IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DAVID SCOTT DANIELS, Defendant and Appellant.	No. S095868 (Sacramento County Sup. Ct. No. 99F10432)

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Sacramento

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IX.

THE TRIAL COURT ERRED WHEN IT PERMITTED APPELLANT TO REPRESENT HIMSELF AT HIS CAPITAL TRIAL

A. Introduction

In *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), the defendant was denied the right to represent himself at his trial on charges of grand theft. (*Id.* at pp. 807-810.)[1] The United States Supreme Court held that under the circumstances, forcing Faretta to accept counsel against his will deprived him of an implied Sixth Amendment right to conduct his own defense. (*Id.* at pp. 819, 836.) This Court has extended *Faretta,* holding that the defendant in a capital case has the right of self-representation at both the guilt and penalty phases of a capital trial. (*People v. Taylor* (2009) 47 Cal.4th 850, 865; *People v. Joseph* (1983) 34 Cal.3d 936, 945.) Based on this Court's precedent, the trial court granted appellant's request to represent himself. (1 CT 6, 11.)

Appellant respectfully requests the Court to reconsider and disapprove its extension of *Faretta* to capital cases. *Faretta* itself and subsequent United States Supreme Court cases recognize that the right of self-representation must yield when certain other interests are at stake, e.g.,

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[1] For the sake of clarity, the instant argument is numbered Argument IX and follows Arguments I through VIII, which were raised in Appellant's Opening Brief. In addition, the record will be cited here in the same manner as in Appellant's Opening Brief: "CT," Clerk's Transcript; "ACT," Augmented Clerk's Transcript; "RTL," Reporter's Transcript in the Lower Court; "RTS," Reporter's Transcript in the Superior Court. appellant refers to the record on appeal in the same manner as in his opening brief. (See AOB, fn. 2.)

the basic constitutional law objective of providing a fair trial. In particular, the Eighth Amendment requires "a greater degree of accuracy and factfinding than would be true in a noncapital case" (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342), and procedures that do not create a substantial risk that a death sentence will be imposed in an arbitrary and capricious way. For this reason, the Sixth Amendment's protection of the assistance of counsel and its guarantee of a fair trial, as well as the Due Process Clause of the Fourteenth Amendment, should have prevailed over appellant's wish to represent himself at his capital trial. Additionally, *Faretta*'s three-part rationale is inapplicable to a bifurcated penalty phase trial. The trial court therefore erred when it failed to revoke appellant's pro se status at the penalty phase.

Appellant acknowledges that this Court has continued to hold that the "rule announced by the *Faretta* majority . . . remains the law of the land." (*People v. Butler* (2009) 47 Cal.4th 814, 824.) To the extent that this Court finds that appellant's claim is foreclosed by *Faretta,* he still must raise it here in order to preserve his claim for review by the high court. (See *Street v. New York* (1969) 394 U.S. 576, 582 [constitutional question must first be presented and ruled upon by highest state court before United States Supreme Court has jurisdiction to rule upon it].)

B. Because of Recognized Limits on the *Faretta* Decision and Eighth Amendment Requirements, the Trial Court Erred When It Granted Appellant's Motion to Represent Himself at His Capital Trial

1. The *Faretta* Decision

In *Faretta, supra*, 422 U.S. at pp. 807-808, the defendant, accused of grand theft, requested that he be allowed to represent himself. After

holding a hearing on the defendant's ability to conduct his own defense, which raised questions as to his knowledge of such matters as the hearsay rule, the trial court refused the defendant's request and appointed counsel to represent him. (*Id.* at pp. 808-810.) On appeal from his conviction, the state appellate court found no error, noting that the defendant had no state or federal constitutional right to proceed pro se. (*Id.* at pp. 811-812.) A divided Supreme Court, relying on the Sixth Amendment, rejected that contention and held that by "forcing Faretta, *under these circumstances*, to accept [a lawyer] against his will . . . the California courts deprived him of his constitutional right to conduct his own defense." (*Id.* at p. 836; italics added.)

In reaching this conclusion, the Court undertook a three-part analysis. First, the Court looked at the historical record on the right of self-representation. (*Faretta, supra*, 422 U.S. at pp. 812-817.) It concluded that its own past recognition of the right of self-representation, the federal-court authority holding the right to be of constitutional dimension, and state constitutions "pointing to the right's fundamental nature" supported the principle that forcing a lawyer on a defendant is contrary to "his basic right to defend himself if he truly wants to do so." (*Id.* at p. 817.)

Next, the Court found that the right of self-representation was also supported by the structure of the Sixth Amendment and the English and colonial jurisprudence that preceded it. (*Faretta, supra,* 422 U.S. at p. 818.) Notably, this section of the Court's analysis frequently invokes the role of the Sixth Amendment in the right to make a *defense*. The language of the Sixth Amendment itself lists the rights basic to our adversary system of justice, i.e., the rights to notice, confrontation, cross-examination and compulsory process. (*Ibid.*) The Amendment thus "constitutionalizes the

right in an adversary criminal trial to make a *defense* as we know it." (*Ibid.*; italics added.)

