge and ability to get things done the defendant might otherwise not be able to get done because he is in custody.

I think it's become abundantly clear to Mr. Waldon that, if allowed to represent himself, the trial will proceed without further delay and that his pro per status is not an excuse to get continuances or further delays from the Court, and he is held to a very high standard as his own attorney. The case will move along and his own ignorance of the law or procedural difficulties will not be an excuse for delay.

That's one of the prices he pays to exercise this right, which the court has made clear that he has, to not allow the government to insert an attorney between him and the People. It's very clear -- everybody in the business knows it -- that self-representation is consistently, if not always, a detriment to the defendant's preparation of his own defense.

Do you understand that that's our opinion, Mr.Waldon?

THE DEFENDANT: Yes, your Honor.

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

You understand that?

THE DEFENDANT: Yes, your Honor.

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

Do you understand that?

THE DEFENDANT: Yes, your Honor.

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

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you agree to do that?

THE DEFENDANT: Yes, your Honor.

(84A RT 59-62.)

Here, the record shows that Waldon understood his right to be represented by counsel and chose to represent himself with an

understanding of the nature and seriousness of the charged crimes and the potential penalties, as well as the risks involved in representing himself. Waldon acknowledged in writing that he understood that he had a right to representation by counsel and that if he was allowed to represent himself he would not have the benefit of "lead counsel" to prepare and present his defense. Waldon acknowledged that he would be held to the same standards as an attorney, that the prosecutor's training and experience may be an advantage, and that being in custody might impair his ability to prepare for trial. He acknowledged that any complaint of ineffective representation would be denied on appeal. He acknowledged that he had been advised that the possible penalties included life without parole or death. (12 CT 2404-2408.)

The trial court explained that it had discretion whether or not to appoint advisory counsel. The court admonished Waldon that self-representation was usually to the defendant's detriment. He reminded Waldon that he would be subject to the same rules and limitations as an attorney and that the prosecutor had far more experience in practicing law. The record amply demonstrates that the trial court granted Waldon's request to represent himself based on a knowing and voluntary waiver of the right to counsel with full appreciation of the risks and consequences involved.

Waldon further contends that any error in advising him regarding his waiver of counsel should result in automatic reversal. (AOB 401-404.) Even assuming that the court's advisal was defective, any error was harmless beyond a reasonable doubt.

In discussing whether a defective *Faretta* waiver is reversible per se, this Court noted in *People v. Burgener* that the United States Supreme Court "has stated somewhat cryptically that the right to be represented by counsel, 'as with most constitutional rights, [is] subject to harmless-error

analysis . . unless the deprivation, by its very nature, cannot be harmless.'" (*People v. Burgener* (2009) 46 Cal.4th 231, 244, quoting *Rushen v. Spain* (1983) 464 U.S. 114, 119, fn.2 [104 S.Ct. 453, 78 L.Ed.2d 267] (per curiam).) Courts in this state and across the country remain divided on the issue of whether a defective *Faretta* warning can be subject to harmless error analysis. (*People v. Burgener, supra*, 46 Cal.4th at pp. 244-245.)

In any event, even under the standard set forth in *Chapman v. California, supra*, 386 U.S. at p. 24, any error was harmless beyond a reasonable doubt because "[t]he constitutional error in the present case had no effect on the decision to proceed in propria persona and thoughtful observers of the justice system would honestly question the intelligence and sensibility of an automatic reversal rule in such circumstances." (*People v. Wilder* (1995) 35 Cal.App.4th 489, 503.)

Waldon did not want to be represented by counsel, and he made that desire known to the court at a relatively early stage of the proceedings. He was thoroughly advised by different judges and advisory counsel regarding the substantial pitfalls and consequences of proceeding without counsel. Having been warned and advised, he consistently opted for self-representation. Nothing in the record suggests that Waldon would have agreed to proceed with counsel had Judge Boyle advised him in more detail regarding the disadvantages of self-representation. A recitation of the specific advisements that Waldon now contends should have been given would have led to the same result—he would have elected to represent himself. Consequently, any inadequacy in the advisements that were provided Waldon was harmless beyond a reasonable doubt.

XII. THE TRIAL COURT DID NOT ERR IN ITS CONSIDERATION OF THE *FARETTA* MOTION OR IN FINDING WALDON COMPETENT TO WAIVE COUNSEL

In Argument IX, Waldon claims the trial court erred in: (1) agreeing to a defense request that it limit its consideration of the *Faretta* motion to the evidence presented in support of the motion; (2) failing to require a psychiatric examination before granting the motion; and (3) finding Waldon competent to waive counsel. (AOB 404-445.) The trial court properly considered the motion, was not required to order a psychiatric examination without evidence of incompetency, and properly found Waldon competent to waive counsel in light of the previous competency finding and the evidence presented in support of the motion.

A. The trial Court Did Not Err in Agreeing to Review Only Materials Submitted by Waldon

Waldon claims in Argument IX.B. that the trial court erred in agreeing to review only the materials submitted by the defense in support of the second *Faretta* motion. (AOB 404-406.) Because Waldon specifically requested that the court not review the prior proceedings in this case, any error was invited and his claim is forfeited on appeal. Moreover, the evidence presented at the earlier proceedings had only limited relevance to Waldon's competency to waive counsel more than two years later. The trial court properly relied on the evidence submitted in support of the motion, as well as its own observations, in finding Waldon was competent to waive counsel

After the matter was assigned to Judge Boyle (79A-2 RT 1-2), defense counsel Bloom and Waldon both requested that the court "limit its review to the pending motion. The review of prior materials, he thinks, we believe, could possibly be prejudicial." The court granted the request. (79A-3 RT 9.) At a subsequent status conference, the trial court indicated

that at request of Waldon and his counsel he had not reviewed the earlier history of the case. (80A RT 15-16.)

Here, the defense, for tactical reasons, asked the court to limit its review to the current motion and to not review the earlier proceedings. Thus, any error was invited. (*People v. Williams, supra*, 43 Cal.4th at p. 629; *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 49.) Because the defense requested the trial court follow this procedure, any resulting error has been forfeited on appeal. (*People v. Reynolds, supra*, 181 Cal.App.4th at p. 1408.)

Moreover, the evidence submitted in support of the earlier motion was of limited relevance to determining his current competency to waive counsel. More than two years had passed since the earlier psychological evaluations, and Waldon had refused to cooperate with the appointed evaluators.

In the context of competency to stand trial, this Court has made clear that the focus of a competency evaluation is the defendant's present mental state. "Evidence that merely raises a suspicion that the defendant lacks present sanity or competence but does not disclose a present inability because of mental illness to participate rationally in the trial is not deemed 'substantial'evidence requiring a competence hearing." (*People v. Deere* (1985) 41 Cal.3d 353, 358, disapproved on other grounds in *People v. Bloom, supra*, 48 Cal.3d at p. 1228, fn. 9; see *People v. Young* (2005) 34 Cal.4th 1149, 1217 [substantial evidence "if psychiatrist or qualified psychologist... [states] in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense,"]; *People v. Hale* (1988) 44 Cal.3d 531, 539 ["[When] defendant has come forward with substantial evidence of present mental incompetence, he is entitled to a section 1368 hearing as a matter of right

under *Pate v. Robinson, supra*, [1966] 383 U.S. 375."]; see also *People v. Kelly* (1992) 1 Cal.4th 495, 543 ["The testimony defendant now cites did not specifically address defendant's present competency ..."]; *People v. Masterson* (1994) 8 Cal.4th 965, 971 ["The sole purpose of a competency proceeding is to determine the defendant's present mental competence..."].)

"The trial court possesses much discretion when it comes to [granting or] terminating a defendant's right to self-representation and the exercise of that discretion 'will not be disturbed in the absence of a strong showing of clear abuse.' [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 735.) Whether a defendant was competent to waive counsel and represent himself is reviewed in light of facts known at the time of the court's ruling, and will not be disturbed on appeal absent an abuse of discretion. (*People v. Clark, supra*, 3 Cal.4th at p. 107; *People v. Teron* (1979) 23 Cal.3d 103, 114, disapproved on another ground in *People v. Chadd* (1981) 28 Cal.3d 739, 750, fn. 7.)

Dr. Ernest Giraldi, a psychiatrist, interviewed Waldon in June 1989 and concluded that he was competent to waive counsel. (38 RT 8237-8243.) Psychologist Ricardo Weinstein also examined Waldon in April 1989 and also concluded that Waldon was competent to waive counsel. (38 CT 8244-8249.) He concluded that Waldon was "an intelligent man who is clearly aware of the consequences of his choice," (38 CT 8249.) He found no indication of major psychopathology and no possibility of organic brain damage. He concluded that "there is no impediment in his psychological capacities to prevent him from representing himself." (38 CT 8249.) Waldon also submitted affidavits or declarations from several lay witnesses as well as the testimony from witnesses at the earlier *Faretta* hearing who expressed their opinions that Waldon was competent to represent himself. (84A RT 55-57; 38 CT 8230-8293; 12 CT 2507-2520; 2521-2531.) The

trial court did not err in relying on this evidence, as well as its own observations, in finding Waldon competent to waive counsel.

B. The Trial Court Did Not Err in Granting the Motion for Self-Representation Without Further Psychiatric Evaluation

In Argument IX.C., Waldon contends that because his competency was in doubt, the trial court erred in granting his motion for self-representation without first ordering a psychiatric evaluation to ensure that he was competent to waive counsel. (AOB 406-425.) A competency evaluation was not required because there was no evidence that Waldon was incompetent to waive counsel.

"[A] court is [not] required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence. [Citations.]" (*Godinez v. Moran, supra*, 509 U.S. at p. 401, fn. 13.) A psychiatric examination is not required if it appears that defendant's self-representation election is knowing and intelligent. (See *People v. Zatko* (1978) 80 Cal.App.3d 534, 541, 542; *People v. Teron, supra*, 23 Cal.3d at p. 103 [no abuse of discretion in granting *Faretta* motion without referral for psychiatric examination, where nothing in record indicated lack of mental capacity to make voluntary and knowing waiver]; *People v. Gallego* (1990) 52 Cal.3d 115, 162, [trial court is not required to order hearing on defendant's competence to stand trial if there is no substantial evidence of incompetence].)

In this case, Waldon had already been found competent to stand trial. Nothing in the record suggests Waldon was mentally incapable of understanding the nature of the charges against him or the nature of the rights he asked to waive. He answered questions appropriately and

indicated to the court that he was familiar with the legal system and the role of the defense attorney. Waldon suggests that his claims that his desire for self-representation were mandated by his religious beliefs should have been considered in determining whether he was competent to waive counsel. (AOB 424-425.) "More is required than just bizarre actions or statements by the defendant to raise a doubt of competency." (*People v. Marshall, supra,* 15 Cal.4th at p. 33.) Where there is no indication of mental illness, a trial court does not err by failing to order a psychiatric examination. (*People v. Teron, supra*, 23 Cal.3d 103, 114.)

C. The Trial Court Did Not Err in Finding Waldon Competent to Waive Counsel

In Argument IX.D.[14], Waldon claims that when determining his competence to waive counsel, the trial court should have applied a higher standard than that required for competence to stand trial, relying primarily on *Indiana v. Edwards* (2008) 554 U.S. 164, 171 [171 L.Ed.2d 345, 353], and this Court's recent decision in *People v. Johnson* (2012) 53 Cal.4th 519. (AOB 425-444.) In granting Waldon's request to represent himself, the trial court did not err, under either the law at the time of his trial, or under *Edwards* and *Johnson.*

In this case, a jury found Waldon to be competent to stand trial. Thereafter, the trial court found that Waldon was competent to waive his right to counsel. (84A RT 64.) Waldon argues that the trial court erred failing to exercise its discretion to deny self-representation under *Edwards* and *Johnson* even if he was competent to stand trial. He suggests that the

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[14] In Argument IX.E., Waldon further suggests that the trial court erred in finding him competent to represent himself while his competence to stand trial remained in doubt. (AOB 445.) His concerns regarding the competency proceedings and the jury's finding of competency are addressed in Arguments II. through IX., above.

judgment must be reversed and the matter remanded to the trial court in order to assess whether he was competent to represent himself under the *Edwards* standard. (AOB 444.)

As set forth above, in *Faretta v. California, supra*, 422 U.S. 806, the United States Supreme Court held the Sixth Amendment to the United States Constitution gives criminal defendants the right to represent themselves. Until *Faretta*, the law in California had been that a criminal defendant had no constitutional or statutory right to self-representation, except, in noncapital cases, the trial court had discretion to grant a defendant's request for self-representation. (*People v. Sharp* (1972) 7 Cal.3d 448, 459, 461, 463-464.)

"In the wake of *Faretta's* strong constitutional statement, California courts tended to view the federal self-representation right as absolute, assuming a valid waiver of counsel." (*People v. Taylor, supra,* 47 Cal.4th at p. 872.) Thus, a trial court was required to grant a defendant's request for self-representation if the defendant voluntarily and intelligently elected to do so, even if the defendant, though competent to stand trial, was not competent to serve as his or her own attorney. (*Id.* at pp. 872-873.)

In *Godinez v. Moran, supra*, 509 U.S. 389, the United States Supreme Court addressed whether competence for purposes of *Faretta* requests are to be assessed under the same test as competence to stand trial, as established in *Dusky v. U.S., supra*, 362 U.S. 402. The issue in that case was whether, as a matter of due process, a defendant who sought to waive his right to counsel and enter a plea of guilty had to be "more competent" than he needed to be just to stand trial. The court ruled there was no such due process requirement. It "reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard." (*Godinez v. Moran, supra*, 509 U.S. at p. 398.) It explained that while states are free to

adopt competency standards that are more elaborate than the standard set forth in *Dusky*, the Due Process Clause does not require them to do so. (*Godinez v. Moran, supra*, 509 U.S. at p. 402.) The court's language left open the question of whether, under the Sixth Amendment, as opposed to the Due Process Clause, a defendant seeking to represent himself at trial could be held to a higher competency standard than that set forth in *Dusky* without violating *Faretta*.

In 2008, in *Indiana v. Edwards, supra*, 554 U.S. 164, the Supreme Court answered that question. It held that a trial court may require a defendant who meets *Dusky's* mental competence standard to be represented by counsel where the court believes the defendant lacks the mental competency required to conduct the trial proceedings himself, without violating the Sixth Amendment. (*Ibid.*)

Ultimately, the *Edwards* court concluded that the Sixth Amendment does not prohibit states from compelling representation by counsel for gray-area defendants, i.e. those defendants who are competent to stand trial, yet suffer from a severe mental illness to the point where they are not competent to conduct trial proceedings themselves.

> [T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States* (1960) 362 U.S. 402] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

(*Indiana v. Edwards, supra*, 554 U.S. at pp. 177-178.)

The Sixth Amendment thus allows, but does not require, states to set differing standards to assess competency to stand trial and the ability to represent oneself. (*Indiana v. Edwards, supra*, 554 U.S. at p. 178.)

In 2009, in *People v. Taylor*, this Court upheld a trial court's decision to grant a defendant's request for self-representation. As this Court explained, *Edwards* did not hold that due process requires a higher standard of mental competence for self-representation than is required to stand trial with counsel. Rather, "[t]he *Edwards* court held only that states may, without running afoul of *Faretta*, impose a higher standard...." (*People v. Taylor, supra*, 47 Cal.4th at pp. 877-878.) Because *Edwards* merely allows, but does not require this higher standard, "*Edwards* thus does not support a claim of federal constitutional error in a case like the present one, in which defendant's request to represent himself was granted." (*Id.* at p. 878.) The *Taylor* court went on to reject the argument that the trial court should have applied a higher standard required for self-representation than the level of competence needed to stand trial. (*People v. Taylor, supra*, 47 Cal.4th at p. 879.) The Court explained, "We reject the claim of error because, at the time of defendant's trial, state law provided the trial court with no test of mental competence to apply other than the *Dusky* standard of competence to stand trial [citation], under which defendant had already been found competent." (*Ibid.*)

Here, as in *Taylor*, at the time of Waldon's trial, California state law did not provide a standard of competence for self-representation different from the standard required to stand trial. As Waldon had been found competent to stand trial, he likewise met the competency standard to represent himself at trial.

In *People v. Johnson*, a case decided more than twenty years after Waldon's motion to represent himself was granted, this Court addressed "whether California courts may accept *Edwards's* invitation and deny self-representation to gray-area defendants." (*People v. Johnson, supra*, 53 Cal.4th at p. 527.) This Court concluded that state trial courts have discretion to deny self-representation to such defendants. (*Id.* at p. 528.)

The Court explained the standard to be applied as follows:

> [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.

(*People v. Johnson, supra*, 53 Cal.4th at p. 530.)

Waldon argues that the case should be remanded to allow the trial court to evaluate his competence to represent himself under this heightened standard. (AOB 444.) *Johnson*, however, was decided after Waldon was tried and therefore does not apply retroactively to him. Changes in the law through legislation or court opinion which govern the conduct of trials apply prospectively only. (*People v. Johnson, supra*, 53 Cal.4th at p. 531.) However, even under the *Johnson* standard for competence, the trial court did not err by granting Waldon's request for self-representation. "As with other determinations regarding self-representation, [this Court] must defer largely to the trial court's discretion." (*People v. Johnson, supra*, 53 Cal.4th at p. 531.) "The trial court's determination regarding a defendant's competence must be upheld if supported by substantial evidence." (*Ibid.*) As the record below makes clear, Waldon was not a "gray-area defendant" who suffered from a severe mental illness that prevented him from representing himself. Waldon actively participated in his own trial over several months and represented himself competently. He submitted and argued pretrial motions, cross-examined prosecution witnesses, presented his own defense witnesses and exhibits, and made opening and closing arguments. The record is clear that Waldon was able to carry out the basic tasks needed to present his defense without the aid of counsel. (*People v. Johnson, supra*, 53 Cal.4th at p. 530.)

XIII. WALDON MAY NOT DIRECTLY CHALLENGE THE COURT OF APPEAL'S FEBRUARY 1990 DISMISSAL OF HIS WRIT PETITION; HIS REMEDY IS LIMITED TO RAISING THE UNDERLYING ISSUES ON DIRECT APPEAL

In Argument X., Waldon claims that the Court of Appeal erred in dismissing his writ challenging the jury's finding of competency. (AOB 446-454.) Waldon has failed to preserve this this claim by failing to seek rehearing or review of the Court of Appeal's 1990 decision. More importantly, he was not entitled to writ relief because he has an adequate remedy on direct appeal. To the extent the claims raised in the writ petition mirror those now raised on direct appeal, those claims are without merit. (See Arguments II. through IX., above.)

In January 1988, Waldon's defense counsel filed a petition for writ of mandate in the Court of Appeal, case no. D007429, seeking review of the trial court's denial of the motions for judgment notwithstanding the judgment and for a new trial as to the competency proceedings. (56 CT 11918-11996.) After the Court of Appeal denied the petition (7 CT 1398; 55 CT 11702), Waldon filed a petition for review (55 CT 11638-11703). In May 1988, this Court granted the petition for review, case no. S004854, and directed the Court of Appeal to issue an alternative writ to be heard in that court. (7 CT 1399; 73 CT 15745; 73 CT 15747.) The Court of Appeal issued the alternative writ and order to show cause and set a briefing schedule. (7 CT 1399.)

While the matter was pending, Russell was relieved as counsel. The Court of Appeal's September 1988 order directing the trial court to relieve Russell as counsel also provided that Waldon's new counsel was to have additional time to consult with Waldon and to file additional briefing in the competency writ proceedings if necessary. (10 CT 1920-1933.) In November 1989, Waldon was given permission to represent himself at trial. (See Argument X.A., *supra.*)

In January 1990, in response to Waldon's request for an extension of time to file additional briefing (see 12 CT 2628-2629), the Court of Appeal noted that because Waldon had been found competent to represent himself, it was unclear to the court why he would proceed on the appeal of competency finding filed by his previous counsel. The Court of Appeal informed Waldon that no response was necessary and that he had 15 days to either dismiss the appeal or to file additional briefing. (7 CT 1391.) On January 25, and again on February 13, Waldon requested additional time to file supplemental briefing. (13 CT 2756-2759.) Instead, on February 24, 1990, the Court of Appeal discharged the writ and dismissed the petition in D007429, concluding that the trial court's finding that Waldon was competent to represent himself rendered the petition challenging the competency finding moot. (55 CT 11702; 62 CT 13783.)

The procedure for seeking review of a court of appeal decision denying a writ of mandate or prohibition is to petition for rehearing in that court, and then, petition for review to the California Supreme Court. (*Barbee v. Appellate Department of Superior Court in and for Los Angeles County* (1930) 209 Cal. 435.) By failing to seek rehearing or review of the Court of Appeal's decision denying the writ, Waldon has failed to preserve his challenge to the the Court of Appeal's decision. (See Cal. Rules of Court, rule 8.490 [finality of order denying petition for writ of mandate or prohibition].)

Waldon's remaining remedy is to challenge the competency finding on direct appeal, as he has done in Arguments I. through X., *supra*. And as explained in detail above, Waldon's claims lack merit because the competency proceedings comported with due process and because the record as a whole makes clear that he was in fact competent to stand trial.

XIV. WALDON WAS NOT ENTITLED TO SEPARATE COUNSEL TO REPRESENT HIM IN PRETRIAL WRIT PROCEEDINGS IN THE COURT OF APPEAL

Waldon claims in Argument XI. that allowing him to represent himself in the writ proceedings challenging the competency finding violated his right to due process and his right to counsel under the federal constitution and state law. (AOB 455-474.) He provides no authority for his assertion that the right to counsel extends to pretrial writ proceedings after a finding of competency has been made and counsel has been waived.

A criminal defendant has a federal and state constitutional right to be represented by counsel at all critical stages of a criminal trial. (U.S. Const., Sixth Amend.; Cal. Const, art. I, § 15; Pen. Code, §§ 686, 859 & 987; *Gideon v. Wainwright, supra*, 372 U.S. at pp. 344-345.) At the same time, a criminal defendant has the right under the Sixth and Fourteenth Amendments to the United States Constitution to waive his right to counsel and to represent himself. (*Faretta v. California, supra*, 422 U.S. 806, 819; *People v. Koontz, supra*, 27 Cal.4th 1041, 1069.)

In *People v. Lightsey*, this Court held that a criminal defendant had a statutory right under Penal Code section 1368 to representation during competency proceedings and that a defendant may not waive this right and represent himself during competency proceedings. (*Id.* at pp. 690-711.) The authorities cited by Waldon provide no basis for extending the holding in *Lightsey* to require that even after a criminal defendant has been found competent under Penal Code section 1368, he is entitled to and must be provided counsel to represent him in writ proceedings challenging that competency finding.

"In California, an indigent prisoner who has been convicted of a capital crime and sentenced to death has a statutory right to the assistance of court-appointed counsel not only on appeal (*Douglas v. California*

(1963) 372 U.S. 353, 356-357 [83 S.Ct. 814, 9 L.Ed.2d 811]; § 1240) but also in a habeas corpus proceeding (Gov. Code, § 68662)." (*In re Morgan* (2010) 50 Cal.4th 932, 937.)

With respect to Waldon's federal and state right to counsel, Waldon has received everything he was entitled to. He was appointed counsel to represent him in the criminal proceedings. He was represented by counsel throughout the competency proceedings. Only after he was found competent to stand trial was he allowed to waive his right to counsel and to represent himself. Waldon never sought and was not entitled to the appointment of separate counsel to pursue his petition for writ of mandate challenging the competency determination.

Waldon alleges that he had no right to self-representation on the "appeal" of his competency determination. (AOB 471-473.) The United States Supreme Court has recognized that a criminal defendant does not have the right to represent himself on appeal. (*Martinez v. Court of Appeal of California, Fourth Appellate District* (2000) 528 U.S. 152, 163-164 [120 S.Ct. 684, 145 L.Ed.2d 597].) "[T]he sole constitutional right to self-representation derives from the Sixth Amendment, which pertains strictly to the basic rights that an accused enjoys in defending against a criminal prosecution and does not extend beyond the point of conviction." (*In re Barnett* (2003) 31 Cal.4th 466, 473.) But a pretrial writ petition purporting to challenge the competency finding is not an appeal. (See Argument XIII., above.) Moreover, the pretrial writ proceedings occurred well before his conviction, at a time where his Sixth Amendment constitutional right to represent himself was still applicable. Waldon cites no authority that supports the proposition that a criminal defendant is entitled to and must be appointed separate counsel to represent him or her in proceedings involving pre-conviction petitions for writs of mandamus or prohibition.

XV. THERE WAS NO BASIS FOR JUDGE EDWARDS'S ORDER APPOINTING MENTAL HEALTH EXPERTS TO EXAMINE WALDON AS TO HIS COMPETENCE TO REPRESENT HIMSELF

Waldon next contends in Argument XII., that the Court of Appeal erred in vacating the order of another superior court judge to reappoint mental health experts to determine his competence to represent himself. (AOB 475-502.) First, because Waldon himself requested that the order be vacated, he has forfeited any claim related to the alleged error. Second, because he did not seek rehearing or review of the Court of Appeal decision, it is not preserved. And finally, the Court of Appeal correctly determined that Judge Edwards abused his discretion in ordering the mental health examination because there had been no change in circumstances or new evidence warranting reconsideration of the earlier competency finding.

In January 1990, after Judge Boyle resigned from the bench, the matter was reassigned to Judge Gill for all purposes. (90A RT 1; 15 CT 3185.) In July 1990, Judge Edwards was assigned to hear Waldon's discovery motion seeking the discovery of files in his former defense counsel's possession. (See 2 RT 243-244; 15 CT 3185.) On August 30, 1990, Judge Edwards noted his doubts as to Waldon's competency to represent himself and indicated that he would appoint two new psychiatrists to examine Waldon. (2 RT 286; 25 CT 5566-5567.) On September 7, the prosecution moved for reconsideration of the order appointing experts. The court denied the motion and appointed counsel to represent Waldon. (4 RT 353; 14 CT 3034-3046; 25 CT 5569.)

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

16075.) The Court of Appeal granted the petitions and directed the lower court to vacate its order requiring mental examinations and appointing counsel. (15 CT 3182-3190.) The Court of Appeal found that Judge Edwards had abused his discretion in reopening the issue of Waldon's self-representation based on his review of reports and hearings conducted more than two years earlier and found that there was no basis to order the examinations. (15 CT 3186-3190.)

As explained above, "[a] party forfeits his or her right to attack error by implicitly agreeing or acquiescing at trial to the procedure objected to on appeal." (*People v. Reynolds, supra*, 181 Cal.App.4th at p. 1408.) Because the Court of Appeal vacated the order at Waldon's request, he may not now challenge the order on appeal. (See *People v. Williams, supra*, 43 Cal.4th at p. 629; *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 49.) Similarly, by failing to seek reconsideration or review of the order, he has failed to preserve the issue for review. (See Cal. Rules of Court, rule 8.490.)

In any event, the Court of Appeal did not err in vacating the order appointing mental health examiners because the order was an abuse of discretion. In general, a trial judge cannot reconsider or overrule an order of another trial judge. (*People v. Riva, supra*, 112 Cal.App.4th 981, 991.) Here, as the Court of Appeal explained, "[q]uestions were raised in Judge Edwards mind only upon his examining reports considered by Judge Zumwalt two and one-half years earlier." (15 CT 3187.) If a competency hearing has already been held and the defendant has been found competent to stand trial, a second competency hearing is not required unless the court is presented with a substantial change in circumstances or new evidence casting serious doubt on the validity of the prior finding. (*People v. Huggins, supra,* 38 Cal.4th at p. 220; *People v. Weaver* (2001) 26 Cal.4th

876, 954; *People v. Medina* (1995) 11 Cal.4th 694, 734; *People v. Jones* (1991) 53 Cal.3d 1115, 1153.)

The Court of Appeal noted that Judge Boyle's subsequent grant of the *Faretta* motion was made only after an extensive hearing and was based on reports from mental health experts and affidavits from numerous people attesting to Waldon's competency. Moreover, the Court explained that Waldon had represented himself for almost ten months at the time of Judge Edward's order without raising a question as to his competence to represent himself. The Court of Appeal concluded that the earlier reports and the trial court's concerns provided no basis to order the mental health examinations. (15 CT 3187-3188.)

In this case, it was not error to vacate the order for mental health examinations because there was no substantial change in circumstances or new evidence casting serious doubt on the validity of the prior finding of competence.

PART THREE: GUILT PHASE/PENALTY PHASE ISSUES

XVI. CALIFORNIA'S DEATH QUALIFICATION PROCESS IS CONSTITUTIONAL

Waldon contends in Argument XIII., that California's death qualification procedure violated his constitutional rights. He asserts that excusing prospective jurors who stated that they would not select the death penalty was error requiring reversal of the conviction and sentence. (AOB 503-532.) This Court has repeatedly held that the death qualification process is constitutional, and Waldon provides no basis for reconsidering those decisions.

"A "death qualified" jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that would 'prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their]

instructions and [their] oath.'" (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 408, fn. 6 [107 S.Ct. 2906, 97 L.Ed.2d 336]; quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; see also *People v. Blair, supra*, 36 Cal.4th at p. 741.) "Death qualification" in a capital case is thus an inquiry into whether the prospective juror's views and attitudes would interfere with his or her ability to """faithfully and impartially apply the law in the case."""" (*People v. Abilez, supra,* 41 Cal.4th at p. 498.)

Both this court and the United States Supreme Court have found that death qualification of jurors and the removal of prospective jurors that would vote for either life or death under all circumstances do not violate any constitutional right to an impartial jury. (*People v. Taylor, supra,* 48 Cal.4th at p. 602, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 176-177 [106 S.Ct. 1758, 90 L.Ed. 2d 137], and *People v. Ashmus* (1991) 54 Cal.3d 932, 956-957 overruled on other grounds in *People v. Yeoman* (203) 31 Cal.4th 93, 117.)

Waldon claims that the viability of this Court's decision in *Hovey v. Superior Court* (1980) 28 Cal.3d 1, should be questioned given the availability of more recent social science studies of death-qualified juries. First, this Court has rejected nearly identical claims supported by the same or similar empirical studies. (See *People v. Howard* (2010) 51 Cal.4th 15, 26, citing *People v. Jennings* (2010) 50 Cal.4th 616, 687-688.) As the Court has found, the death qualification process does not result in juries that are biased against the defense, does not undermine the function of a jury as a "cross-section of the community participating in the administration of justice" (see *ibid.*; see also *Buchanan v. Kentucky, supra,* 483 U.S. at pp. 415-416), and does not produce a "conviction prone" jury or one that is "racially biased" in any way. (See *People v. Carrera* (1989) 49 Cal.3d 291, 333; accord *People v. Gurule, supra*, 28 Cal.4th at p. 597;

see *People v. Johnson* (1989) 47 Cal.3d 1194, 1214-1215.) Moreover, as the Court has noted, any views to the contrary would directly conflict with firmly established case law from the United States Supreme Court that have not been overruled. (See *People v. Howard, supra*, 51 Cal.4th at p. 26, citing *Lockhart v. McCree, supra*, 476 U.S. at p. 174-176; see also *People v. Steele* (2002) 27 Cal.4th 1230, 1243.)

As this Court recently explained, "The *Hovey* court's concerns about the state of the statistical evidence have been superseded by subsequent decisions finding '[t]he exclusion of those categorically opposed to the death penalty at the guilt phase of the trial does not offend either the United States Constitution [] or the California Constitution [].' (*People v. Mills, supra,* 48 Cal.4th at p. 172, internal citations omitted.)

Any suggestion that Waldon was entitled to a separate jury to try his penalty phase is also without merit. "Section 190.4, subdivision (c), expresses the Legislature's long-standing preference for a single jury to decide both guilt and penalty, and this preference does not violate a capital defendant's federal or state rights to due process, to an impartial jury, or to a reliable death judgment." (*People v. Davis* (2009) 46 Cal.4th 539, 626.) "This court and the United States Supreme Court have repeatedly rejected the claim that separate juries are required because jurors who survive the jury selection process in death penalty cases are more likely to convict a defendant. [Citations.]" (*Ibid.*)

Waldon's claim that death qualification of jurors violates his equal protection rights is without merit. "[C]apital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez* (2005) 37 Cal.4th 547, 590, citing *People v. Johnson* (1992) 3 Cal.4th 1183, 1242–1243; see also *People v. Valdez* (2012) 55 Cal.4th 82, 180.)

XVII. THE COURT WAS NOT REQUIRED TO CONDUCT A SECOND COMPETENCY HEARING

In Argument XV., Waldon contends the trial court's failure to hold a second competency hearing to further examine his competency to stand trial requires reversal of the judgment. (AOB 628-679.) A jury found Waldon competent and there was no evidence of a substantial change of circumstances regarding his mental competency. Accordingly, the trial court was not required to hold a second competency hearing.

"When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing. [Citation.] Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competence to stand trial." (*People v. Danielson* (1992) 3 Cal.4th 691, 726 overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1059.) The defendant "is presumed competent unless the contrary is proven by a preponderance of the evidence." (*People v. Lawley, supra,* 27 Cal.4th at p. 131.)

As explained above, if a competency hearing has already been held, and the defendant has been found competent to stand trial, the trial court need not suspend proceedings to conduct a second competency hearing unless it is presented with a substantial change in circumstances or new evidence casting serious doubt on the validity of the prior finding. (*People v. Huggins, supra,* 38 Cal.4th at p. 220; *People v. Weaver, supra,* 26 Cal.4th at p. 954; *People v. Medina, supra,* 11 Cal.4th at p. 734; *People v. Jones, supra*, 53 Cal.3d at p. 1153.)

The evidence supporting a second competency hearing must itself be substantial. (*People v. Frye supra*, 18 Cal.4th at p. 1004.) It may consist of "a sworn statement of a mental health professional that defendant is incapable of understanding the purpose and nature of the proceedings." (*People v. Gallego, supra,* 52 Cal.3d at p. 162.) In addition, "when . . . a

competency hearing has already been held, the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state. This is particularly true when, as here, the defendant has actively participated in the trial." (*People v. Jones, supra*, 53 Cal.3d at p. 1153.) Indeed, once a defendant has been found to be competent, "even bizarre statements and actions are not enough to require a further inquiry." (*People v. Marks, supra,* 31 Cal.4th at p. 220, citations and internal quotations omitted.)

The trial court's decision whether to conduct a second competency hearing is reviewed for an abuse of discretion. (*People v. Marshall, supra*, 15 Cal.4th at p. 33.) A reviewing court generally defers to the trial court's observations and assessments regarding whether a defendant has presented substantial evidence of incompetency. (*People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1047, citing *People v. Marshall, supra*, 15 Cal.4th at p. 33.) "An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper." (*Ibid.*, internal quotation marks omitted.)

Waldon contends that his unwillingness to discuss options for his defense with his advisory counsel and his claims that his advisory counsel, the prosecution, and even the trial court were involved in a conspiracy against him constituted substantial evidence that he was incompetent to stand trial. (AOB 643-650.) There was no indication that Waldon did not understand the nature of the proceedings against him or that he was unable to assist in his own defense. Rather, the record shows that Waldon refused to work with his advisory counsel and his ancillary staff in order to delay the proceedings and avoid moving forward. Even as Waldon refused to prepare for trial and sought to use his lack of preparation as an excuse to delay, the trial court repeatedly made clear that it was mindful of its

responsibility to ensure that Waldon was competent to stand trial. Nonetheless, as the trial court explained, there was never any change in circumstances or new evidence casting doubt on Waldon's competency.

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

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

years. I'm not going to let you do that. That's not in your best interest, I think, or anyone's best interest.

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

On April 19, 1991, after Waldon claimed that his advisory counsel and investigator, who allegedly were acting as "prosecution agents," had deliberately gone through and "mixed up" his boxes of legal materials, the trial court responded:

> 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. One, I'm certainly not persuaded that's a basis for—for giving you some more time. But beyond that, I have two thoughts about that.
>
> If you honestly believe what you're telling me, if you honestly 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 just grasping at any reason you can not to face up to reality and get ready for trial, I don't have to tolerate that. I wouldn't tolerate that from an attorney, I don't have to tolerate that from you as your own attorney.
>
> And on either score, I think you're—you know, you put yourself in substantial risk of—of losing your, apparently, highly cherished right to represent yourself.
>
> I don't mean that as a threat. You—you couple times you say, you keep threatening me to terminate my pro per. I'm not threatening you, but I'm telling you I'm disturbed when I hear you talk that way for those two reasons. And I need you to understand that and think about that a little bit.