The Court found that the right of self-representation was necessarily implied by the Sixth Amendment. (*Faretta, supra,* 422 U.S. at p. 819.) This is because the Amendment gives rights directly to the accused, "who suffers the consequences if the defense fails." (*Id.* at pp. 819-820.) The Court concluded that this reading of the Sixth Amendment was reinforced by the Amendment's roots in the legal history of England and the American Colonies. (*Id.* at pp. 821-832.)

Finally, the Court examined the right of self-representation in light of the "basic thesis" of its prior cases on the right to counsel, which is that "the help of a lawyer is essential to assure the defendant a fair trial." (*Faretta, supra,* 422 U.S. at pp. 832-833.) The Court recognized that in most cases, defendants can "better defend" with counsel's guidance. (*Id.* at p. 834.) Nevertheless, because the defendant will bear the consequences if he is convicted, the right to defend is personal. (*Ibid.*) In this respect, the Court invoked the importance in the law of "respect for the individual." (*Ibid.*)

2. *Faretta* Itself and Later United States Supreme Court Cases Recognize the Limits of *Faretta*

Although the Supreme Court's rationale in *Faretta,* which relied on historical and textual analyses, was broad, the Court's ultimate conclusion was that "under the circumstances" forcing counsel upon the defendant violated his Sixth Amendment right to conduct his own defense. (*Faretta, supra,* 422 U.S. at p. 836.) The circumstances of the case, of course, included the fact that Faretta was charged with grand theft, a noncapital offense. (*Id.* at p. 807.)

Faretta recognized other limits to the right of self-representation as well. It noted that a judge can terminate self-representation, e.g., when a defendant "deliberately engages in serious and obstructionist misconduct." (*Faretta, supra,* 422 U.S. at p. 834, fn. 46.) A judge can appoint standby counsel, even over a defendant's objection, to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. (*Ibid.*)

United States Supreme Court cases after *Faretta* continued to recognize its limits. In *McKaskle v. Wiggins* (1984) 465 U.S. 168 (*McKaskle*), the Court built on its comments in *Faretta* regarding standby counsel. It held that a pro se defendant's Sixth Amendment right to self-representation, as expressed in *Faretta*, was not violated by standby counsel's unsolicited participation in the defense, even over the defendant's continuing objections. (*Id.* at pp. 176-177, 180.) The Court based this on "both *Faretta*'s logic and its citation of the *Dougherty* case [which] indicate that no absolute bar on standby counsel's unsolicited participation is appropriate or was intended." (*Id.* at p. 176, citing *Faretta, supra,* 422 U.S. at p. 834, fn. 46; see also *United States v. Dougherty* (D.C. Cir. 1972) 473 F.2d 1113, 1124-1126 [explaining utility of the role of standby counsel].) The Court also delineated the role that standby counsel could play. (*McKaskle, supra,* 465 U.S. at pp. 183-184.)

In *Martinez v. Court of Appeal of Cal., Fourth Appellate District* (2000) 528 U.S. 152, 163 (*Martinez*), the Supreme Court held that there is no right of self-representation on appeal. In so holding, the Court noted that *Faretta* had recognized that the right to self-representation is not absolute. (*Id.* at p. 161.) "Even at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the

defendant's interest in acting as his own lawyer." (*Id.* at p. 162.) The Court found most of *Faretta*'s three rationales, including the historical evidence, inapplicable to appellate proceedings. (*Id.* at pp. 156-158.) *Faretta*'s reliance on the structure of the Sixth Amendment was also irrelevant. (*Id.* at p. 159.) The Amendment lists rights available for trial; it does not include any right to appeal. (*Id.* at pp. 159-160.) A defendant's interest in autonomy, grounded in the Sixth Amendment, is also inapplicable at the appeal stage. (*Id.* at p. 161.) The Court concluded that, in the appellate context, the balance between the "competing interests" in self-representation versus the government's interest in ensuring the integrity and efficiency of a trial tipped in favor of the State. (*Id.* at p. 162.)

Most recently, in *Indiana v. Edwards* (2008) 554 U.S. 164, after discussing the various limitations on the right to self-representation, the Court held that the right to self-representation was not infringed when the trial court refused to allow Edwards, a mentally-ill defendant, to represent himself at trial. (*Id.* at p. 174.) The Court recognized that, before permitting a defendant to represent himself at trial, the states may impose requirements beyond the mere capacity to waive the right to counsel. (See *id.* at p. 178.) Moreover, where self-representation "undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial," the government's interest in preserving the latter outweighs a defendant's interest in acting as his own lawyer. (*Id.* at pp. 176-177.) Further, the courts must act to preserve constitutional processes such as a fair trial:

> As Justice Brennan put it, "[t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes." *Allen*, 397 U.S., at 350[] (concurring opinion). See *Martinez*, 528 U.S., at 162 [] ("Even at the trial level . . . the

> government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer"). See also *Sell v. United States*, 539 U.S. 166, 180 (2003) ("[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one").