(12 RT 877-878.)

On April 29, 1991, the trial court responded to Waldon's request that he be allowed to stand while addressing the Court during pretrial motion hearings as follows:

> Again, you know, we're kind of putting form over substance here I think and I think, frankly, that's sort of a manifestation of your mental condition, if you will, that you, you know, you 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 of the substance of the real issues that need to be addressed.

(13 RT 981.)

Much later in the proceedings, in October 1991, during the guilt phase proceedings, in a discussion regarding Waldon's "COINTELPRO" defense that took place outside the presence of the jury, the trial court noted:

> You may think in your own mind, I don't know. I'm not sure whether you really believe it or not, but you may have convinced yourself in your own mind as part of a defense mechanism. And I say, may be further manifestation of a mental disorder that I think you are burdened with to some extent. Not that I have any question for a moment about your competency, but I think it's obvious that you have some disabilities that you're contending with that I think get in the way of rational thought on your part.

(66 RT 13529-13530.)

There was no substantial evidence present that Waldon was incompetent to stand trial. In *People v. Lewis* (2008) 43 Cal.4th 415, overruled on another ground in *People v. Black, supra,* 58 Cal.4th 912, 917, the defendant claimed the trial court erred by failing to hold a competency hearing where the defendant was, as Waldon was in this case, uncooperative. The California Supreme Court held that no competency hearing was required where there was no substantial evidence the defendant's behavior reflected inability rather than an unwillingness to cooperate with counsel and where the trial court had observed the defendant's behavior and demeanor at trial and concluded there was no

substantial evidence of incompetence. (*People v. Lewis, supra,* 43 Cal.4th at p. 526.)

In *People v. Marshall , supra*, 15 Cal.4th at p. 33, this Court found no substantial change of circumstances to warrant a second competency hearing despite unusual statements by the defendant about his having large amounts of money, that he was a god, that the President and Governor were conspiring against him, and that the conspirators would be beheaded. In *People v. Welch, supra,* 20 Cal.4th 701, the trial court found the defendant was incompetent to waive counsel. On appeal, the defendant claimed the trial court erred by failing to declare a doubt as to his competency to stand trial and ordering a competency hearing. The court found the trial court did not abuse its discretion in failing to declare a doubt as to the defendant's competence even though the defendant and counsel did not agree on his defense, the defendant "had a paranoid distrust of the judicial system" and claimed his counsel "was in league with the prosecution." (*Id.*, at p. 742.)

In this case, the trial court was not required to order a second section 1368 competency hearing or to further investigate Waldon's competency. Again, no new evidence was presented which would suggest that the previous competence determination was in error or required reexamination. The record reveals that the trial court was aware that it could re-visit the issue of Waldon's competence to stand trial and the decision to allow him to represent himself. The trial court's remarks show that it understood its responsibilities to assess whether Waldon was competent to stand trial. As there was no evidence that raised a doubt that Waldon understood the nature of the proceedings or that he was unable to assist in his own defense, the court simply had no reason to reinitiate competency proceedings. (See *People v. Koontz, supra*, 27 Cal.4th at p. 1064.)

Waldon further suggests that the irrationality of his chosen defense and the manner in which he presented that defense were also substantial evidence of mental incompetence. Waldon's reliance on *People v. Murdoch* (2011) 194 Cal.App.4th 230, is misplaced. In *Murdoch*, experts opined that the defendant suffered from serious or severe mental illness, but that he was competent if he continued taking prescription medication. However, the defendant stopped taking his medication. (*Ibid.*) Shortly before the trial began, the defendant informed the court his defense would be that the prosecution witnesses were not human. (*Id.* at pp. 233-234.) At trial, the defendant cross-examined only one witness and asked a single question relating to his theory that the witness was not human. (*Id.* at p. 235.) The appellate court concluded the expert evidence and defendant's behavior should have prompted the trial court to raise a doubt as to the defendant's competence. (*Id.* at p. 238.)

In contrast, here there was no information before the court indicating Waldon suffered from a mental illness that prevented him from presenting a defense. And although Waldon's chosen defense—that he had been framed by the FBI or CIA—seemed more like a bad Hollywood screenplay than a coherent or credible defense, there was no evidence to suggest that it was a result of delusional or irrational thinking.

As in *People v. Koontz, supra*, 27 Cal.4th 1041, Waldon "took an active role in pretrial proceedings and voir dire. Moreover, he questioned witnesses concerning the facts of the case ... although his shaky grasp of the concept of legal relevancy did not well serve his cause." (*People v. Koontz, supra*, 27 Cal.4th at p. 1065.) Waldon's manner of presenting his case fell far short of what a competent attorney would have done. However, "[t]hese deficiencies in his self-representation suggest not incompetency to stand trial but, rather, the lack of legal training common to most pro se defendants." (*Ibid.*) Waldon's approach to his own representation simply

did not provide the court with new evidence to justify a second competency hearing. The trial court did not err in failing to declare a doubt as to his competency or institute competency proceedings.

XVIII. THE TRIAL COURT'S INTERACTIONS WITH ADVISORY COUNSEL DID NOT INTERFERE WITH WALDON'S *FARETTA* RIGHTS

Waldon contends in Argument XVI. that the trial court erred in its dealings with his advisory counsel leading to violations of his rights to self-representation and due process under the Sixth and Fourteenth Amendments. (AOB 680-730.) More specifically, he claims the trial court interfered with his right to control strategic decisions and to present his chosen defense by failing to clarify roles among the defense team, allowing standby counsel to prepare a "shadow" defense that interfered with funding of Waldon's preferred defense, and pressuring Waldon to give advisory/standby counsel control over the case. (See AOB 699.) Waldon also claims the trial court erred in refusing to replace Rosenfeld (one of two advisory counsel appointed) when she withdrew due to illness just before the penalty phase. (AOB 717-719.) Waldon further contends the trial court's actions interfered with his right to represent himself (AOB 719-726), and that reversal is required without any showing of prejudice (AOB 726-730). The trial court adequately protected Waldon's right to self-representation, and advisory's counsel's participation, even over Waldon's objections, did not substantially interfere with his *Faretta* rights.

A. The Trial Court Did Not Breach Any Duty to Monitor and Clarify the Role of Advisory Counsel

In Argument XVI.D., Waldon contends the trial court breached its duty to monitor and clarify the role of advisory counsel. (AOB 706-711.) The record shows that the trial court made every effort to protect Waldon's

right to represent himself, and that the actions of advisory counsel did not interfere with Waldon's *Faretta* rights.

1. Background

By the time this case was tried, Waldon and his various advisory counsel had a long and often-contentious history. In March 1987, Alex Landon was appointed as advisory counsel to advise Waldon as to his first *Faretta* motion. (9A-2 RT 16; 10A RT 17.) In May 1987, Waldon indicated that he wanted Landon replaced as advisory counsel by Ben Sanchez. (20A-1 RT 17-18; 3 CT 593-602.) The trial court denied the motion to replace advisory counsel. (20A RT 24.)

In February 1988, the trial court agreed to again appoint advisory counsel to advise Waldon as to whether or not to proceed *pro per*. Waldon asked the trial court to appoint Benjamin Sanchez. (36A RT 11.) On February 16, Judge Peterson appointed Charles Sevilla as advisory counsel. (37A RT 1-5.) The next day, Sevilla indicated that Waldon had refused to meet with him and Sevilla was relieved as advisory counsel. Waldon again asked that Sanchez be appointed. The Court found that Waldon was unwilling to cooperate with efforts to provide advisory counsel, and ordered the matter to proceed. (28A RT 1-3.)

On February 25, 1988, Judge Zumwalt appointed Sanchez as advisory counsel for purposes of Waldon's *Faretta* and *Marsden* motions. (39A RT 30-32.) In March 1988, the trial court agreed to continue the appointment of advisory counsel so that Waldon could file a writ petition to challenge the denial of the *Faretta/Marsden* motions. (48A-1 RT 6-9.)

In February 1989, after Russell was removed as counsel, Waldon requested an emergency *Marsden* hearing regarding his advisory counsel, Sanchez. He asked that Allen Bloom be substituted in as advisory counsel. (65A RT 5.) As explained above, Bloom offered to accept an appointment for the limited purpose of Waldon's motion to represent himself. (66A RT

9-10.) The trial court agreed to continue Sanchez's appointment and appoint Bloom to assist Waldon as to the *Faretta* motion. (66A RT 15.)

As discussed in more detail above, in June 1989, Waldon asked the court to either appoint counsel to represent Waldon, but work under Waldon's direction, or to allow him to represent himself with the assistance of advisory counsel that were to work under his direction. (11 CT 2344-2354; 12 CT 2491-2501 [motion].) Judge Langford denied the first part of the motion, ruling that any appointed counsel would not be directed to follow Waldon's decisions and directions for all purposes. (78A RT 26-35; 79A-2 RT 1-2.)

Thereafter, as explained above, having granted Waldon's request to represent himself, Judge Boyle made clear that the court was not required to provide advisory counsel, and engaged in a lengthy explanation of the responsibilities of a self-represented defendant and the role of advisory counsel. (84 A RT 60, 66-70, 74-76, 79-80.) The trial court appointed Wolf and Sanchez as advisory counsel. (85A RT 87.) In December 1989, Wolf was allowed to withdraw as advisory counsel, and Bloom was appointed as second advisory counsel. (86A RT 13-16.)

By January 1990, Waldon had asked for Bloom to be relieved as advisory counsel (13 CT 2721-2726), and Bloom was seeking to withdraw as advisory counsel (88A RT 3). Waldon asked that Mark Chambers be appointed as advisory counsel. (88A RT 4-5.) Waldon also sought an order directing Sanchez to cooperate with him. (90A RT 8-9; 1 RT 24.) After the matter was assigned to Judge Gill for all purposes, Waldon again asked the court to appoint Chambers or to direct Bloom to continue as advisory counsel. (92A RT 15; 1 RT 10.) In April 1990, Judge Gill appointed Nancy Rosenfeld as second advisory counsel after determining that Chambers was committed to another capital case. (1 RT 27-31.)

In June 1990, Waldon expressed his dissatisfaction with advisory counsel to the funding panel:

> THE DEFENDANT: Your honor, I am completely without effective advisory counsel. I have two advisory counsels in name, but not in fact.
>
> THE COURT: Were those the people you requested, Mr. Waldon? What happened to your advisory counsel?
>
> THE DEFENDANT: What happened to him?
>
> THE COURT: Yeah.
>
> THE DEFENDANT: Um, they are still appointed, but like I said I have two in name but not in fact.
>
> THE COURT: Why?
>
> THE DEFENDANT: Why do I have them in name but not in fact? Because they have refused to fulfill the function of valid advisory counsels. For example, Miss Rosenfeld, in the last month she has been down to the jail twice for a few minutes each visit and it's a capital case. A person needs a full-time advisory counsel.

(987.9-12A RT 4.)

In July 1990, the trial court relieved Sanchez and appointed Chambers as advisory counsel. (1 RT 171.) In July 1990, the trial court relieved Sanchez and appointed Chambers as advisory counsel. (1 RT 171.) In an August 1990 hearing, Waldon complained that Rosenfeld was not devoting sufficient time to his case. (3 RT 324.) When Rosenfeld asked to respond, Waldon objected. (3 RT 324, 329.) The trial court explained to Waldon that although Rosenfeld had been appointed advisory counsel, she was not "required to sacrifice her basic professional and personal responsibility as an officer of the court." (3 RT 330.) Rosenfeld proceeded to outline the work she had completed on pretrial motions on Waldon's behalf. The trial court told Waldon that it was in his best interests to work

with his advisory counsel if he was to continue to represent himself. (3 RT 330-331.)

On December 13, 1990, Waldon asked to address the trial court outside the prosecutor's presence regarding his concerns about advisory counsel. (7 RT 441.) The trial court advised Waldon that it felt that it would be inappropriate for the court to insert itself into matters of defense tactics and strategy, but that, in general,

> ... Ms. Rosenfeld and Mr. Chambers are available to you as you have requested as your advisors. What you do with the advice they give you is entirely your judgment and your discretion. You're free to follow the advice or not as you choose, and I don't presume to tell you what to do in that regard or become involved in any way in the substance of the advice they're giving you.

(7 RT 442-443.)

Waldon complained that Rosenfeld was not working full-time on his case. (7 RT 443-445.) Rosenfeld responded that she was available by telephone or to meet in person with Waldon at his request. (7 RT 445-446.) The trial court expressed its concern that not enough progress was being made to prepare for trial:

> I do think that, frankly, more attention ought to be paid on motions and getting ready for trial and less attention on all this broad side 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 decided to represent himself.
>
> So I'm not disposed to make any such order or make any change in the status of advisory counsel at this point. Based on what I've heard, I'm satisfied factually that Miss Rosenfeld is devoting her best efforts, time and attention to whatever requests and assignments are given to her by Mr. Sequoyah.

(7 RT 446.)

In February 1991, although Waldon asserted that his advisory counsel was providing inadequate assistance, Judge Gill denied his request that Chambers's appointment be terminated. (8 RT 477-478.) That same day, in proceedings before Judge Revak, Waldon asked to fire defense investigator Atwell. Waldon then asked to have Chambers fired and another advisory counsel appointed because he alleged Chambers was filing motions for funding under Penal Code section 987.9 without his permission. (9-1 RT 506-510.) Judge Revak advised Waldon that he could terminate Chambers but that he might not be able to obtain a second advisory counsel in time for trial. (9-1 RT 506-513.) Judge Revak initially terminated Atwell's appointment as investigator and relieved Chambers (9-1 RT 515, 536-39), but later vacated his orders as to Atwell and Chambers after determining that Judge Gill had already heard Waldon's complaints and had denied the motions to relieve the investigator and advisory counsel. (9-1 RT 563-575.)

On February 15, 1991, Waldon again objected to Chambers's and Atwell's presence. The trial court reminded him that it was his choice whether to use advisory counsel. (9 RT 576.) In response to Waldon's complaints about his advisory counsel, the trial court explained that the attorneys were obligated to give him their best professional advice, but that it was his decision whether to act on that advice. The trial court said that Waldon was creating "an impossible situation," and manipulating the system, which could result in revocation of Waldon's pro per status. (9 RT 590.)

That same day, Judge Gill further addressed Waldon's complaints regarding Rosenfeld's performance as advisory counsel. Waldon objected to Chambers's presence at the hearing. (9-1 RT 615.) Rosenfeld explained that Waldon's insistence on keeping information from her was contributing

to their lack of communication. (9-1 RT 615-616.) The trial court determined that because Chambers and Atwell had already done a great deal of work on the case, they would continue as standby counsel even if Waldon refused to work with them. The court found it was appropriate to have someone available to step in as defense counsel in case Waldon asked for representation or the court terminated his pro per status. (9-1 RT 616-617.) In response to Rosenfeld's concerns regarding a speedy trial motion that Waldon wanted her to prepare, the court said:

> He can seek whatever advice from you on that, and he can follow your advice or not. Again, I think if a pro per attorney has advisory counsel and said, 'Look, I want to file this motion, and I want some legal advice from you,' and if the legal advice there has no merit to to that motion, Mr. Pro Per, then that's not ineffective assistance of counsel. You can either follow that advice or you don't.
>
> But advisory counsel is not obligated to tell you that's a great motion if the advisory attorney think's that's not true. I think that's what's happening here. These advisory attorneys are telling you things you don't want to hear and telling you things you need to do to get ready for trial, and that's the last thing you want. So suddenly, that's ineffective assistance of counsel.
>
> Well, we're never going to get effective advisory counsel if they tell you when you have motions that they have merit when they don't and going to play by your rules. You're laying down an impossible set of rules which your attorneys are expected to abide by, and I think they have done a marvelous job up to this point.

(9-3 RT 618.)

As trial approached, Waldon repeatedly complained that advisory counsel refused to follow his orders. (11 RT 646, 651; 13 RT 912; 14 RT 1208-1213; 16 RT 1697-1698.) He opposed advisory counsel's request for copies of the daily transcripts. (11 RT 666-667.) Waldon alleged that Atwell and Chambers had deliberately disorganized the material in

Waldon's files. (12 RT 808, 866-877; 13 RT 912.) He seemed particularly focused on alphabetizing and organizing his boxes of materials and repeatedly complained that advisory counsel did not spend time assisting him with alphabetizing his material. (12 RT 706; 12-1 RT 851-858; 12 RT 866-877; 13 RT 912, 1026; 16 RT 1697.)

Waldon repeatedly asserted that requiring him to use materials submitted or prepared by advisory counsel or by his former counsel violated his religious beliefs and denied him his right to present his own arguments. (12 RT 700-701, 716, 814-817; 12-1 RT 856; 29 RT 4522; 32 RT 5192-5193; 37 RT 6554-6555; 56 RT 10947-10948.) He objected to advisory counsel speaking to the court without his permission, referring to them as "prosecution agents." (See e.g., 13 RT 1026-1027; 14 RT 1217-1218; 17 RT 1898; 31 RT 4984; 32-1 RT 5211; 33 RT 5385; 48 RT 9116; 17 CT 3845.) He complained if advisory counsel spoke to the prosecutor, or to each other, or if the prosecutor gave defense copies of materials to advisory counsel rather than directly to Waldon. (See e.g., 24-1 RT 3480-3481; 29 RT 4521; 31 RT 4984.)

In a March 18, 1991 letter to Waldon, Rosenfeld expressed her concerns about his lack of preparation for trial, telling Waldon that his refusal to communicate with her or Chambers and his refusal to coordinate his efforts with those of advisory counsel were impeding their ability to assist him. She cautioned that his actions would likely be considered an attempt to create a situation where advisory counsel was ineffective and that any resulting claim about advisory counsel's alleged ineffectiveness would likely be unsuccessful on appeal. (38 CT 8359-8364.)