(*Indiana v. Edwards, supra,* 554 U.S. at pp. 176-177; parallel citations omitted.)

Thus, the Supreme Court has limited *Faretta* in circumstances where its reasoning is inapplicable, where the Sixth Amendment has to yield to other interests or constitutional rights, and/or where the Sixth Amendment itself does not apply. The primacy of the Eighth Amendment in capital cases must be viewed in light of these limitations.

3. Pursuant to Eighth Amendment Requirements, the Right of Self-Representation Must Be Limited to Noncapital Cases

As described above, the reasoning in *Faretta* is based upon analysis of the Sixth Amendment, and the reach of *Faretta* is limited by both its facts and its reasoning. *Faretta* did not consider the circumstances of a capital trial or the Eighth Amendment. This is not surprising, given that in 1975, when the opinion was issued, capital punishment in the United States had ground to a halt following the Supreme Court's decision in *Furman v. Georgia* (1972) 408 U.S. 238 (*Furman*). *Furman* invalidated state statutes under which juries exercised unrestrained discretion to impose capital punishment. (*Id.* at pp. 239, 256-257 (conc. opn. of Douglas, J.), 312-313 (conc. opn. of White, J.).)

Following *Furman* and after the *Faretta* opinion in 1975, the Court further developed its capital Eighth Amendment jurisprudence. The Court announced that under the Eighth Amendment, the death penalty cannot be

imposed under procedures that create a "substantial risk" that it will be imposed in an "arbitrary and capricious way." (*Gregg v. Georgia* (1976) 428 U.S. 153, 188.) In *Beck v. Alabama* (1980) 447 U.S. 625, 638, the Court held that a prohibition against giving a lesser included offense instruction in a capital case was unconstitutional because it diminished the reliability of a guilt determination. And in *Strickland v. Washington* (1984) 466 U.S. 668, 704, the Court observed that "we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and the accuracy of factfinding."

Examining *Faretta*'s reasoning in light of Eighth Amendment requirements demonstrates that the right of self-representation must give way at a capital trial, where procedures must guard against diminished reliability at the guilt phase (*Beck v. Alabama, supra,* 447 U.S. at p. 638), and the imposition of the death penalty in an arbitrary and capricious way (*Gregg v. Georgia, supra,* 428 U.S. at p. 188). This is because, as *Faretta* recognized, the Sixth Amendment right to counsel is one of the constitutional procedures that is essential to assure the defendant a fair trial. (*Faretta, supra*, 422 U.S. at pp. 832-833.)

In *Strickland v. Washington, supra,* 466 U.S. at p. 685, a capital case, the Court described the right to counsel as playing "a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Competent defense counsel are expected to provide the skill and knowledge that will render the trial a reliable adversarial process. (*Id.* at p. 688.) When such counsel is lacking, the result of a proceeding can be rendered unreliable. (*Id.* at p. 694.)

The *Faretta* opinion acknowledged that most defendants will receive a better defense with counsel's guidance than by their own unskilled efforts. (*Faretta, supra,* 422 U.S. at p. 834; see also *Martinez, supra,* 528 U.S. at p. 161 [even where counsel's performance is ineffective, it is reasonable to assume that it is more effective than what an unskilled appellant could provide for himself].) The opinion recognized that the right of self-representation "seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel." (*Faretta, supra,* 422 U.S. at p. 832.) For this reason, a strong argument could be made that the whole thrust of those decisions "must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant." (*Id.* at p. 833.) The opinion summarily rejected that argument, however, because the defendant, and not his lawyer or the State, bears the consequences of a conviction, so the defendant must be free to personally decide whether to utilize counsel for his defense. (*Id.* at p. 834.) Ultimately, then, *Faretta* traded the essential protections afforded by the right to counsel for a defendant's interest in "free choice." (*Id.* at pp. 815, 834.)

In capital cases, however, there are interests at stake other than those personal to a defendant. Inherent in the Eighth Amendment prohibition against cruel and unusual punishment is the principle that the State must not arbitrarily inflict a severe punishment. (*Furman v. Georgia, supra,* 408 U.S. at p. 274 (conc. opn. of Brennan, J.).) This is done by determining whether a particular law or practice involving the death penalty meets or violates "the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) These

standards are decided by maintaining a link between contemporary community values and the penal system. (*Ibid.*)

Accordingly, the Eighth Amendment demands that substantive and procedural safeguards be in place to ensure that the trier of fact can make the requisite individualized sentencing determination. The assistance of counsel is one of those procedural safeguards, as the role of counsel is to render a trial reliable. (*Strickland v. Washington, supra,* 466 U.S. at pp. 688, 694.) Allowing a capital defendant to forego representation at his capital trial simply creates too much of a risk that any resulting conviction will lack sufficient indicia of reliability or that a death judgment of will be imposed in an "arbitrary and capricious manner" (*Gregg v. Georgia, supra,* 428 U.S. at p. 188), and hence be unreliable.

Because the death penalty must be imposed in accord with the Eighth Amendment (see, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 599), and the right to self-representation must bend in favor of the state's interest in the integrity of even a noncapital trial (*Martinez, supra,* 528 U.S. at p. 162), the former takes precedence at a capital trial. For this reason, the trial court erred when it permitted appellant to represent himself at his capital trial.

C. Because *Faretta*'s Reasoning Does Not Support the Right to Self-Representation at the Penalty Phase, the Trial Court Erred When It Continued to Allow Appellant to Represent Himself There

As appellant argues above, consistent with the recognized limits of the *Faretta* decision, the procedural protections afforded by the Sixth Amendment right to counsel cannot be waived in a capital trial, where "proceedings [must] be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." (*Strickland v. Washington, supra,* 466 U.S. at p. 704.) This is especially

true at the penalty phase of a capital trial, where the three-part rationale of *Faretta* does not apply at all. For this reason, even if this Court rejects appellant's argument that *Faretta* applies to the entire capital trial, it must acknowledge that it does not apply at the penalty phase, reverse the death sentence and remand for a penalty phase trial where appellant is represented by counsel.

1. The Historical Evidence Does Not Support a Right to Self-Representation at the Second Phase of a Bifurcated Capital Proceeding

After setting forth the relevant English and colonial history, the *Faretta* court concluded that the historical record supported the right to self-representation at trial. (*Faretta, supra*, 422 U.S. at pp. 812-817.) In contrast, looking to the same historical record, the *Martinez* Court concluded that, because there was no right to appeal at the time of the Nation's founding, the right to self-representation did not apply to an appellant. (*Martinez, supra*, 528 U.S. at p. 159.) Similarly, one cannot conclude that the historical record speaks in favor of finding a right to self-representation for defendants during the penalty phase of a capital trial.

Unified capital trials were the norm when the Sixth Amendment was created; the question of guilt and the question of death both were decided in a single jury verdict at the end of a single proceeding. (Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing* (2005) 105 Colum. L. Rev. 1967, 1972-1973, 2011.) Bifurcation came to capital cases later, largely in response to the United States Supreme Court's Eighth Amendment decisions in the mid-1970s. (*Ibid.*)

Thus, four years after *Furman v. Georgia, supra,* 408 U.S. 238, the Supreme Court endorsed Georgia's bifurcated capital trial scheme, in which

a "defendant is accorded substantial latitude as to the types of evidence that he may introduce" at the penalty stage. (*Gregg v. Georgia, supra,* 428 U.S. at p. 164 (joint opn. of Stewart, Powell and Stevens, JJ.).) The Court recognized that "accurate sentencing information" about "the character and record" of an individual offender, which "is an indispensable prerequisite to a reasoned determination" on punishment, often may be irrelevant or extremely prejudicial to a decision on guilt. (*Id.* at pp. 190, 206.) For that reason, the Court stated that the concerns of *Furman* are "best met by a system that provides for a bifurcated proceeding." (*Gregg v. Georgia, supra*, 428 U.S. at p. 195.)

At the time of the passage of the Sixth Amendment, the Framers were not contemplating its application at the penalty phase of a bifurcated proceeding. Accordingly, the historical record does not speak in favor of applying *Faretta* to the penalty phase of a capital trial.

2. The Structure of the Sixth Amendment Does Not Support the Conclusion That the Right to Self-Representation Applies to the Penalty Phase at a Capital Trial

As described above, in *Faretta*, the Court rooted its holding in the text and structure of the Sixth Amendment, finding that it implied the right to defend oneself personally. (*Faretta, supra,* 422 U.S. at pp. 819-820.) In *Martinez, supra*, 528 U.S. at p. 160, the Court found support for its limitation on *Faretta* to the trial stage in the structure of the Sixth Amendment, a structure in which rights are "presented strictly as rights that are available in preparation for trial and at the trial itself." Similarly, in *McKaskle*, the Court made express what had been implied in *Faretta*: "[T]he 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." (*McKaskle*, *supra*, 465 U.S. at pp. 177-178, fn. 8.)

In contrast, the issue at the penalty phase is whether the person convicted is uniquely qualified to receive society's ultimate punishment, not whether one has a defense to the crime charged. Indeed, "mak[ing] a defense" is so entirely absent at the penalty phase that a convicted defendant who has reached the penalty phase is not entitled to a "lingering doubt" instruction as to guilt or innocence. (*Oregon v. Guzek* (2006) 546 U.S. 517, 523-527; *People v. Hartsch* (2010) 49 Cal.4th 472, 511-513 [no lingering doubt instruction required by either federal or state Constitution].) As a convicted defendant at the penalty phase is no longer making a defense to an accusation, the structure and language of the Sixth Amendment simply does not support a finding that the right to self-representation applies at the penalty phase.