In April 1991, the trial court agreed to provide copies of the daily transcripts to Rosenfeld and Chambers over Waldon's objections. The trial court noted that counsel could potentially act as standby counsel if needed, but that Rosenfeld and Chambers were appointed as advisory counsel

regardless of whether Waldon chose to use their services. (13 RT 1027-1029.)

At a May 1991 hearing, the trial court again explained to Waldon that advisory counsel did not work for Waldon, but had been appointed by the court to assist him. The trial court explained that counsel was not required to sacrifice their personal and professional integrity to do so. (14 RT 1216.) The trial court said that Waldon did not want counsel's advice and assistance because he was focused on avoiding trial. (14 RT 1217.)

In June 1991, when the trial court attempted to address Waldon's Penal Code section 1538.5 motion, Waldon said the court's failure to direct advisory counsel to follow his orders and to give him access to his legal materials forced him to stand mute rather than address the motion. (16 RT 1711.) The next day he refused to oppose the prosecution's motion to admit evidence of the Oklahoma crimes because, he claimed, he lacked advisory counsel. The trial count pointed out that Rosenfeld had prepared and given him a memo on the issue and that it was Waldon's choice not to use the information provided. (16 RT 1773-1776; see also 29 RT 4430-4431.)

As jury selection began, Waldon refused to allow Rosenfeld or Chambers to sit at counsel table with him. (17 RT 1898-1900.) The trial court indicated that Rosenfeld and Chambers could remain present in the audience during trial as potential standby counsel. (17 RT 1903.)
In July 1991, as the prosecution's case-in-chief began, Waldon claimed he was unprepared to address instructions, to call experts, or to cross-examine a witness because he had been deprived of advisory counsel. (32 RT 5181, 5225, 5336-5337.) Outside the presence of the jury, Waldon asked that advisory counsel be ordered not to approach him or to try to communicate with him. Rosenfeld told the trial court that she had attempted to give Waldon advice, and that she was ready to advise him as needed, but that

Waldon refused to speak to her. The trial court declined to give such an order. (32-1 RT 5211-5217.)

The next day, Rosenfeld appeared at counsel table, seated next to Waldon at his request. (33 RT 5423.) But as trial progressed, Waldon continued to raise complaints about advisory counsel. (See e.g., 38 RT 6692, 6701-6715; [July 18, 1991 - accused Chambers of taking videotapes out of discovery materials without his permission]; 44 RT 8031 [August 12, 1991 - refuses to accept witness address given to Rosenfeld by Chambers]; 48 RT 8933-8934 [August 22, 1991 - complaint that Rosenfeld had copied some of his personal materials without permission]; 50-1 RT 9528-9530 [August 28, 1991 - complaint that Rosenfeld had refused to submit funding motion for out of state witnesses]; 50 RT 9672-9674 [August 29, 1991 - [complaint that Rosenfeld spoke to prosecutor's investigator].) As the time approached for the defense to proceed, Waldon told the trial court that he was not ready because the court had deprived him of advisory counsel, explaining that Chambers and Rosenfeld were working for the prosecution and refused to follow his orders. (50 RT 9721-9724, 9742.)

On October 1, 1991, Waldon again complained about Chambers and asked that he be excluded from the courtroom. (59 RT 11713.) On October 3, he complained that Rosenfeld shared a copy of her notes with the prosecution without his permission. (60 RT 11947-11950.) When the trial court allowed Rosenfeld to respond to the complaint, Waldon claimed that he was being forced into not calling the witness in order to maintain his own dignity and autonomy. (60 RT 11953-11957.) Waldon did, in fact, call the witness that same afternoon, and allowed Rosenfeld to conduct the direct examination. (60 RT 12046-12047, 12054-12055.)

On November 1, 1991, the trial court denied Waldon's request to call Chambers as a defense witness at trial to show that he had been denied due process as a result of Chambers's "outrageous deceit." (67 RT 13737-

13738.) Waldon also unsuccessfully sought to call Rosenfeld and his former advisory counsel, Sanchez. (67 RT 13743-13745.)

2. The trial court did not interfere with Waldon's *Faretta* rights

As shown above, the trial court made every effort to respect Waldon's right to represent himself, while at the same time encouraging him to take advantage of the advice and assistance of advisory counsel. As explained above, advisory counsel is an arrangement in which "the attorney actively assists the defendant in preparing the defense case by performing tasks and providing advice pursuant to the defendant's requests, but does not participate on behalf of the defense in court proceedings." (*People v. Moore, supra*, 51 Cal.4th at p. 1120, fn. 7.) The trial court has discretion to allow such an arrangement "when the interests of justice support such an arrangement." (*Id.* at p. 1120.)

A defendant who is representing himself has no constitutional right to advisory counsel, or other forms of "hybrid" representation. (*Id.* at p. 1104, 1119-1120.) While a defendant has a right to counsel and the right to self-representation, there is no constitutional right to appointment of standby counsel, advisory counsel, or co-counsel. (*People v. Blair, supra*, 36 Cal.4th at p. 723.) Trial courts may "appoint advisory counsel or stand-by counsel as part of their inherent power to control the proceedings." (*People v. Garcia* (2000) 78 Cal.App.4th 1422, 1431.) However, defendants who elect to represent themselves cannot later claim that they received ineffective assistance of counsel. (*People v. Garcia, supra*, 78 Cal.App.4th at p. 1430, citing *McKaskle v. Wiggins, supra*, 465 U.S. at p. 177, fn. 8, and *Faretta v. California, supra*, 422 U.S. at pp. 834-835, fn. 46.)

> This rule is entirely eviscerated when a defendant is allowed to challenge a verdict on the ground that he or she was not provided with advisory or stand-by counsel. To permit such a challenge is to allow a defendant to complain that because of the

> poor quality of his self-representation, he was improperly denied effective assistance of counsel in the form of a hybrid representation.

(*People v. Garcia, supra*, 78 Cal.App.4th at pp. 1430-1431.)

This Court has recognized under state decisional law a very narrow and limited ability to challenge the performance of advisory counsel:

> To prevail on a claim that counsel acting in an advisory or other limited capacity has rendered ineffective assistance, a self-represented defendant must show that counsel failed to perform competently within the limited scope of the duties assigned to or assumed by counsel [citations] and that a more favorable verdict was reasonably probable in the absence of counsel's failings [citations]. A self-represented defendant may not claim ineffective assistance on account of counsel's omission to perform an act within the scope of duties the defendant voluntarily undertook to perform personally at trial.

(*People v. Michaels, supra,* 28 Cal.4th at pp. 525-526.) This Court further clarified,

> when a defendant raises an issue of effective assistance of advisory counsel, defendant must also show that counsel's challenged action or inaction was not the result of the defendant's own decision, with advisory counsel merely carrying out defendant's directions.

(*Id.* at p. 526; emphasis added.)

In this case, rather than claiming that he or his advisory counsel were constitutionally ineffective, or that his own self-representation was inadequate, Waldon claims the trial court failed to adequately protect his *Faretta* rights by failing to clarify the role and responsibilities of advisory counsel.

In general, in determining whether a trial court respected a defendant's *Faretta* rights, the reviewing court must focus "on whether the defendant had a fair chance to present his case in his own way." (*McKaskle v. Wiggins, supra*, 465 U.S. at p. 177.) This requires that the pro per

defendant maintain control over how the case is presented to the jury. If 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 matter of importance, the *Faretta* right is eroded. (*Id.* at p. 178 [first emphasis added].)

"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. (*McKaskle v. Wiggins, supra*, 465 U.S. at pp. 176-177.) In this regard, appearing to the jury as the individual conducting his own defense, is an important aspect of the *Faretta* right to the criminal defendant. (*Id.* at 178.)

"*Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the pro se defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel." (*McKaskle v. Wiggins, supra*, 465 U.S. at p. 179.)

Waldon cites *People v. Stansbury* (1993) 4 Cal.4th 1017, overruled on other grounds sub nom. *Stansbury v. California* (1994) 511 U.S. 318 [114 S.Ct. 1526, 128 L.Ed.2d 293], to suggest that the trial court has an affirmative duty to ensure that advisory counsel's assistance stays within constitutional limits by ensuring that advisory counsel and the self-represented defendant understand their respective roles. (AOB 682, 706.) In *Stansbury*, this Court found that neither the trial court nor advisory counsel unconstitutionally interfered with the defendant's right to represent himself. The defendant in *Stansbury* was allowed to represent himself as lead counsel, with one of his former counsel appointed as co-counsel. After conflicts arose between the defendant and his co-counsel, the trial court

relieved co-counsel and reappointed him as "assistant counsel." The trial court explained that Stansbury would have decision-making authority for the defense, but that at Stansbury's request, counsel would be allowed to actively participate in the trial. *People v. Stansbury, supra*, 4 Cal.4th at pp. 1035-1036.) This Court rejected Stansbury's claim that the trial court had deprived him of effective control over his defense.

Here, as in *Stansbury*, Waldon personally and actively participated in his defense. And as was also the case in *Stansbury*, the trial court did not "usurp[]defendant's control of defense tactics and strategy." (*Id.* at p. 1038)

Waldon's claim that the trial court interfered with his right to self-representation in failing to clarify the roles of defendant and his advisory counsel is without merit. First, the instances about which Waldon now complains occurred outside the presence of the jury and the jury was not privy to the discussions. Certainly, the appearance that Waldon was in charge of his own defense was not undermined by advisory counsel's participation outside the jury's presence. (*McKaskle v. Wiggins, supra*, 465 U.S. at p. 179.)

Second, it is not clear what more the trial court could have done. The trial court made every effort to ensure that Waldon knew that advisory counsel was available to work with him in preparing his defense. At the same time, the court recognized that advisory counsel was not required to set aside his or her professional judgment or ethical obligations as attorneys. The court repeatedly explained that Waldon was responsible for his own defense, that the attorneys were present to advise and assist him, and that it was ultimately Waldon's choice whether to follow that advice. The dysfunctional relationship between Waldon and his advisory counsel cannot be attributed to any action the trial court did or did not take. Instead, the difficulties were caused by Waldon's refusal to communicate

with advisory counsel, his unwillingness to follow the advice he was given, his failure to prepare for trial, and his ongoing efforts to prevent the trial proceedings from going forward.

Third, the trial court did not allow advisory counsel to make or interfere with defense tactical decisions, or to speak instead of Waldon as to any matter of importance. Any deficiencies in Waldon's presentation of his case can be attributed to his own actions and not to any interference by advisory counsel. Although Waldon cites many instances of conflicts with advisory counsel, the record shows the trial court resolved any tactical matters that would normally left to the discretion of counsel in favor of Waldon. "In short, defendant points to no instance in which it can be fairly said that the trial court resolved adversely a conflict between him and his counsel when the matter was 'one that would be normally be left to the discretion of counsel.'" (*People v. Stansbury, supra*, 4 Cal.4th at p. 1040, citing *McKaskle, supra*, 465 U.S. at p. 179.)

B. The Trial Court Did Not Permit Chambers to Usurp Waldon's Role in Planning and Preparing his Defense

Waldon further contends in Argument XVI.D. that the trial court allowed Chambers to interfere with Waldon's right to control decisions and to present his own defense. In particular, Waldon points to Chambers's actions before the court empanelled to hear funding requests pursuant to Penal Code section 987.9, and suggests that the funding court improperly deferred or acquiesced to Chambers's opinions as to whether expenditures were necessary to the defense. (AOB 699-705, 711-716.) This claim should be denied, as advisory counsel did not usurp Waldon's role in planning and preparing his defense. To the extent that the funding court denied Waldon's requests for defense funding, the court simply determined that Waldon had not shown that such requests were reasonably necessary.

1. Background

Beginning as early as February 1990, advisory counsel frequently appeared with Waldon before the funding panel, often over Waldon's objection. Waldon consistently objected to advisory counsel's presence at the hearings, objected to counsel speaking without Waldon's permission or filing requests for funding with the court without his knowledge, and asked the court to exclude advisory counsel from the hearings. (See e.g., 987.9-7B RT 3-5; 987.9-15 RT 1-2; 987.9-16 RT 2 [Dec. 4, 1990]; 987.9-16 RT 2 [Dec. 11, 1990]; 987.9-16 RT 2, 7 [Dec. 17, 1990]; 987.9-16 RT 2 [Dec. 24, 1990]; 987.9-17 RT 2-3, 18-19, 30, 39, 54; 987.9-18 RT 3; 987.9-19A RT 1,6; 987.9-19B RT 3; 987.9-20 RT 1; 987.9-25 RT 4.)

On February 27, 1990, advisory counsel Sanchez appeared with Waldon. (987.9-7B RT 3-5.) Sanchez explained to the panel that he was concerned about his ability to meet his obligations to be adequately prepared to advise Waldon, especially with respect to any penalty phase matters. The court asked Sanchez to present his briefs or requests to Waldon for his review and response before the court would address any issues. (987.9-7B RT 6-7.)

The next month, Waldon refused to approve the materials submitted by Sanchez and the panel declined to consider it. (987.9-7C RT 3.)

Sanchez again appeared before the panel on May 8, 1990, expressing his concern that trial preparation was not being completed. The panel declined to hear his concerns without Waldon present, but told Sanchez that in order to obtain funding, he and Waldon should analyze the investigation that had already been done and come up with a detailed plan setting forth the investigation and other services required to present a defense. (987.9-10 RT 3-7.)

In July 1990, the funding court explained to Waldon that he had resources available to assist him, but that the court had a responsibility to

ensure that it was "not just pouring money down a hole." (987.9-12B RT 4.) Waldon complained that advisory counsel was doing "almost nothing" because counsel claimed Waldon had not provided funding for law clerks. The panel asked Waldon to be present with advisory counsel at the next hearing so that counsel's roles could be clarified. (987.9-12B RT 5-6.) The court denied a request submitted by Chambers seeking funding for services related to a change of venue motion. (987.9-12B RT 6-8.)

In October 1990, Waldon complained to the funding court that advisory counsel had refused to tell him what they were billing to his case. (987.9-14 RT 7.) The court pointed out that Waldon was seeking funds for an investigator to travel throughout the country. The court noted that it had already informed Waldon that he was to have the investigator review the work already completed by his former attorney, Russell. Waldon responded that the materials from Russell had been picked up by Chambers and taken to Rosenfeld's office, but had not been turned over to Waldon. The court indicated that it would verify with Chambers that he and the investigator were reviewing the files to determine what investigative work had already been completed and what had yet to be done. (987.9-14 RT 7-8, 10.) The court further explained that it would not authorize out of state travel without a showing of extraordinary need. (987.9-14 RT 8.)

In November 1990, Waldon told the funding court that, contrary to the court's directions, Chambers had not gone through the materials or prepared motions in his case. The court requested that Chambers appear before it to address the issue. Waldon objected to Chambers's appearance without his permission. The court told Waldon that he could be present as well, but that it would not authorize funds to review the files until it was satisfied that it was not funding duplicate work. (987.9-15 RT 1-2.)

On December 4, 1990, Chambers told the court that he had reviewed most of the files, and that he had submitted several motions to Waldon

about three weeks earlier. (987.9-16 RT 3 [Dec. 4, 1990].) The trial court expressed it concerns that because the case was set for trial the next month, they were now facing "an emergency situation. (987.9-16 RT 4.) The court told Waldon that his funding requests did not contain enough specific information to justify approval, and that it would not approve work done that had not been authorized by the panel. (987.9-16 RT 5-6.) The court asked Chambers for a detailed list of the motions that had been prepared and that were yet to be prepared. (987.9-16 RT 6.) The court made clear to Waldon's law clerks that it would not authorize payment for work that was not authorized ahead of time, and emphasized that Waldon's efforts should be focused on preparing his defense for trial. (987.9-16 RT 11.)

The next week, the funding court characterized Waldon's most recent request for funding as inadequate and not realistic. (987.9-16 RT 12 [Dec. 11, 1990].) Waldon told the court that he wanted to file a *Kelly-Frye* motion but needed funding for an expert. The court said that it would provide funding for an expert as soon as the defense had obtained such an expert. (987.9-16 RT 19.) Waldon told the funding panel that Judge Gill had already given him permission to file such a motion. The funding court asked Chambers whether he thought such a motion was valid. Chambers indicated that he did not. (987.9-16 RT 19.) The court reiterated that Waldon should focus on preparing his case for trial. When the funding court inquired about Rosenfeld's status, Waldon told the court that he had fired her. (987.9-16 RT 23-24.)

On December 17, Waldon asked for 160 hours of funding to have his case materials organized and put into file folders. The funding court asked Chambers about the status of the materials. Chambers told the court that his review of the materials was almost complete. The court concluded that additional funding for review of those materials was unnecessary. (987.9-16 RT 6-7 [Dec. 17, 1990].) Waldon objected, saying that Chambers was

not correct. Waldon insisted that he needed additional law clerk time to file and alphabetize the material and to assist him in preparing funding requests. The court again explained that it would approve any reasonable, specific requests for funding related to trial preparation. (987.9-16 RT 7-11.) At the next hearing, Chambers told the Court that he had presented a funding motion to Waldon, but that Waldon refused to sign it. (987.9-16 RT 4 [Dec. 24, 1990].) In the motion, Chambers requested funding for a fire investigation expert, a fire causation expert, and funds for the investigator, Atwell. Waldon told the Court that he did not want the funding request approved because it was submitted by Chambers rather than him personally. He refused to give any other explanation, but said that he would not communicate further with Chambers and did not want any investigation that Chambers had recommended or authorized. He requested an order directing the investigator to report only to him and to have no communications with Chambers. The court indicated that it would approve the funding requests but that it was up to Waldon whether he wanted to use the requested resources, or to delay trial by refusing to avail himself of the available services. (987.9-16 RT 4-7.)

In January 1991, the funding court approved Chambers's request for funding for an expert criminalist. Waldon objected and went on to tell the court:

> And I did not place this motion before the court. Mark Chambers did. And the motion is withdrawn by the attorney of record, and I object to any taxpayers' dollars being squandered here. And Mr. Chambers knows full well what my beliefs are, especially my religious beliefs concerning self-representation, that forbid me to call Mr. Bell as a witness now because Mr. Chambers has come in, and he is attempting to represent me instead of allowing me to represent myself.
>
> No one will be—I'm the attorney of record. It will be me who calls witnesses at my pretrial motion, and it will be me who calls witnesses during my trial. And no witnesses will be called

except those that I've come in and requested funding for. And I have not requested funding for Mr. Bell. This motion is withdrawn by the attorney of record.

And I respectfully and humbly object to Mr. Chambers being in these proceedings. His presence here violates Penal Code section 987.9, which guarantees the attorney of record confidential proceedings. That means no one is present without the attorney of record's permission. And I respectfully object also to Mr. Atwell being present. And I further respectfully and humbly object to all four of these gentlemen being sworn, since that violates my privilege under the evidence code, the attorney-client privilege, which states any knowledge they have or any information they have cannot be revealed without the permission of me, the attorney of record, and me, the client.

(987.9-17 RT 3-4.)

The trial court denied the request to exclude Chambers as well as the request to relieve Atwell and Chambers. The Court explained that it found the expert and investigator funding to be reasonably necessary under the circumstances and that to refuse to complete the requested investigation would jeopardize the defense. (987.9-17 RT 4-5.)

Waldon went on to ask for additional funds for additional motion preparation. The trial court said that it would require Waldon to be specific as to what amendments needed to be made to the existing motions before it would approve additional funding. (987.9-17 RT 6-7.) After hearing explanation from Waldon's two law clerks, the Court asked for Chambers opinion. Chambers told the court that using the law clerks to research the prosecution's response to the existing motions was an appropriate use of their time. (987.9-17 RT 7-9.) When Waldon questioned the court for inquiring about specific arguments that were to be raised in the motions, the court responded as follows:

Let me just jump in here for a moment.

Counsel, it seems to me, regardless of what any other judge has done, that the question of whether or not an argument has

> potential merit is part and parcel of whether or not the work done is reasonable and necessary to the defense of the case, so that's going to be part of the standard that's employed by me in making that judgment. I have a fiduciary obligation to the people of the State of California to make sure that the expenses made in this case are reasonable and necessary. My purpose is not to thwart the defense, but to assist by funding of reasonable and necessary activity, so you come to me prepared to express what is reasonable and necessary, and we'll fund it, but we have to have that standard, that test; otherwise, in my judgment, I'm not living up to my obligation.

(987.9-17 RT 11.)

When the court asked Waldon if there was anything he wanted Chambers to do regarding advising him as to the merits of any other motions, Waldon told the court that he would not be communicating with Chambers. The court asked Chambers whether, in his judgment, there were other motions that should be considered, and Chambers said there were not. (987.9-17 RT 12-13.)

At the next funding hearing, Waldon told the funding court that he intended to pursue a speedy trial motion and a discovery motion. (987.9-17 RT 17-18.) At the court's request, Chambers offered his opinion that a discovery motion was not needed because there was an existing, ongoing discovery order. Waldon objected to Chambers speaking and to his presence, but the court responded that as advisory counsel, Chambers was appointed by the court as advisory counsel and the court intended to seek his opinion. (987.9-17 RT 18-19.) The court authorized Chamber's request for funding for a psychiatrist with respect to any penalty phase issues over Waldon's objection. (987.9-17 RT 5-6.) The Court approved Chambers's request for Chambers and Atwell to travel to Oklahoma to investigate the Oklahoma offenses and to speak to Waldon's family members. (987.9-17 RT 22-24.) Waldon objected, saying that Chambers was attempting to undermine his defense and was acting as a "prosecution agent." (987.9-17

RT 24-26.) He requested funding for an additional investigator, but refused to reveal the investigator's name in Chambers's presence. The court denied the request, but told Waldon it would consider such a request if it was properly presented (987.9-17 RT 26-27.)

At the January 15, 1991 hearing, after dealing with Waldon's requests for funding for his law clerks, the court asked Rosenfeld if there was anything that, in her opinion, it needed to authorize in order to prepare for trial. (987.9-17 RT 34.) The Court further explained,

> This case apparently is going to trial, and it seems to me that one of the questions that needs to be analyzed at one of these hearings in the very near future is specifically what needs to be done to get his case ready to go to trial, referring to trial prep. And it seems to me that there are arguments that need to be prepared for and there is trial preparation that needs to be done. And if the defendant doesn't want to talk to advisory counsel, I would at least like to hear from advisory counsel as to what their advice is as to what ought to be done by competent counsel in preparation of this case. So it seems to me that some thought ought to be given to that subject by advisory counsel between now and the next time we meet.
>
> 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, but it seems to me that some thought ought to be given to that subject, so perhaps you could be here at the next meeting and give us your thoughts in that regard, counsel.

(987.9-17 RT 34-35.)

Waldon requested to exclude both Chambers and Rosenfeld at the next funding hearing on January 22. The court noted that the attorneys had been appointed by the court as advisory counsel. The court again explained to Waldon that advisory counsel were present with the court's permission, but that it was his decision whether to follow their advice or to use their services. (987.9-17 RT 39.) In discussing funding for Waldon's two law clerks to prepare certain motions, the court asked both advisory counsel

whether the issues had already been addressed by earlier motions that had already been prepared and filed, or whether additional motions were necessary. Both Chambers and Rosenfeld said that there were additional issues to be raised that had not yet been addressed. The trial court agreed to authorize additional funding for the law clerks to pursue the motions. (987.9-17 RT 40-43.) Chambers submitted a request for funding for penalty phase witnesses that the court approved. (987.9-17 RT 45-46.) Waldon objected because the request was submitted by advisory counsel and not through him, claiming that this violated his religious beliefs. (987.9-17 RT 45-46.) When Waldon asked if the court would provide funding for him to file two appellate writs, the court told him that it was his choice as to how he used his funding, but that he would not receive any additional funding for law clerk or paralegal time. (987.9-17 RT 46-47.)

The next week, Waldon told the funding court that there were several pretrial motions that needed to be prepared. (987.9-17 RT 48.) The court asked Chambers if any of the motions had potential merit. Chambers told the court that the issues had already been addressed, and that because the filing date for pretrial motions had passed, it was too late to proceed with the motions. He thought a motion to strike the escape allegation from the statement in aggravation should be brought. (987.9-17 RT 48-49.) When the court asked Waldon if he intended to bring such a motion, Waldon said he had not looked into it. Chambers indicated that he had given the law to Waldon's paralegals and that they should be able to help prepare the motion. (987.9-17 RT 49.) The court asked Waldon to submit a plan of what actions were needed to get his case ready for trial. (987.9-17 RT 50.)

Chambers submitted a request for funding for a fingerprint expert. (987.9-17 RT 50.) He indicated that the expert had already worked under Waldon's former attorney, but his report was not in the material that had been turned over. The expert was willing to provide the report and discuss

his findings with the defense. When the court authorized the request, Waldon objected:

> THE DEFENDANT: Your honor, I respectfully and humbly object to this motion. This motion, among others, states on line twenty-five on the first page,
>
> "Defendant hereby requests approval of Penal Code section 987.9 ..."
>
> Your honor, I am the defendant, and I'm not making this request.
>
> I believe a court of law should be a place of honesty and integrity. This is just an outrageous lie. And I object to it. And Mr. Chambers and the court is well aware that my religious beliefs forbid me to ever call Mr. Emmerson as a witness simply because my right to self-representation has been revoked.
>
> And I was not the one who put in this motion. And basically I'm—I object to being deprived of advisory counsel, and I'm objecting to being deprived of witnesses and experts that I need in my defense. And—

(987.9-17 RT 51.)

The trial court responded:

> THE COURT: 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. This case is going to be ready. And as far as I'm concerned, there's no reason it should not go forward so your statement is noted.

(987.9-17 RT 52.)

At the hearing on February 5, 1991, Waldon argued that a motion submitted by Chambers regarding a mental health expert violated his right to due process. He objected to any information being shared with the

expert without his permission. He also objected to any funding for investigator Atwell, telling the funding court that Atwell was no longer his investigator. The Court responded that the investigator had been appointed by the court, and the objection was denied. (987.9-17 RT 58-59.)

On February 14, 1991, the court denied his request to exclude Chambers, Rosenfeld, and Atwell from the proceedings, explaining that Rosenfeld and Chambers were employed by the Court as advisory counsel, and that advisory counsel had employed and requested funding for Atwell. (987.9-18 RT 3.) Chambers requested funding for a psychologist to assist with jury selection, but the court denied the request. Waldon objected because the request had come from Chambers, and not through him. (987.9-17 RT 3-4.) The court refused to approve additional funding for Waldon's law clerks because the motions submitted to that date were exact copies of the motions previously filed by Russell. The trial court urged Waldon to direct his efforts toward trial preparation. The court denied further funding for the law clerks to prepare motions because there had been no showing that the funding was necessary. (987.9-17 RT 4-5.) Waldon told the court that there were additional pretrial motions that were in progress. The court commented that he was suspicious about what his law clerks had been doing based on the work product that had been produced, telling Waldon, "The showing, in terms of necessity and in terms of the work [product] that's been produced in this case is sorely deficient in my judgment." (987.9-17 RT 5-6.) The court again told Waldon that the next time they met, Waldon was expected to submit a plan as to the specific trial preparations he planned and what funding he needed to carry out that plan. (987.9-17 RT 6.)

On February 20, 1991, Chambers told the funding panel that he was continuing to prepare for trial as standby counsel. (987.9-19A RT 5.)

The next week, when the court indicated that it would grant Chambers's funding request, Waldon asked to be heard. Waldon argued that Chambers was "becoming more and more simply a prosecution agent." (987.9-19A RT 6-7.) He told the Court that Chambers was dishonest in stating in his declaration that he had been appointed standby counsel. (987.9-19A RT 7.) Waldon told the court that while the trial court had appointed advisory counsel, that Chambers had never been appointed standby counsel. Waldon further claimed that the court could not take away his advisory counsel and replace it with standby counsel without due process. (987.9-19A RT 7, 9.) The funding court indicated that Judge Gill had appointed Chambers as standby counsel..(987.9-19A RT 8, 9-10.)

On March 12, 1991, Waldon objected to the approval of funding requests submitted by Chambers, claiming, among other things that "my religious beliefs forbid me to use anything that this court funds that has been funded without my participation and over my objection, and I object to the taxpayers money just being squandered here by Investigator Atwell and Mark Chambers doing things that I will not in any way use in the upcoming trial." (987.9-19B RT 4.)

On May 14, the funding panel cautioned Waldon about submitting requests for costs without adequate documentation to justify such expenses. (987.9-21 RT 1-8.)

On June 25, the funding panel explained that the court would no longer rely solely on declarations from Waldon to justify defense funding applications because of misrepresentations made in earlier applications. (987.9-24 RT 16.)

On July 9, 1991 the trial court denied Waldon's request for an additional law clerk, finding that Waldon had not made an adequate showing of necessity. (987.9-25 RT 4-11.)

On September 3, 1991, the court approved Waldon's funding requests. The court also approved Chambers's request for funding for expert and reporter's fees over Waldon's objection. (987.9-26 RT 1-2.) On September 10, the court denied a motion for further funding, again explaining to Waldon that he must be more specific as to what the funding is to be used for and why it is reasonably necessary to the defense. The court authorized $400 for expenses. (987.9-27 RT 2-10.)

On October 28, 1991, Rosenfeld told the court that it should not use funds authorized for Atwell's investigation as a basis for denying further investigative funding because Waldon would not use the work that had been done by Atwell. She insisted that the work done by the second investigator, Cotton, was necessary. The court approved the funding request. (987.9-31 RT 6-8.)

2. Chambers did not interfere with Waldon's ability to present his defense

Waldon's claim that Chambers deprived him of control over his own defense is without merit because Chambers did not make or interfere with defense tactical decisions, nor did the funding court allow Chambers to speak instead of Waldon as to whether requested funds for the defense were necessary. Waldon has not shown that the funding court resolved any conflicts between him and Chambers in Chambers's favor as to any matter of importance. (*McKaskle v. Wiggins, supra*, 465 U.S. at p. 179.)
As explained above, the "core of the *Faretta* right" is the defendant's right "to preserve actual control over the case he chooses to present to the jury." (*McKaskle v. Wiggin, supra*, 465 U.S. at p. 178.) Standby counsel unconstitutionally interferes with a defendant's self-representation by (1) depriving the defendant of "actual control over the case he chooses to present to the jury," or (2) "destroy[ing] the jury's perception that the defendant is representing himself." (*Ibid.*)

"The due process right to effective counsel includes the right to ancillary services necessary in the preparation of a defense. [Citations.]" (*People v. Faxel* (1979) 91 Cal.App.3d 327, 330; *People v. Blair, supra,* 36 Cal.4th at pp. 732-733.) The defendant has the burden of demonstrating that the requested ancillary services are reasonably necessary. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320.) "Translation of the abstract right to ancillary defense services into practice in individual situations requires that the defendant exercising the right demonstrate a need for the service by reference to 'the general lines of inquiry he wishes to pursue, being as specific as possible.' [Citations.]" (*People v. Faxel, supra,* 91 Cal.App.3d at pp. 330-331.) A trial court's order on a motion for ancillary services is reviewed for an abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1085, overruled on another point by *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Moreover, "the crucial question underlying all of defendant's constitutional claims is whether he had reasonable access to the ancillary services that were reasonably necessary for his defense." (*People v. Blair, supra,* 36 Cal.4th p. 732.)

Under Penal Code section 987.9, a capital defendant may request funds for the preparation or presentation of the defense. (*People v. Gonzales* (2011) 52 Cal.4th 254, 286, citing *People v. Guerra, supra,* 37 Cal.4th at p. 1085.) "Although the trial court should view a motion for assistance with considerable liberality, it should order the requested services only upon a showing they are reasonably necessary." (*People v. Gonzales, supra,* 52 Cal.4th at p. 286.)

Here, any failure to obtain funding for his defense is attributable to Waldon who, as his own counsel, controlled the litigation. The trial court did not err in allowing advisory counsel to participate in the funding hearings even over Waldon's objections. Waldon was allowed to fully participate and to submit applications for funding for his chosen defense.

Although Waldon cites instances where his funding requests were disapproved, there is nothing to support his allegation that Chambers's funding requests were approved at the expense of Waldon's chosen defense. To the extent that Waldon's requests for funding were not approved, such funding requests were declined because he failed to demonstrate that the funds were reasonably necessary. Although the funding panel, at times, asked Chambers for his opinion as to whether certain expenses were necessary, the panel did not merely rely on Chambers's opinion. The record does not support a finding that Chambers was allowed to usurp Waldon's role in preparing and planning his own defense or that the funding court merely acquiesced in Chambers's requests for funding at the expense of Waldon's own requests. Instead, it shows that the funding panel considered each request for funding and exercised its own discretion in finding either that the requests were reasonably necessary or that no adequate justification had been provided.

C. The Trial Court Did Not Err in Failing to Replace Advisory Counsel When Rosenfeld Withdrew

In Argument XVI.D.4., Waldon asserts that the trial court erred in refusing to replace Rosenfeld when she withdrew as advisory counsel, in violation of *People v. Bigelow*. (See AOB 717-719.) Assuming his claim is that the failure to replace Rosenfeld was an abuse of the trial court's discretion, this claim is without merit. Waldon had no right to the assistance of advisory counsel. Moreover, as the trial court determined, Chambers was still available and prepared to assist Waldon as advisory counsel.

1. Background

On November 21, 1991, the day before the penalty phase began, Rosenfeld informed the court that she had to withdraw as advisory counsel due to health reasons, although she would prefer a six-week continuance of

the penalty phase. The trial court noted that it seemed unlikely that Rosenfeld would be available again in six weeks. She was to be in the hospital for a minimum of 30 days, and would not be available to immediately resume her duties as advisory counsel even after her release. (72 RT 14826-14828.; see 36 CT 8105-8111.)

The trial court pointed out that Waldon continued to represent himself and that he had Chambers ready, willing, and available as advisory counsel, should he choose to avail himself of that resource. (72 RT 14828.) The court noted that Chambers and an investigator had already traveled to Oklahoma to locate and interview potential penalty phase witnesses. Chambers had been present throughout the guilt phase proceedings and had provided assistance and information to Rosenfeld or to Waldon when requested to do so. (72 RT 14828-14829.) Waldon objected and asked the court to terminate Chambers and to appoint new advisory counsel. The court declined to do so, finding that Chambers had been very diligent, prepared, and competent. The court reminded Waldon that he himself had insisted on Chambers as advisory counsel. (72 RT 14830-14831.)

Outside the presence of the prosecutor, Chambers told the court that he and an investigator had interviewed victims and witnesses as well as family members in Oklahoma. (72-1 RT 14859-14860.) Chambers told the court that he was fully prepared and able to advise Waldon to the extent his advice was sought. (72-1 RT 14861.) Waldon objected. (72-1 RT 14861-14862.)

2. There was no abuse of discretion

This Court has recognized a trial court's discretion to appoint advisory counsel for a litigant, even when he has no actual right to such appointment. (*People v. Bigelow* (1984) 37 Cal.3d 731, 742; see also *People v. D'Arcy, supra,* 48 Cal.4th at p. 282 ["[N]one of the 'hybrid' forms of representation, whether labeled 'cocounsel,' 'advisory counsel,' or

'standby counsel,' is in any sense constitutionally guaranteed." (some internal quote marks omitted)].) The appointment of advisory counsel to assist a pro per defendant lies within the sound discretion of the trial court. (*People v. Crandell, supra,* 46 Cal.3d at p. 861; *People v. Bigelow*, *supra*, 37 Cal.3d at p. 742.)

Factors pertinent to the decision whether to appoint advisory counsel include "the defendant's demonstrated legal abilities and the reasons for seeking appointment of advisory counsel." (*People v. Crandell, supra*, 46 Cal.3d at p. 863.) In exercising its discretion, a trial court may consider a defendant's demonstrated skill and knowledge and the reasons cited in support of the motion. (*People v. Clark, supra*, 3 Cal.4th 41 at pp. 111-112; *People v. Crandell, supra*, at pp. 863-864.) A denial of advisory counsel is reviewed under an abuse of discretion standard and will not be set aside "as long as there exists a reasonable or even fairly debatable justification, under the law, for the action taken." (*People v. Clark, supra*, 3 Cal.4th 41 at p. 111.)