3. A Defendant's Interest in "Free Choice" Recognized in the *Faretta* Line of Cases Is Inapplicable at the Penalty Phase of a Capital Trial

In *People v. Taylor*, *supra*, 47 Cal.4th 850, this Court stated 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'" (*Faretta, supra*, 422 U.S. at p. 834) – applies at a capital penalty trial as well as in a trial of guilt. (*People v. Taylor, supra,* 47 Cal.4th at p. 865.)

Appellant respectfully disagrees. The words "autonomy" and "dignity" are used broadly in cases concerning the application of *Faretta.* (See, e.g., *Indiana v. Edwards, supra,* 554 U.S. at p. 176, citing *McKaskle, supra,* 465 U.S. at pp. 176-177; *Martinez, supra,* 528 U.S. at pp. 160-161; *McKaskle, supra,* 465 U.S. at pp. 176-177; *People v. Blair* (2005) 36

Cal.4th 686, 738.) While these concepts have an innate appeal, their application at the penalty phase cannot be assumed for several reasons.

First, neither word appears in the majority opinion in *Faretta* with respect to an accused; rather, the case refers to "free choice." (*Faretta, supra*, 422 U.S. at pp. 815, 834.) As demonstrated *ante*, the "free choice" recognized in *Faretta* applies to the right to defend oneself in a trial at which guilt of the charged offense is the issue. (*McKaskle, supra*, 465 U.S. at pp. 177-178, fn. 8.)

Second, and more importantly, the decreased autonomy interest following conviction (*Martinez, supra,* 528 U.S. at pp. 159-161, 163) coincides with the heightened interest in dignity crucial to the Eighth Amendment. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 100.) This is because "[w]hile the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." (*Ibid.*) The preservation of dignity comes in capital cases from systems that promote reliability by insisting that each capital defendant be treated and considered as an individual. (See, e.g., *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 602-605.) Thus, a state's power to punish is restricted and must comport with the Eighth Amendment. The rhetoric of "autonomy" is therefore irrelevant at the penalty phase of a capital trial.

Because *Faretta*'s reasoning provides no support for an affirmative constitutional right of self-representation at the penalty phase of a capital trial, the trial court erred when it permitted appellant to represent himself at the punishment phase below. The death verdict must therefore be reversed.

D. Conclusion

As demonstrated above, neither the circumstances nor reasoning of *Faretta* provides a basis for extending the right of self-representation to a capital trial. The circumstances of appellant's trial in particular demanded that the Sixth Amendment right to counsel and Eighth Amendment protection against cruel and unusual punishment take precedence over appellant's wish to represent himself.

Faretta rights exist in the context of an adversarial determination of guilt. (*McKaskle*, *supra,* 465 U.S. at pp. 177-178, fn. 8.) The Court's conclusion in *Faretta* extended only to a defendant's constitutional right to conduct his own defense. (*Martinez*, *supra*, 528 U.S. at p. 154.) In this case, knowing that appellant wanted to plead guilty to capital murder and declined the appointment of advisory counsel or an investigator (1 CT 180; 1 RTS 12, 41, 47-48), the trial court erred when it granted appellant's request for self-representation. At a minimum, the trial court should have revoked appellant's pro per status at the conclusion of the court trial on guilt, when it was clear that no adversarial process had occurred: appellant had asked no questions, made no objections, and presented no evidence or argument on his behalf.

Because of the need to protect the government's interest in fairness and integrity at appellant's trial (*Martinez*, *supra,* 528 U.S. at p. 162), and heightened reliability necessary at a capital proceeding (see, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305), the trial court should never have granted pro per status to appellant. Under the circumstances which existed at appellant's trial, the failure of the trial court to provide counsel at trial violated the Sixth, Eighth and Fourteenth Amendments, and the convictions, special circumstance findings and death sentence must be

reversed.

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X.

THE CONVICTIONS, SPECIAL CIRCUMSTANCE FINDINGS AND DEATH VERDICT MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY PERMITTED APPELLANT TO WAIVE COUNSEL IN VIOLATION OF PENAL CODE SECTION 686.1

A. Introduction

Penal Code section 686.1 provides that "the defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings." As described below, key to the enactment of section 686.1 in 1972 was recognition by the Legislature and voters of the importance of providing fair trials and an adequate defense to criminal defendants in capital cases.

Just a few years later, the United States Supreme Court issued its opinion in *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). As appellant argued in Argument IX, *ante*, the *Faretta* decision is limited and does not cover capital cases. Nevertheless, over time, the courts of this state have interpreted the right established by *Faretta* as "absolute" (*People v. Taylor* (2009) 47 Cal.4th 850, 872 (*Taylor*)), and ignored the legislative mandate of section 686.1.