As to exercise of discretion,

> it has been held that "[w]hen the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. [Citation.] A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" [Citation.]

(*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1533.)

It is clear from the record that the trial court did not refuse to exercise its discretion whether to replace Rosenfeld as advisory counsel. As the trial court noted, Waldon had Chambers available and prepared to assist him

during the penalty phase proceedings. The court was justified in determining that any further delay to obtain additional advisory counsel was unnecessary. As long as there exists reasonable justification for the trial court's denial of a self-represented defendant's request for the appointment of advisory counsel, the trial court's action will not be set aside on appeal. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 554-555.)

Moreover, even if the trial court had abused its discretion by denying a request for advisory counsel, on the record of this case such an error would have been harmless under the standard of *People v. Watson, supra*, 46 Cal.2d at p. 836. (*People v. Crandell, supra*, 46 Cal.3d at pp. 864-865; *People v. Chavez* (1980) 26 Cal.3d 334, 348-349.)

D. There Was No Interference with Waldon's *Faretta* Rights

The United States Supreme Court has indicated that advisory or standby counsel's actions that substantially interfere with a defendant's right to self-representation are not subject to harmless error analysis. "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless." (*McKaskle v. Wiggins, supra*, 465 U.S. at p. 177, fn. 8.

However, the Court went on to explain,

> As a corollary, however, a defendant who exercises his right to appear pro se "cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.' " *Faretta*, 422 U.S., at 834 n. 46, 95 S.Ct. at 2540 n. 46. Moreover, the defendant's right to proceed pro se exists in the larger context of the criminal trial designed to determine whether or not a defendant is guilty of the offense with which he is charged. The trial judge may be required to make numerous rulings reconciling the participation of standby counsel with a

> pro se defendant's objection to that participation; nothing in the nature of the *Faretta* right suggests that the usual deference to "judgment calls" on these issues by the trial judge should not obtain here as elsewhere.

(*Ibid.*)

Here, the trial court adequately protected Waldon's right to self-representation, and advisory's counsel's participation, even over Waldon's objections, did not substantially interfere with his *Faretta* rights.

XIX. THE TRIAL COURT PROPERLY EXCLUDED THE COINTELPRO EVIDENCE

In Argument XVII., Waldon contends the trial court violated his Sixth Amendment right to present a defense when it excluded testimony by former FBI agent Wesley Swearingen as an expert witness in support of his "COINTELPRO" defense. (AOB 731-757.) The trial court properly exercised its discretion and did not violate Waldon's constitutional rights in excluding the evidence because it was irrelevant.

A. The Proffered Evidence and the Trial Court's Ruling

At trial, Waldon claimed that he was the target of an FBI or CIA counterintelligence program, or COINTELPRO, aimed at discrediting his Esperanto and Native American political activities by framing him for the charged murders and other offenses. As noted above, at one time, there actually was such an FBI program. (See *In re Elmer Pratt* (1980) 112 Cal.App.3d 795, 807-809 [discussion and summary of senate report regarding the aim and scope of the program]; see also footnote 1, *supra.*)

> The [senate report] describes COINTELPRO activities as covert action programs initiated for the purpose of "protecting national security, preventing violence, and maintaining the existing social and political order by 'disrupting' and 'neutralizing' groups and individuals perceived as threats."
>
> COINTELPRO's activities during the 15-year period it was operational (between 1956 and 1971) were described as being

> aimed at five targeted groups "perceived (as) threats to domestic tranquility: the 'Communist Party, USA' program (1956-71); the 'Socialist Workers Party' program (1961-69); the 'White Hate Group' program (1964-71); the 'Black Nationalist-Hate Group' program (1967-71); and the 'New Left' program (1968-71)."

(*In re Pratt, supra*, 112 Cal.App.3d at pp. 807-808.)

At an October 2, 1992 in camera hearing to discuss the admission of the "COINTELPRO" testimony, Waldon indicated that he would like to call Ward Churchill, a University of Colorado professor, and co-author of *The COINTELPRO Papers and Agents of Repression*, as well as Churchill's co-author, Jim Vander Wall. Waldon also sought to introduce the testimony of former FBI agent Wesley Swearingen. (60-1 RT 11814-11815.) Waldon said that Churchill and Vander Wall would testify as to what a COINTELPRO is, the characteristics of a COINTELPRO, and that COINTELPRO operations had been used to target American Indian activists. (60-1 RT 11815-11825.) The trial court found that Waldon had made a sufficient showing to pursue funding for the proposed witnesses, but that it would hold an Evidence Code section 402 hearing before the witnesses would be allowed to testify. (60-1 RT 11882-11883; 61 RT 12241.)

Waldon later told the court that Swearingen was a retired FBI agent that was involved in COINTELPRO operations against activists for Indian autonomy and other political groups. (62 RT 12356.) According to Waldon, Swearingen would testify as to what "a COINTELPRO" is and the characteristics or "symptoms" of a "COINTELPRO." (62 RT 12359-12389.) After hearing Waldon's offer of proof and hearing argument from both sides, the trial court found that any testimony by Swearingen was irrelevant, and any slight probative value was "clearly compellingly overwhelmingly outweighed by the danger of misleading, confusing the jury, unduly consuming time." (62 RT 12398.) The trial court found the

proffered evidence could not raise a reasonable doubt as to defendant's guilt. (62 RT 12399.)

The next day, the trial court agreed to reconsider its ruling on the admissibility of Swearingen's testimony. (62 RT 12511-12513.) Waldon argued that the exclusion of this evidence violated his Sixth Amendment right to present evidence and his Fifth Amendment right to due process in that it prevented him from presenting a third party culpability defense. (62 RT 12515-12516.) Waldon submitted several case citations in support of his argument (62 RT 12516-12526), and offered a six page statement from Swearingen as to his proffered testimony (62 RT 12526-12527.) That same afternoon, the trial court indicated that as of that point, he did not consider the testimony to be relevant. (62 RT 12556-12559, 12574-12575.)

On October 28, 1991, the trial court agreed to again reconsider the admission of Swearingen's testimony. (65 RT 13344-13362.) The trial court indicated that it had reviewed the prior proceedings concerning Swearingen's proposed testimony and the declarations submitted by Swearingen, and would allow the prosecution to examine Swearingen outside the presence of the jury to test the admissibility of his testimony. (66 RT 13480-13483.)

Swearingen testified that he was a former FBI agent, having retired from that agency in 1977. (66 RT 13483.) He could not remember any example of receiving access to more current investigative files, for example, those created in the 1980s or later. (66 RT 13487.) His only source of information about FBI counterintelligence activities directed at American Indian autonomy activists was public source information such as newspapers and magazine articles. (66 RT 13487-13488.) In Swearingen's opinion, there was no way to confirm or disprove the existence of any such counterintelligence activities from outside the agency using the Freedom of Information Act. (66 RT 13488.)

According to Swearingen, the FBI under J. Edgar Hoover investigated any groups that deviated from the accepted political or social norm. A person gaining a leadership position or gaining a following in a particular political or ethnic group would become the target of counterintelligence, or aggressive investigation, in order to keep that group from organizing or to break up an existing organization. (66 RT 13490-13492.)

Swearingen testified that COINTELPRO activities had resulted in innocent persons being convicted of crimes. However, a person's claim of innocence was not enough to show he was the target of COINTELPRO. (66 RT 13494.) One would have to look at the actual evidence in the case to determine whether the person was actually innocent. (66 RT 13509.) The FBI would not have murdered innocent bystanders just to frame someone who was a target. (66 RT 13495-13496.) They might try to find evidence that the target had committed some sort of crime in order to discredit the target. (66 RT 13496-13497.) They sought to neutralize targets that had a following or the potential to acquire a following among the targeted group members. The FBI used informants to infiltrate the group and befriend the target. (66 RT 13497.) They used disinformation to discredit the target in the news media and among the target's friends. (66 RT 13498, 13501-13502.) The FBI would conduct surveillance of the targets. (66 RT 13499-13500.) Russell Means was a target of the FBI's COINTELPRO He did not want to speculate whether charges against Means were a result of COINTELPRO activities. (66 RT 13505-13506.) Swearingen had no knowledge of any CIA involvement in the counterintelligence programs. (66 RT 13512.) FBI agents did not inform the subjects that they were targets, and did not conduct their activities in front of the target or while in uniform. The agents made every effort to keep the subject unaware of the FBI's COINTELPRO efforts. (66 RT

13512.) He knew of only one instance in which a target became aware of that he was a COINTELPRO target. (66 RT 13513.)

Waldon argued that Swearingen's testimony was relevant to show that COINTELPRO activities were conducted in his case. (66 RT 13514.) The prosecution countered that the testimony was only being offered to bolster alibi evidence presented by the defense, and that Waldon had failed to show any nexus between the proffered testimony and the charged offenses. He pointed out that Swearingen had left the FBI years before these crimes occurred, and that according to the evidence submitted, the FBI counterintelligence program had been discontinued years earlier. (66 RT 13515.)

The trial court ruled that the proffered testimony would not be admitted, explaining:

> I think the basic inquiry here before the court is one of relevance, and then perhaps an application of the provisions of section 352 of the evidence code. The basic definition of relevant evidence, of course, is found in section 210 of the evidence code. And I do not understand that Proposition 8 purported to or intended to alter the basic definition of relevant evidence contained in section 210.
>
> There is some application here I think of sections of the Evidence Code dealing with expert witnesses. Section 720, basically which deals with qualifications of an expert witness. And to the extent that there is an effort to present some opinion testimony from an expert witness, of course, that would bring in section 801b of the Evidence Code.
>
> Not entirely clear to me exactly what opinions may be sought or might be sought from Mr. Swearingen were he to testify in the presence of the jury, despite Mr. -- some of Mr. Sequoyah's past statements, which might seem to suggest that he was not going to seek opinions from Mr. Swearingen, I suspect that he might. And, of course, those opinions would be – would be an attempt I think to get Mr. Swearingen to opine in some way about this particular case.

In that regard I think there's some serious question whether, in terms of any current ongoing COINTELPRO activity by the FBI, I think there's a significant and substantial issue as to the basis for any such opinion on the part of Mr. Swearingen.

And mindful of the language of 801b, whether any such opinion would be based upon information or matter, is the term 801b uses, matter of a type reasonably relied upon by experts in forming any such opinion. As he was I think candid to point out, his only information about current, or even since the 1980's, FBI activity in that regard comes from the, as he termed I think, the public source information, the popular press, newspapers, magazines, stories, as he put it. And I don't think that satisfies the requirements of 801b.

He was asked whether it was possible through the FBI or FBI information files, materials to confirm any present COINTELPRO activity on the part of the FBI, and his answer was no. That would be just a guess, as he put it, on his part. And then later I think he did refer to it as an opinion. But his initial response was no, that would be just a guess on his part.

So he may have some expertise in terms of COINTELPRO activities that he personally participated in, was involved in many years ago, but I don't think he has any—there's been any showing of any expertise on his part concerning any current-day FBI activities.

Certainly nothing at all about the CIA. When he was asked that question he mentioned there was—well, he—he had only had one personal contact himself with any CIA agent or representative and that was involving a foreign counterintelligence. And, of course, again many years ago when he was, as I understand it, when he was still on active duty as a—as an FBI agent.

So I think there's some serious questions about—and I don't think sufficient showing has been made either under 720 or 801 in terms of his expertise as it might relate to—to his particular case and any current or even contemporaneous FBI activities.

As pointed out by Mr. Sequoyah's own submission, the definition of COINTELPRO as part of the definition relates to the—refers to the '60s and the '70s, '56 through '71. I take it—I

> take the point that that—well, maybe that term COINTELPRO is no longer in use but the activities are still going on. Again I don't think there's any competent evidence before me to establish that in any way. If anything, the preponderance, clear preponderance and the weight of the evidence is to the contrary. I say, resorting to Mr. Sequoyah's own submissions, the definition which is court's 53, the senate report which is court's 50, and Mr. Swearingen's testimony, the clear—clearly preponderate weight of that evidence suggests just to the contrary, that the FBI is not and has not for some time engaged in such activities.

(66 RT 13519-13521.)

The trial court went on to compare Swearingen's proffered testimony to Waldon's list of "symptoms of a COINTELPRO"—circumstances that Waldon claimed would suggest that a subject was now or had been a target of FBI counterintelligence efforts. (66 RT 13521-13528.) The court concluded that even giving "full value" to Swearingen's testimony, which the court found to be credible, Waldon had failed to show the necessary connection between the proffered testimony and the facts of the case. (66 RT 1329.) The trial court found that the testimony was not shown to be relevant and that it also should be excluded under Evidence Code section 352. The trial court noted that there was no evidence that the FBI even knew of Waldon's existence or that it had any interest in him or his organizations or activities. (66 RT 13533-13534.)

B. The Trial Court Properly Exercised its Discretion in Excluding the Proffered Testimony

Only relevant evidence is admissible, and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. (Evid. Code §§ 350, 351; *People v. Scheid, supra*, 16 Cal.4th at pp. 13-14.) Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of

relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Hamilton, supra,* 45 Cal.4th at p. 913.) Trial courts have broad discretion in relevancy determinations, but lack "discretion to admit irrelevant evidence." (*Ibid.*)

In this case, evidence regarding the FBI's COINTELPRO program was simply not relevant absent some link between the program and Waldon or the crimes with which he was charged. As such, the trial court properly excluded the testimony as irrelevant. The proffered evidence was too tenuous and speculative to be admitted as third party culpability evidence.

Third party culpability evidence, like other types of exculpatory evidence, is admissible only if it is relevant, and its probative value is not substantially outweighed by the dangers of undue prejudice, delay, or confusion of the issues. (*People v. Hamilton, supra*, 45 Cal.4th at p. 913.) Thus, courts are not required to admit any evidence, regardless of remoteness, to show a third person's possible culpability. (*People v. Prince* (2007) 40 Cal.4th 1179, 1242.) Instead, to be admissible, third party culpability evidence must "be capable of raising a reasonable doubt of defendant's guilt." (*People v. Hall, supra,* 41 Cal.3d at pp. 833-834; see also *Holmes v. South Carolina* (2006) 547 U.S. 319, 327 [126 S.Ct. 1727, 164 L.Ed.2d 503], citing *People v. Hall, supra*, as an example of a widely accepted third party culpability evidence rule.) Evidence of another person's motive or opportunity to commit a crime, without more, is insufficient to raise a reasonable doubt about a defendant's guilt . "[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall, supra*, 41 Cal.3d at p. 833.)

In this case, Swearingen's testimony could not have connected the FBI's now-discredited counterintelligence program to the charged crimes in

any manner. In the 1980 case, *In re Pratt*, the defendant claimed that government agents working for the FBI counterintelligence program had attempted to use false evidence to procure his conviction. In *Pratt*, the Court of Appeal denied habeas corpus relief, concluding "that defendant Pratt's contention that FBI's COINTELPRO agents conspired with local law enforcement authorities and the prosecuting attorney to 'frame' him by illegally manufacturing, manipulating and withholding evidence in order to insure his conviction is based on rank speculation and sheer conjecture which does not justify the relief sought. Nor does the mere existence of COINTELPRO and its activities as it related to the [Black Panther Party] or to defendant Pratt in and of itself in any way constitute exculpatory evidence." (*In re Pratt, supra*, 112 Cal.App.3d at pp. 882-883.) As was the case in *Pratt*, Waldon simply failed to show any connection between the FBI COINTELPRO program and the charged crimes.

In this case, Waldon was unable to show that he had ever been a target of any government counterintelligence activities, and there was nothing to support his claim that government agents were responsible for manufacturing or manipulating evidence against him, or even more incredibly, actually committing the charged crimes in order to frame him. Accordingly, the trial court properly exercised its discretion in excluding the testimony, because it was inadmissible as third party culpability evidence and irrelevant. (See e.g., *People v. Hamilton, supra*, 45 Cal.4th at p. 913 [trial court properly excluded proffered third party culpability evidence in penalty phase where evidence did nothing to connect third party to crime in any manner]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1136-1137 [trial court properly excluded evidence that "Pablo or some other third party involved in drug trafficking had a motive or possible opportunity" to commit the murder]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1018 [trial court properly excluded evidence victim associated with Hell's

Angels members and drug dealers, because the evidence failed to identify a possible suspect apart from defendant, did not link any third party to the commission of the crime, and did not establish an actual motive for murder, only a potential one].)

Because there was no state law error, Waldon's constitutional claims also fail. (*People v. Prince, supra*, 40 Cal.4th at p. 1243; *People v. Panah, supra,* 35 Cal.4th at p. 482, fn. 31.)

Finally, even if the trial court erred in excluding the witness's testimony, the error was harmless. Given the absence of evidence linking the COINTELPRO program to Waldon or to the charged crimes, there is no reasonable possibility that Waldon would have received a more favorable outcome but for the exclusion of this testimony.

XX. THE ACTIONS OF COURTROOM SECURITY PERSONNEL DID NOT VIOLATE WALDON'S RIGHTS TO DUE PROCESS OR A FAIR TRIAL

In Argument XVIII., Waldon contends the atmosphere in the courtroom related to the trial court's rulings on security issues, and the bailiff's demeanor and nonverbal communications with jurors violated his rights to due process and a fair trial. (AOB 58-774.) Waldon has not shown that any courtroom security rulings or behavior by the bailiffs impermissibly influenced the jurors.

A. Background

In June 1991, Waldon complained about the bailiffs jumping to their feet whenever Waldon stood up to speak. (27 RT 4062-4063.) The bailiff responded that he had not done so, and that he and the other bailiff were careful to avoid doing so. The trial court agreed and said that he had not observed any such conduct, but that he would watch for it in the future. (27 RT 4063-4064.) The court indicated that at least two or three bailiffs would be present in the courtroom during the proceedings. (27 RT 4071.)

A few days later, Waldon complained that during the morning's proceedings he had been moved through the hallway in view of potential jurors while in handcuffs. The trial court explained that this was an isolated incident caused by the need to retrieve material from Waldon's cell, but that the court and staff would make every effort to ensure that it did not happen again. (29 RT 4530-4533.)

In July 1991, Waldon complained that the trial court had ordered additional bailiffs be present in the courtroom without allowing him to be heard as to the necessity for the increased security. (40 RT 6949-6950.) The trial court told Waldon that he had increased the number of bailiffs stationed in the courtroom to three, and that the court had done so acting within its own discretion, based on the number of spectators present and the numerous exhibits, including weapons and potential weapons, present in the courtroom. The court reiterated that Waldon was being allowed to move throughout the courtroom to the same extent as the prosecutor. (40 RT 6955-6956.)

On October 3, 1991, Waldon complained that the prosecutor and the bailiffs were laughing and smirking and that the bailiff's behavior was obvious to the jury. (60 RT 12043-12044.)

On October 16, Waldon told the trial court that the bailiff and the prosecutor had been making faces throughout the trial, and that their expressions were visible to the jurors during the defense's presentation of evidence. (63 RT 12765.) The trial court noted that he had not observed any such conduct by his staff, but that if he were to see it, he would take appropriate action. The court thanked Waldon for bringing the matter to its attention. The prosecutor denied observing any such conduct. (63 RT 12767-12768.)

In an in-chambers hearing on October 23, 1991, outside the presence of Waldon or the bailiffs, Rosenfeld told the court that the defense would

be moving for a mistrial, based on misconduct by the bailiffs in the courtroom. She asked that the current bailiffs be replaced with new bailiffs. (65-1 RT 13093-13094.) Rosenfeld told the trial court that she had observed Deputy Tremble (as well as the prosecutor) laughing at and making facial expressions during defense testimony that suggested "that he doesn't perhaps believe." (65-1 RT 13095.) She told the court that during a sidebar discussing the admissibility of certain character evidence, the bailiff made a comment about the admissibility of the evidence in a tone of voice that could be heard by others in the courtroom. (65-1 RT 13095-13097.) When she spoke to the deputy about his remarks, he brushed off her concerns. (65-1 RT 13098.) She also complained that if a bailiff were not positioned near the prosecutor during a sidebar, the prosecutor would sometimes stare at the bailiffs until one of them approached the bench and positioned themselves near him, creating the impression for the jurors that Waldon was a threat. (65-1 RT 13096-13097.)

Rosenfeld suggested that one of the jurors was obviously looking to Deputy Tremble for nonverbal cues or reactions after each sidebar. (65-1 RT 13098-13099.) She told the court that since Waldon had brought his earlier concerns about the bailiff's behavior to the court's attention, Deputy Tremble seemed to be making a conscious attempt to avoid eye contact with that juror, but that the juror was now looking to another deputy for a reaction. (65-1 RT 13099.) According to Rosenfeld, the two deputies had been talking and flirting with that same juror. (65-1 RT 13100.) She complained that the bailiff gave the jurors the impression that the trial was just a formality, by saying for example, "All right. Come on in. Gee, we have to go through another day of this. Isn't it too bad[?]" (65-1 RT 13100.)

She said another juror would nod or shake her head or sigh when the prosecutor elicited something she liked or disliked. She thought that the

two jurors had taken cues from the bailiff and the "atmosphere in the courtroom" which she characterized as "very oppressive." She complained that the bailiff was now positioning himself between Waldon and the bench during sidebars. The trial court indicated that he had not seen any such behavior or change in behavior. (65-1 RT 13101-13102.) Rosenfeld told the court that the bailiff was staring at Waldon during sidebars, and that Waldon was consciously trying to avoid looking at the bailiff so that he would not feel intimidated. (65-1 RT 13103.) She also said that during breaks, while Waldon was still in the courtroom, Deputy Tremble had a habit of snapping and unsnapping his gun holster, and that on other occasions, he had taken the gun out of the holster, and taken out and reinserted the clip. (65-1 RT 13103.) On one occasion, he had joked about the gun going off accidentally. She interpreted his behavior as an attempt either to intimidate Waldon, or to communicate to the jury that the proceedings were a waste of time and/or a joke. (65-1 RT 13104.)

Rosenfeld complained that the deputy had gotten into the habit of rushing Waldon out of the courtroom. (65-1 RT 13104.) She thought it was unusual that the deputy seemed to get irritated when defense witness Spruth (who was in custody at the time of his testimony) claimed to be sick when he was first scheduled to testify, and acted unreasonably in requiring Spruth to be restrained. (65-1 RT 13104-13105.) She felt that the bailiff was no longer impartial, and suggested that his bias might compromise the confidentiality of her communications with Waldon in the courtroom, although she did not give an example. (65-1 RT 13106.) She related an incident in which she claimed that the deputy had shoved her chair while she was seated near the witness stand during Waldon's testimony. (65-1 RT 13106-13107.)

The prosecutor denied staring at the bailiff during proceedings and pointed out that the long trial had been difficult for all involved. (65-1 RT

13108-13109.) Both the court and the prosecutor noted that they avoided making direct eye contact with the jurors so that the jurors would not be influenced by any nonverbal communication. (65-1 RT 13109.) The prosecutor noted that the jury seemed to be responding to Waldon's own behavior and statements, rather than anything that the bailiffs might have said or done. (65-1 RT 13110.) Rosenfeld said that the deputy's behavior gave her concern for Waldon's safety and for the integrity of the trial. (65-1 RT 13111-13112.) She felt that the deputy's attitude communicated to the jury that he did not like Waldon and thought he was guilty. (65-1 RT 13113.)

The trial court noted that the jury was probably frustrated by the process, but that the jury had managed to maintain a good attitude. (65-1 RT 13114-13115.) He indicated that he understood Rosenfeld's concerns and thanked her for pointing out the issue, and again noted that he had not observed or noticed the conduct such as the bailiff's positioning in the courtroom but that he would be watching for the situation in the future. (65-1 RT 13116, 13118-13119.)

The prosecutor argued that there was insufficient evidence to support a mistrial. Rosenfeld indicated that she would be submitting declarations from others who had observed the conduct. (65-1 RT 13120-13121.) The trial court pointed out that the bailiffs had more direct interface with Waldon and that the deputies may have become frustrated with his constant delays and manipulation. (65-1 RT 13123-13125.) The trial court indicated that based on the evidence before him at that time, the motion for mistrial was denied, but that Rosenfeld could renew the motion.[15] He also

[15] It appears from the record that no declarations were submitted to support the allegations, and that Rosenfeld did not renew the motion for mistrial.

declined to request new bailiffs, finding that it was important to maintain continuity in a trial of this nature. The trial court agreed to be more sensitive and aware to concerns about the bailiff's behavior and that the issue could be revisited as appropriate. (65-1 RT 13121-13122. 13125, 13127-13130.)

On October 29, 1991, during a discussion outside the jury's presence, Waldon complained that he was distracted because the bailiff had "jerked" the microphone away from him and that the deputy was "standing over there in an agitated fashion" and that he thought the bailiff might try to shoot him at "any second." The bailiff suggested removing Waldon from the courtroom, but the trial court merely characterized Waldon's claim as "baloney" and continued the discussion. (66 RT 13565.) Later, for the record, the trial court clarified that the bailiff had not jerked the microphone away from Waldon. At the time, Waldon was shouting into the microphone, and the bailiff simply reached over and turned the microphone off. (66 RT 13572.)

On October 30, 1991, Waldon claimed that bailiff snickered at him during a sidebar conference in view of the jury. (67 RT 13615.) Both the trial court and the prosecutor stated that they did not observe any such behavior. The trial court added that the jury was "extremely unlikely," to have seen the bailiff in the position he was standing during the sidebar. The bailiff indicated that he did not recall laughing or snickering, and that he was facing away from the jury at the time. Rosenfeld stated that she did observe the bailiff laugh, but that he was not facing the jury. (67 RT 13617.)

B. The Alleged Conduct by the Courtroom Bailiff did not Impermissibly Influence the Jurors

"[A] 'trial court has broad power to maintain courtroom security and orderly proceedings.'" (*People v. Stevens* (2009) 47 Cal.4th 625, 632.)

Any suggestion that the presence of three bailiffs within the courtroom violated Waldon's rights to due process or a fair trial is without merit. Security measures that are not inherently prejudicial, such as use of metal detectors, or stationing security or law enforcement personnel within courtroom, do not need to be justified by a showing of extraordinary need like that required for physical restraint of a defendant. (*People v. Stevens, supra,* 47 Cal.4th at pp. 633-634.) "[T]he presence of security guards in the courtroom 'is seen by jurors as ordinary and expected.'" (*Id.* at p. 635.) Similarly, Waldon has not shown that a single incident where Waldon was present in handcuffs where he could have been seen by the potential jurors is sufficient to show prejudice. (*People v. Ochoa* (1998) 19 Cal.4th 353, 417 [single juror's brief view of defendant in chains outside the courthouse did not require removal of the juror].) It cannot be assumed from a silent record that the jury viewed the restraints. (*People v. Medina, supra,* 11 Cal.4th at p. 732.) The record does not establish that any jurors actually saw the restraints. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584.) Where there is no evidence that the jury viewed any unjustified or unadmonished shackling, any error is harmless. (*People v. Foster* (2010) 50 Cal.4th 1301, 1322; *People v. Anderson* (2001) 25 Cal.4th 543, 596; *People v. Coddington* (2000) 23 Cal.4th 529, 651, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Waldon's primary contention appears to be that the bailiff's alleged conduct impermissibly influenced the jury and denied him a fair trial. The federal and state Constitutions guarantee a criminal defendant a fair trial by a panel of unbiased, impartial jurors. (*People v. Nesler* (1997) 16 Cal.4th 561, 582; U.S. Const., amends. VI, XIV; Cal. Const., art. I, § 16.)

Evidence against a criminal defendant must "'come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.'"

(*Parker v. Gladden* (1966) 385 U.S. 363, 364 [87 S.Ct. 468, 17 L.Ed.2d 420].)

Turner v. Louisiana (1965) 379 U.S. 466 [85 S.Ct. 546, 13 L.Ed.2d 424], is inapposite. In *Turner*, the United States Supreme Court held that a defendant's right to a fair trial by an impartial jury was violated where two of the prosecution witnesses were deputy sheriffs who also served as bailiffs at the trial. (*Turner v. Louisiana, supra*, 379 U.S. at p. 473-474.) Unlike *Turner*, the deputy here did not testify, and thus there was no danger that the jury would accord any such testimony additional weight based on their direct interaction with the bailiff.

Parker v. Gladden, 385 U.S. 363, is also distinguishable. In *Parker*, the bailiff in charge of a sequestered jury told one juror, in the presence of other jurors, that the defendant was a "wicked fellow" who was guilty and then on another occasion told another juror, under similar circumstances, that if there were anything wrong in finding the defendant guilty, the Supreme Court would correct it. (*Id.* at pp. 363-364.) The United States Supreme Court held that the statements of the bailiff violated the defendant's Sixth Amendment right to trial by an impartial jury and to confront the witnesses against him. (*Id.* at pp. 363-364.) The Court explained:

> As we said in *Turner v. State of Louisiana*, 379 U.S. 466, 472-473, 85 S.Ct. 546, 550, 13 L.Ed.2d 424 (1965), 'the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.' Here there is dispute neither as to what the bailiff, an officer of the State, said nor that when he said it he was not subjected to confrontation, cross-examination or other safeguards guaranteed to the petitioner. Rather, his expressions were 'private talk,' tending to reach the jury by 'outside influence.' [citation] We have followed the 'undeviating rule,' [citation], that the rights of confrontation and

> cross-examination are among the fundamental requirements of a constitutionally fair trial. [citations].

(*Ibid.*)

The court further concluded that "the unauthorized conduct of the bailiff 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process.'" (*Parker v. Gladden, supra*, 385 U.S. at p. 365 (citations omitted). But the egregious misconduct in *Parker* is a far cry from the alleged acts in the instant case. There is no showing that the jurors were biased by the bailiff's conduct towards Waldon.

The jurors were instructed to consider only evidence presented at trial and to not let any outside influence affect their duty to impartially weigh the evidence. (69 RT 14239-14241.) There has been no showing that, even assuming the bailiff acted improperly, any juror was actually influenced by the alleged actions.

Here, the trial court immediately and appropriately addressed the concerns regarding the bailiff's conduct. "[O]nly when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred" is an evidentiary hearing called for. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419.) In this case, the trial court concluded that there had been no prejudicial misconduct, but invited Waldon and advisory counsel to renew the motion, should evidence of such misconduct be available or if any further instances of alleged misconduct occurred. The decision as to what type of inquiry to conduct in such situations rests within the trial court's sound discretion. (*People v. Ray* (1996) 13 Cal.4th 313, 343, 344.) The trial court here did not abuse its discretion or act unreasonably in conducting its inquiry.

The ultimate question is whether there is a substantial likelihood that any of the jurors were actually biased. (*People v. Nesler, supra*, 16 Cal.4th

at pp. 578-79.) Actual bias is defined as "'a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.'" (*Id.* at p. 581.) The record here does not demonstrate such likelihood. Therefore, Waldon's claim should be rejected.

XXI. PRETRIAL CHANGES OF JUDGES DID NOT VIOLATE WALDON'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL

Waldon contends in Argument XIX. that the pretrial transfer of this case between different departments of the superior court violated his rights to due process and a fair trial. Waldon has forfeited this claim by failing to raise the objection below. Moreover, matters may be reassigned to different judges before trial begins as long as the presiding judge determines that the transfer is reasonably necessary. Waldon has not shown that any pretrial reassignment resulted in prejudice resulting from any lack of familiarity or preparation by the trial court.

First, Waldon forfeited this claim by not raising this objection to the reassignments in the trial court. This Court has "consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable" on appeal. (*People v. Seijas* (2005) 36 Cal.4th 291, 302, quoting *People v. Green* (1980) 27 Cal.3d 1, 22; see also *People v. Williams* (1988) 44 Cal.3d 883, 906.) Waldon forfeited any claim of error based on the trial court's lack of familiarity with the record by failing to object on that ground at trial. (*People v. Cowan* (2010) 50 Cal.4th 410, 460; *People v. Halvorsen* (2007) 42 Cal.4th 379, 427.)

Although Penal Code section 1053, specifically allows a substitution of judges where the trial judge is unable to proceed, Waldon points to no authority that prohibits reassignment of a matter, or requires any showing

that the assigned judge is unable to proceed, in order for a matter to be reassigned to another judge before the trial commences. Section 1053 provides: "If after the commencement of the trial of a criminal action or proceeding in any court the judge or justice presiding at the trial shall die, become ill, or for any other reason be unable to proceed with the trial, any other judge or justice of the court in which the trial is proceeding may proceed with and finish the trial." This Court recently rejected the contention that due process of law and the constitutional right to a jury trial require the same judge to preside over all stages of a criminal proceeding. (*People v. Cowan, supra*, 50 Cal.4th at p. 459 [substitute judge may rule on motion to modify death penalty verdict].)

The California Rules of Court give the Presiding Judge of the Superior Court broad authority to establish policies and to assign cases and tasks within the court. California Rules of Court, rule 10.603 allows the presiding judge to reassign cases between departments as convenience or necessity requires. "In every multi-judge court it is necessary to have some procedure whereby a presiding judge or supervising judge transfers and retransfers cases in order to distribute the business of the court." (*Villarruel v. Superior Court* (1973) 35 Cal.App.3d 559, 563.) In this case, the court acted within its broad authority in reassigning the matter as needed over the five years between Waldon's arrest and his trial.

Waldon has not shown that he was prejudiced by the substitution of judges. Instead, he repackages the claims of error raised elsewhere and attributes them to the judges' lack of familiarity and preparation. This attempt must fail because not only has Waldon failed to demonstrate any lack of familiarity with the record or lack of preparation by the assigned judges, but as explained elsewhere, the complained-of pretrial rulings were not error and not prejudicial. In analogous circumstances, this Court has rejected the contention that a substitute trial judge who had not personally

heard guilt phase testimony could not fully exercise independent judgment when ruling on a motion to modify a death penalty verdict. (*People v. Espinoza* (1992) 3 Cal.4th 806, 829–830.) Numerous rulings adverse to the defense do not establish bias, especially when—like here—they are subject to appellate review. (*People v. Guerra, supra*, 37 Cal.4th at p. 1112.)

XXII. *EDWARDS* AND *TAYLOR*, CANNOT BE READ TO REQUIRE REPRESENTATION BY COUNSEL AT ALL CAPITAL TRIALS

In Argument XX., Waldon contends that the Fifth, Eighth, and Fourteenth Amendment, as well as Penal Code section 686.1[16] require that a mentally impaired capital defendant be represented by counsel. (AOB 804-824.) This argument was considered and rejected by this Court in *People v. Taylor, supra*, 47 Cal.4th 850.

As explained above in Argument XIII.C., there is simply no indication in the record that Waldon suffered from a severe mental illness to the degree that he was unable to carry out the basic tasks needed to present a defense. The record demonstrates that Waldon was a capable advocate on his own behalf.

Moreover, as this Court explained in *Johnson*, the *Edwards* court specifically declined to overrule *Faretta v. California, supra*, 422 U.S. 806. (*People v. Johnson, supra*, 53 Cal.4th at p. 531.) A criminal defendant has a constitutional right to represent himself if he "'knowingly and intelligently'" forgoes the traditional benefits associated with the right to counsel. (*Faretta v. California, supra*, 422 U.S. at pp. 819, 835.) In *Edwards*, the Supreme Court held states may, but need not, limit a defendant's right to self-representation and insist the defendant be

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[16] Section 686.1 states:

Notwithstanding any other provision of law, the defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings.

represented by counsel at trial "on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." (*Indiana v. Edwards, supra*, 554 U.S. 164, 174.) Self-representation by defendants who wish it and validly waive the right to counsel remains the norm. (*People v. Johnson, supra*, 53 Cal.4th at p. 531.)

In *People v. Taylor, supra*, 47 Cal.4th at page 878, this Court rejected the argument that granting a request for self-representation, as was done here, could violate the federal Constitution. As this Court explained, *Edwards* "does not support a claim of federal constitutional error in a case like the present one, in which defendant's request to represent himself was granted." "The court in *Edwards* did not hold ... that due process mandates a higher standard of mental competence for self-representation than for trial with counsel. The *Edwards* court held only that states may, without running afoul of *Faretta*, impose a higher standard...." (*People v. Taylor, supra*, 47 Cal.4th at pp. 877-878; *People v. Johnson, supra*, 53 Cal.4th at p. 527.)