More recently, this Court has recognized that the "absolutist view of the right to self-representation" has been rejected. (*People v. Lightsey* (2012) 54 Cal.4th 668, 694-695, citing *Indiana v. Edwards* (2008) 554 U.S. 164, 169, 178.) For this reason and the reasons demonstrated in Argument IX, *ante*, California should now give effect to section 686.1. Vindication of the State's policy requires counsel in the greatest number of capital cases that federal law allows. This is especially so as to the special circumstances

and penalty phases, due to the primacy of the Eighth Amendment at these proceedings. (*Tuilaepa v. California* (1994) 512 U.S. 967, 971-972 [death-eligibility and death-worthiness stages of capital proceedings must meet Eighth Amendment requirements].)

To the extent that this Court finds that appellant's claim is foreclosed by its opinion in *Taylor, supra,* 47 Cal.4th at pp. 865-866, or *Faretta,* he still must raise it here in order to preserve his claim for review by the high court. (See *Street v. New York* (1969) 394 U.S. 576, 582 [constitutional question must first be presented and ruled upon by highest state court before United States Supreme Court has jurisdiction to rule upon it].)

B. Because California Law Provides No Statutory or Constitutional Right to Self-Representation, Penal Code Section 686.1, Requiring Counsel in Capital Cases, May Be Implemented When Permitted by the United States Constitution

Section 686.1, requiring that "a defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings," was adopted in 1972 pursuant to a constitutional amendment. Prior to 1972, article 1, section 13, of the California Constitution guaranteed the right of a criminal defendant to represent himself. (See generally *People v. Sharp* (1972) 7 Cal.3d 448, 463-464 [Appendix] (*Sharp*).) In order to enact legislation requiring counsel in certain cases, the Constitution had to be amended. (*Ibid.*) The Legislature passed such a constitutional amendment in 1971, deleting the right to self-representation from article 1, section 13. That constitutional amendment was then put to the voters in 1972 as Proposition 3. (*Ibid.*)

The Voter Pamphlet accompanying that amendment explained that the amendment was "necessary in order to ensure the defendant is fairly

advised of his rights during the trial," and to ensure "*a fair trial for every defendant.*" (Ballot Pamp., Proposed Amends, to Cal. Const. with arguments to voters, Primary Elec. (June 6, 1972) p. 8; italics added.) The ballot pamphlet further explained that "[t]oday's complex legal system leaves no room for the person unschooled in law and criminal procedure. Studies show that the person who represents himself in a serious criminal case is unable *to defend himself adequately.*" (*Ibid.*; italics added.) Thus, concern regarding the right to a fair trial and an adequate defense were animating forces behind the passage of Proposition 3 and, hence, section 686.1. The statute represents "the legislatively stated policy . . . of this state." (*People v. Dent* (2003) 30 Cal.4th 213, 224 (conc. opn. of Chin, J.).)

Immediately after the passage of Proposition 3, this Court held in *Sharp*, *supra,* 7 Cal.3d at p. 459, that neither the California Constitution nor any state statute conferred a right to represent oneself. (*Taylor, supra,* 47 Cal.4th at pp. 871-872.) *Sharp* remains good law as to the California Constitution and Penal Code (*id.* at p. 872, fn. 8), and the courts "should give effect to this California law when [they] can." (*People v. Johnson* (2012) 53 Cal.4th 519, 526.) Because California law "provides *no* statutory or constitutional right of self representation . . . " (*id.* at p. 528; italics in original), "California courts may deny self-representation when the United States Constitution permits such denial." (*Id.* at p. 523.)

C. United States Supreme Court Decisions Permit California to Restrict the Sixth Amendment Right to Self-Representation When the Exercise of That Right Compromises the Integrity of its Death Judgments

After the United States Supreme Court decided *Faretta v. California* in 1975, the courts of this state interpreted that decision as establishing a defendant's absolute right to self-representation. (*Taylor*, *supra*, 47 Cal.4th

at p. 872.) However, as shown in the previous argument, *Faretta* and the decisions that followed it have recognized that *Faretta* is limited by a number of state interests. (See *Indiana v. Edwards*, *supra*, 554 U.S. at p. 171 [recognizing that *Faretta* rights are not absolute]; *Martinez v. Court of Appeal of Cal., Fourth Appellate District* (2000) 528 U.S. 152, 163 [no right of self-representation on direct appeal in a criminal case]; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 187-188 [appointment of standby counsel over self-represented defendant's objection is permissible]; *Faretta*, *supra*, 422 U.S. at p. 834, fn. 46 [no right "to abuse the dignity of the courtroom"; no right to avoid compliance with "relevant rules of procedural and substantive law"; and, no right to "engag[e] in serious and obstructionist misconduct," citing *Illinois v. Allen* (1970) 397 U.S. 337]; see also *People v. Butler* (2009) 47 Cal.4th 814, 825 [citing additional limits to *Faretta* recognized in California cases, i.e., requests that are untimely, abandoned, equivocal, "made in passing anger or frustration," or intended to delay or disrupt proceedings may be denied].)