In *Taylor*, the defendant claimed that criminal defendants should be represented by counsel in all capital cases, or at a minimum, whenever the self-representing defendant's conduct in his or her trial renders it unfair. (*People v. Taylor, supra*, 47 Cal.4th at p. 865.) This Court rejected defendant's claim stating:

> We addressed and rejected much the same set of claims in *People v. Blair* (2005) 36 Cal.4th 686, 736-740, [], and other cases. We have explained that the autonomy interest motivating the decision in *Faretta*—the principle that for the state to "force a lawyer on a defendant" would impinge on "'that respect for the individual which is the lifeblood of the law'" [Citation]—applies at a capital penalty trial as well as in a trial of guilt. [Citation.] This is true even when self-representation at the penalty phase permits the defendant to preclude any investigation and presentation of mitigating evidence. [Citations.] A defendant convicted of a capital crime may

> legitimately choose a strategy aimed at obtaining a sentence of death rather than one of life imprisonment without the possibility of parole, for some individuals may rationally prefer the former to the latter. [Citation.]

(*People v. Taylor, supra*, 47 Cal.4th at p. 865.)

This Court even more recently considered *Faretta* and *Edwards* in *People v. Johnson, supra*, 53 Cal.4th 519. The Court explained that California courts may deny self-representation when *Edwards* permits, stating:

> Denying self-representation when *Edwards* permits does not violate the Sixth Amendment right of self-representation. Because California law provides no statutory or constitutional right of self-representation, such denial also does not violate a state right. Consistent with long-established California law, we hold that trial courts may deny self-representation in those cases where *Edwards* permits such denial.

(*People v. Johnson, supra*, 53 Cal.4th at p. 528.)

The Court then considered the standard to apply when deciding whether to deny self-representation under *Edwards*. (*People v. Johnson, supra*, 53 Cal.4th at p. 529.) The Court rejected the suggestions of the parties and amici curiae, including a suggestion to return to the pre-*Faretta* standard in California , stating:

> All of these suggested standards are plausible. But we are constrained by the circumstance that what is permissible is only what *Edwards* permits, not what pre-*Faretta* California law permitted. In other words, because of federal constitutional constraints, in considering the defendant's mental state as a reason to deny self-representation, a California court may not exercise the discretion permitted under California law but solely that permitted in *Edwards*.

(*People v. Johnson, supra*, 53 Cal.4th at p. 530.)

The Court reiterated that denying a defendant's Sixth Amendment right to represent himself/herself should not be done lightly, stating:

> Trial courts must apply this standard cautiously. The *Edwards* court specifically declined to overrule *Faretta, supra*, 422 U.S. 806, 95 S.Ct. 2525. (*Edwards, supra*, 554 U.S. at p. 178, 128 S.Ct. 2379.) Criminal defendants still generally have a Sixth Amendment right to represent themselves. Self-representation by defendants who wish it and validly waive counsel remains the norm and may not be denied lightly. A court may not deny self-representation merely because it believes the matter could be tried more efficiently, or even more fairly, with attorneys on both sides. Rather, it may deny self-representation only in those situations where *Edwards* permits it.

(*People v. Johnson, supra*, 53 Cal.4th at p. 531.)

Thus, a court may deny self-representation based on a defendant's mental state only to the degree *Edwards* permits, not what pre-*Faretta* California law permitted. (*Ibid.*) The law remains that a criminal defendant has the right to self-representation even though many may perceive that it is not in his/her best interest to do so. For example, a defendant's announced intention to seek the death penalty does not compel denial of the motion for self-representation. (*People v. Bradford, supra*, 15 Cal.4th at pp. 1371-1372; *People v. Bloom, supra*, 48 Cal.3d at pp. 1222-1224, revd. on other grounds *Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267.) It is also true that a defendant has the right not to present a defense and to take the stand and confess guilt and request imposition of the death penalty. (*People v. Clark* (1990) 50 Cal.3d 583, 617.) Waldon's claim that he was a mentally impaired defendant who must be represented by counsel is without merit and should be rejected.

XXIII. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE FEDERAL CONSTITUTION OR INTERNATIONAL LAW

In Argument XXI., Waldon contends California's capital sentencing scheme or the instructions used during the penalty phase violates the Constitution. These claims are without merit.

A. Penal Code Section 190.2 is Not Impermissibly Broad

Contrary to Waldon's assertion (AOB 825-826), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.) This Court has repeatedly rejected the claim that California's death penalty statutes are unconstitutional because they fail to sufficiently narrow the class of persons eligible for the death penalty. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1288; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Schmeck* (2005)37 Cal.4th 240, 304; *People v. Wilson* (2005) 36 Cal.4th 309, 361-362; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Welch, supra*, 20 Cal.4th at p. 767; *People v. Arias* (1996) 13 Cal.4th 92, 187.) Waldon gives no justification for this Court to depart from its prior rulings on this subject.

B. The Application of Section 190.3, Factor (a), Did Not Violate Waldon's Constitutional Rights

Equally unavailing is the claim that the application of Penal Code section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (AOB 826-827.) Allowing a jury to find aggravation based on the "circumstances of the crime" under section 190.3, factor (a), does not result in an arbitrary and capricious imposition of the death penalty. (*People v. Virgil, supra*, 51 Cal.4th at p. 1288. As the United States Supreme Court noted in *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], "The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence."

"Nor is section 190.3, factor (a) applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different

cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a)." (*People v. Carrington* (2009) 47 Cal.4th 145, 200.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*Ibid.*, quoting *People v. Brown* (2004) 33 Cal.4th 382, 401.)

C. There Is No Constitutionally Required Burden of Proof at the Penalty Phase

Waldon contends that the death penalty statute and the jury instruction during the penalty phase proceedings failed to set forth the appropriate burden of proof. (AOB 828-837.) His claims related to this contention must be rejected because there is no required burden of proof as to the penalty determination.

1. The jury is not required to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty

Contrary to Waldon's argument (AOB 828-829), the jurors were not constitutionally required to find beyond a reasonable doubt that the aggravating factors outweighed mitigating factors, and the trial court was not required to instruct the jury that such a finding was required. (*People v. Bunyard* (2009) 45 Cal.4th 836, 858 [rejecting argument that *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, 466 support a claim of constitutional error]; *People v. Romero* (2008) 44 Cal.4th 386, 429.) Furthermore, "neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process

clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty." (*People v. Blair, supra,* 36 Cal.4th at p. 753.) In fact, "the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase." (*Ibid.*)

2. No burden of proof is required and the jury is not required to be instructed that there is no burden of proof

Waldon argues that Evidence Code section 520, which imposes the burden of proof on the prosecution in a criminal case, creates a burden of proof requirement in penalty phase proceedings, citing *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175]. (AOB 830.) This Court has considered the applicability of Evidence Code section 520 to capital sentencing determinations, and rejected the contention that it creates a burden of proof. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.)

As this Court has repeatedly held, "no burden of proof or burden of persuasion is required during the penalty determination." (*People v. Bennett* (2009) 45 Cal.4th, 577, 631.) As this Court explained: "Because the determination of penalty is essentially moral and normative [citation], and therefore is different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. [Citation.]." (*People v. Lenart, supra*, 32 Cal.4th at pp. 1136-1137, quoting *People v. Hayes* (1990) 52 Cal.3d 577, 643.) The penalty phase determination is "not akin to 'the usual fact-finding process,' and therefore 'instructions associated with the usual fact-finding process–such as burden of proof–are not necessary.'" (*People v. Lenart, supra*, 32 Cal.4th at p. 1137, quoting *People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418.)

Waldon further contends that if no burden of proof is required, the jury should have been so instructed. (AOB 830-831.) There is no constitutional requirement that a capital jury be instructed concerning a burden of proof. (*People v. Samuels* (2005) 36 Cal.4th 96, 137.) Conversely, there is no constitutional requirement to instruct that there is no burden of proof. Because the penalty determination process is normative, not factual, there is no burden of proof at the penalty phase. Therefore, no instruction on the burden of proof is required, as to either the presence or absence of any such burden. (*People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Cornwell* (2005) 37 Cal.4th 50, 104, overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421.)

3. There is no requirement the jury make unanimous findings as to the aggravating factors or that Waldon engaged in prior unadjudicated criminal activity

Waldon contends his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution were violated because there is no assurance that the jury found, either unanimously or by a majority, which aggravating circumstances warranted the death penalty, or that he engaged in prior criminality. (AOB 831-833.) There is no constitutional requirement that a capital jury reach unanimity on the presence of aggravating factors. (*People v. Martinez* (2009) 47 Cal.4th 399, 455; *People v. Burney* (2009) 47 Cal.4th 203, 268.) Nor is there a constitutional requirement that a capital jury unanimously agree that prior criminal activity has been proven. (*People v. Martinez, supra*, 47 Cal.4th at p. 455; *People v. Dykes* (2009) 46 Cal.4th 731, 799.) Nor does the failure to require jury unanimity as to aggravating factors violate Waldon's right to equal protection. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Griffin* (2004) 33 Cal.4th 536, 598, overturned on other grounds by *People v. Riccardi* (2012) 54 Cal.4th 758.)

4. CALJIC No. 8.88 is not impermissibly vague and ambiguous for using the words "so substantial"

Waldon contends the phrase "so substantial" contained in the jury instruction CALJIC No. 8.88 rendered that instruction impermissibly vague and ambiguous in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution. (AOB 833-834.) The jury was instructed that their determination of penalty depended 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 [emphasis added]) This Court has previously rejected this same claim and should do so again here. (*People v. Jones* (2012) 54 Cal.4th 1, 78; *People v. Carrington, supra*, 47 Cal.4th at p. 199; *People v. Rogers* (2009) 46 Cal.4th 1136, 1179; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249.)

5. CALJIC No. 8.88 is not unconstitutional for failing to inform the jury that the central determination is whether death is the appropriate punishment

Waldon contends CALJIC No. 8.88, informing the jurors that they can return a death verdict if the aggravating evidence "warrants" death, violates the Eighth and Fourteenth Amendments to the Constitution because the proper inquiry is whether the death penalty is the appropriate penalty, not whether it is "warranted." (AOB 834.) This contention lacks merit. (*People v. Rogers, supra*, 46 Cal.4th at p. 1179; *People v. Jackson* (2009) 45 Cal.4th 662, 701.)

6. The instructions were not constitutionally deficient because they failed to inform the jurors that if mitigation outweighed aggravation, they must return a sentence of life without the possibility of parole

Although the instructions informed the jury the circumstances under which it could return a death verdict, Waldon contends the instructions were deficient because they did not inform the jury of the converse–that if the mitigating circumstances outweigh the aggravating circumstances they must return a verdict of life without the possibility of parole. He claims the instructions therefore violated his right to due process. (AOB 835.) His claim is without merit. (*People v. Rogers, supra*, 46 Cal.4th at p. 1179; *People v. Moon* (2005) 37 Cal.4th 1, 42, citing *People v. Dennis, supra,* 17 Cal.4th at p. 552.)

7. The instructions were not constitutionally deficient in failing to inform the jury as to the standard of proof as to mitigating circumstances

Waldon contends the failure to instruct the jury on a burden of proof as to facts in mitigation violated his Eighth Amendment rights. (AOB 836.) No instruction is required regarding the standard of proof as to mitigating circumstances. (*People v. Loy* (2011) 52 Cal.4th 46, 78; *People v. Cook, supra*, 40 Cal.4th at p. 1365; *People v. Breaux* (1991) 1 Cal.4th 281, 314-315.) Thus, the instructions were not constitutionally deficient in failing to so instruct the jury.

8. There is no requirement to instruct the jury that there is a presumption of life

Waldon next argues the trial court's failure to instruct the jury that life without possibility of parole is presumed to be the appropriate sentence violated his rights under the Eighth and Fourteenth Amendments. (AOB 836-837.) As Waldon acknowledges, this Court has rejected the argument

that an instruction on the presumption of life is required in capital cases. (*People v. Arias, supra*, 13 Cal. 4th at p. 190; see *People v. Moon, supra*, 37 Cal.4th at p. 43.)

D. Written Findings Are Not Constitutionally Required

Waldon claims the failure of the jury to make any written findings during the penalty phase violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 837-838.) Jurors are not required to make written findings in determining the appropriate penalty. (*People v. Valdez, supra,* 55 Cal.4th at p. 180, citing *People v. Cook* (2006) 39 Cal.4th 566, 619.) This Court has consistently rejected any claim that the jury must make written findings as to aggravating factors. (*People v. Riggs, supra,* 44 Cal.4th at p. 329; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Cornwell, supra*, 37 Cal.4th at p. 105.)

E. The Instructions on Mitigating and Aggravating Circumstances Did Not Violate Waldon's Constitutional Rights

1. The use of the words "extreme" and "substantial" in CALJIC No. 8.85 was permissible

Waldon argues that the use of certain adjectives in the list of potential mitigation factors acted as an unconstitutional barrier to the jury's consideration of those factors. (AOB 838.) "Including in the list of potential mitigating factors adjectives such as "extreme" (§ 190.3, factors (d), (g)) and "substantial" (id. factor (g)) does not erect an impermissible barrier to the jury's consideration of mitigating evidence." (*People v. Valdez, supra*, 55 Cal.4th at p. 180, citing *People v. Avila* (2006) 38 Cal.4th 491, 614.)

2. There is no constitutional requirement to delete inapplicable sentencing factors

Waldon also contends his constitutional rights were violated because the trial court failed to delete inapplicable sentencing factors from CALJIC No. 8.85, which sets forth factors that may be considered in mitigation or aggravation. (AOB 838-839.) The trial court is not required to delete inapplicable sentencing factors from the standard instruction. (*People v. Burney, supra*, 47 Cal.4th at p. 261; *People v. Bramit, supra*, 46 Cal.4th at p. 1248.)

3. The trial court is not required to inform the jurors that some factors are relevant only in mitigation

Waldon contends the failure to instruct the jury that certain factors set forth in CALJIC No. 8.85 were relevant solely as potential mitigators was constitutionally impermissible. (AOB 839.) This Court has repeatedly held that CALJIC No. 8.85 is not unconstitutional for failing to inform the jury that some factors can be only used as mitigation. (*People v. Perry* (2006) 38 Cal.4th 302, 319, *People v. Moon, supra*, 37 Cal.4th at p. 42; *People v. Farnam* (2002) 28 Cal.4th 197, 191.)

F. Intercase Proportionality Review is Not Constitutionally Required

Waldon suggests contends the failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution because the proceedings are conducted in a constitutionally arbitrary, unreviewable manner, or in violation of equal protection or due process principles. (AOB 840.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Cornwell, supra*, 37 Cal.4th at p. 105; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.)

G. California's Capital Sentencing Scheme Does Not Violate Equal Protection

Waldon argues California's capital sentencing scheme violates the Equal Protection Clause because it gives more procedural protections to non-capital defendants. As examples, he complains that in capital cases there is no burden of proof, the jurors need not agree on what aggravating circumstances apply, and there are no written findings. (AOB 840.) As this Court has repeatedly and consistently held, equal protection does not "deny capital defendants equal protection because it provides a different method of determining the sentence than is used in noncapital cases. [Citation.]" (*People v. Elliot, supra*, 37 Cal.4th at p. 488; accord *People v. Dunkle, supra*, 36 Cal.4th at p. 940; *People v. Panah, supra*, 35 Cal.4th at p. 500.) This is because "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law. [Citation.]" (*People v. Manriquez, supra,* 37 Cal.4th at p. 590.) Thus, this argument is without merit.

H. California's Death Penalty Law Does Not Violate International Law

Lastly, Waldon contends the death penalty violates international law, the Eighth and Fourteenth Amendments and "evolving standards of decency." (AOB 841.) This Court has repeatedly rejected similar arguments and should do so again here. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citation.]" (*People v. Alfaro, supra,* 41 Cal.4th at p. 1332; accord *People v. Mungia, supra,* 44 Cal.4th at p. 1143; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Panah, supra*, 35 Cal.4th at p. 500.)

XXIV. THERE WAS NO CUMULATIVE ERROR

In Argument XXII., Waldon argues that the cumulative effect of the claimed errors in this case warrants reversal of the judgment and sentence. (AOB 842-847.) As discussed above, there are no errors to cumulate. (See *People v. Thornton* (2007) 41 Cal.4th 391, 453.)

A criminal defendant is entitled to a fair trial, but not a perfect one, even where he has been exposed to substantial penalties. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; see, e.g., *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and...the Constitution does not guarantee such a trial."].)

Any claim based on cumulative error must be assessed to see if it is reasonably probable the jury would have reached a result more favorable to the defendant in their absence. (*People v. Holt* (1984) 37 Cal.3d 436, 458.) Applying that analysis to the instant case, this contention should be rejected. Notwithstanding Waldon's arguments to the contrary, no prejudicial error has been shown. To the extent any error arguably occurred, the effect was harmless. Review of the record without the speculation and interpretation offered by Waldon shows that he received a fair and untainted trial. The Constitution requires no more.

Even when considered together, it is not reasonably probable that, absent the alleged errors, Waldon would have received a more favorable result, and any errors were harmless. Thus, even cumulatively, any errors are insufficient to justify a reversal of the verdicts.

CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: May 28, 2014

Respectfully submitted,

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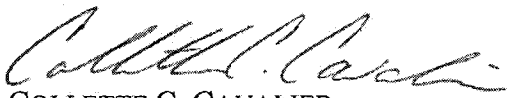

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 89, 208 words.

Dated: May 28, 2014

KAMALA D. HARRIS
Attorney General of California

COLLETTE C. CAVALIER
Deputy Attorney General
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. BILLY RAY WALDON** No.: **S025520**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **May 29, 2014**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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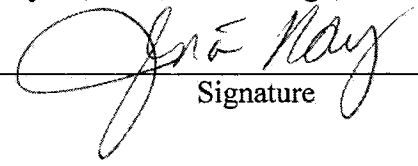
For delivery to:
Honorable David M. Gill, Judge

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 29, 2014**, at San Diego, California.

Jena Ray
Declarant



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