In the context of a defendant lacking mental capacity, self-representation "undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." (*Indiana v. Edwards, supra*, 554 U.S. at pp. 176-177.) Similarly, California's interest in the integrity and fairness of its trials takes precedence over the right to self-representation when the latter eviscerates a fair trial and undermines the reliability of a death judgment. In the trial below, allowing appellant to represent himself and remain passive throughout the proceedings undermined the fairness and reliability of the judgment. Appellant's *Faretta* rights should have yielded to the government's "constitutionally essential interest in assuring that the defendant's trial is a fair one [citation omitted]." (*Id.* at p. 177.)

D. The Trial Court's Failure to Deny Appellant's *Faretta* Motion, or at Least to Revoke His Pro Se Status when Appellant Rested His Case at the Guilt Phase Without Questioning Any of the Prosecution Witnesses, Making Any Objections, or Presenting Any Evidence or Argument on His Behalf

As explained above, *Faretta* and its progeny permit curtailing the self-representation right where, as here, the government's interest in the integrity and fairness of its trials is threatened or eliminated. This Court has also recognized that conduct "that threatens to 'subvert the "core concept of a trial" [citation] or to compromise the court's ability to conduct a fair trial [citation]' may lead to forfeiture of the right of self-representation." (*People v. Butler*, *supra,* 47 Cal.4th at p. 826, quoting *People v. Carson* (2005) 35 Cal.4th 1, 10.) As Justice Brennan remarked, "[t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes." (*Illinois v. Allen*, *supra,* 397 U.S. at p. 350 (conc. opn. of Brennan, J.).)

The trial court below thus had the authority curtail appellant's *Faretta* rights if his conduct threatened to compromise the court's ability to conduct a fair trial. (See *People v. Butler*, *supra,* 47 Cal.4th at p. 826.) In addition, the court had the more general "responsibility to ensure the integrity of all stages of the proceedings." (*People v. Bradford* (2007) 154 Cal.App.4th 1390, 1415.) By failing to limit appellant's self-representation, the trial court also failed in its duty to conduct a fair trial.

At the time of appellant's request to represent himself, the court knew that appellant wanted to plead guilty to all charges, including capital murder, and had declined the appointment of advisory counsel or an investigator. (1 CT 180; 1 RTS 12, 41, 47-48.) Because appellant's request threatened to compromise the court's ability to conduct a fair trial and the

reliability of any findings supporting a death judgment, the court should have followed section 686.1 and denied appellant's request to represent himself. At the very least, the trial court should have revoked appellant's pro per status when appellant rested at the guilt phase without examining any of the prosecution's witnesses, making any objections or presenting any evidence or argument in his own behalf. (1 CT 290; 2 RTS 265.) If a trial court can limit the right to self-representation when the request is untimely or intended to delay or disrupt proceedings (*People v. Butler, supra,* 47 Cal.4th at p. 825), it should have done so in the circumstances here. Allowing a trial to proceed when the adversary system has ceased to function is just as, if not more, pernicious than tolerating a trial where proceedings are delayed or disrupted.

Revoking appellant's *Faretta* status would not have put an undue burden on the trial court; the trial court itself offered to appoint counsel for appellant at the start of the penalty phase on January 10, 1996. (2 RTS 317.) In any case, revocation of *Faretta* status is not uncommon in capital cases in this state. For example, in *People v. Bloom* (1989) 48 Cal.3d 1194, appellant requested to represent himself after the jury found him guilty of capital murder. The court revoked self-representation after the penalty phase, but reinstated it for the motion to modify the death verdict. (*Id.* at p. 1203.) In *People v. Clark* (1992) 3 Cal.4th 41, 113-116, this Court upheld the trial court's decision to revoke defendant's *Faretta* status when he announced his intention, mid-trial, to stand mute, reasoning that it was obliged "to interpret *Faretta* in a reasonable fashion." Revoking appellant's *Faretta* status after the prosecution rested at the guilt phase would similarly have been a reasonable interpretation of *Faretta.*

E. This Court Should Reevaluate its View That it Cannot Limit the Right of Self-Representation at a Capital Trial

This Court has rejected the claim that California may limit the right to self-representation because a case is capital one. In light of the *Faretta* line of cases culminating in *Indiana v. Edwards*, *supra,* 554 U.S. 164, however, it is apparent that the holdings of these cases were based on incorrect views of the limits of *Faretta,* of *Faretta* rights as being absolute, of the balance between a defendant's *Faretta* right and the state's interest in obtaining reliable death judgments, and on the primacy of the Eighth Amendment at the death-eligibility and death-worthiness stages of capital proceedings.

Thus, in *People v. Bloom*, *supra*, 48 Cal.3d 1194, this Court acknowledged that the Eighth Amendment imposed a "high requirement of reliability on the determination that death is the appropriate penalty in a particular case," but stated that "the high court has never suggested that this heightened concern for reliability requires or justifies forcing an unwilling defendant to accept representation . . . in a capital case." (*Id.* at p. 1228.) Appellant respectfully suggests that this conclusion is based upon a misreading of *Faretta*. No case is authority for a proposition not considered by the court. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.) As shown in Argument IX, *ante*, neither *Faretta* nor the line of Supreme Court cases that followed it were capital cases or ever considered an Eighth Amendment issue.

People v. Clark (1990) 50 Cal.3d 583 rejected the argument that *Faretta* "invalidates [Penal Code] section 686.1, which mandates representation by counsel in all stages of a capital trial, only as to the guilt phase." (*Id.* at p. 618, fn. 26.) *Clark's* holding was expressly premised on

the now discredited theory that the right recognized in *Faretta* "is absolute." (See *ibid.* and *Indiana v. Edwards*, *supra*, 554 U.S. at p. 171 ["the right of self-representation is not absolute"].)

The holdings in *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365, and *People v. Koontz* (2002) 27 Cal.4th 1041, 1074 – that despite "the state's significant interest in a reliable penalty determination," "a defendant's fundamental constitutional right to control his defense governs" – are also undermined by *Martinez* and *Indiana v. Edwards*, which recognized that self-representation must give way when it threatens the basic objective of a fair trial, even in a noncapital case. (See *Indiana v. Edwards, supra,* 554 U.S. at pp. 176-177; *Martinez v. Court of Appeal of Cal., Fourth Appellate District*, *supra*, 528 U.S. at pp. 161-162.) It follows that because the death penalty must be imposed in accord with the Eighth Amendment (see, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 599), Eighth Amendment requirements in a capital trial can outweigh an individual's interest in self-representation.

People v. Taylor, *supra,* 47 Cal.4th 850, postdates *Edwards*. There, the defendant argued that the Fifth and Eighth Amendments required representation by counsel at the penalty phase in order to ensure reliability of the death verdict. (*Id.* at p. 865.) This Court relied on its prior cases for the proposition that the "autonomy interest motivating the decision in *Faretta*" applies at a capital penalty trial as well as in a trial of guilt. (*Ibid.*) However, as appellant demonstrated in Argument IX, *ante*, the historical and structural analyses of the Sixth Amendment the Court undertook in *Faretta* cannot be transplanted to the Eighth Amendment, which governs the death-eligibility and death-worthiness phases of a capital trial. In addition, *Faretta*'s "free choice" rationale is grounded in the right to waive

procedural trial protections and does not apply to the Eighth Amendment, which imposes substantive limits on punishment. (Argument IX, *ante,* and *Gregg v. Georgia* (1976) 428 U.S. 153, 172, 174.) Appellant respectfully requests this Court to reconsider its conclusion in *Taylor* and prior cases that a defendant has autonomy interests in capital cases that can eviscerate Eighth Amendment requirements. Under the circumstances here, the Court should conclude that failure to appoint counsel at trial was error.

F. Failure to Enforce Penal Code Section 686.1 Was Error and Denial of Counsel Requires Reversal

The foregoing United States Supreme Court cases demonstrate that rights pursuant to *Faretta* must give way when the resulting trial is the antithesis of a fair and reliable one. (See, e.g., *Indiana v. Edwards, supra,* 554 U.S. at pp. 176-178.) As argued above in section B of this argument, similar concerns about trial fairness were the animating forces behind the enactment of section 686.1.

Because of the limits to *Faretta* described in Argument IX, including the Supreme Court's recognition that the states are free, in certain circumstances, to enforce their laws requiring counsel in criminal prosecutions (*Indiana v. Edwards, supra*, 554 U.S. at p. 178), California has the latitude to enforce Penal Code section 686.1's requirement of counsel at trial, or at least at the penalty phase. Failure to do so under the circumstances of this case was error. (See *People v. Robles* (1970) 2 Cal.3d 205, 218-219 [error to permit defendant to waive counsel in violation of state law]; *People v. Carter* (1967) 66 Cal.2d 666, 672 [same].)

The erroneous deprivation of the right to counsel under state law requires reversal without a showing of prejudice. (*People v. Robles, supra,* 2 Cal.3d at pp. 218-219 [reversing judgment of death without showing of

prejudice where defendant erroneously permitted to represent himself at penalty phase]; *People v. Carter*, *supra*, 66 Cal.2d at pp. 672-673 [reversing judgment without showing of prejudice where defendant erroneously permitted to represent himself].) Appellant's convictions, the special circumstance findings and death verdict must therefore be reversed.

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CONCLUSION

For all of the reasons stated in this brief, as well as those in Appellant's Opening Brief, the judgment must be reversed in its entirety.

Dated: February 7, 2014

Respectfully submitted,

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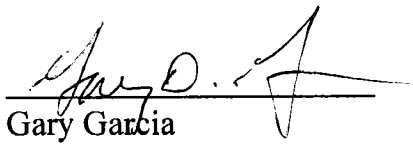
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, Rule 8.630(b)(2))

I, Gary Garcia, am the Senior Deputy State Public Defender assigned to represent appellant David Scott Daniels in this automatic appeal. I instructed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 7,101 words in length.

Dated: February 7, 2014



Gary Garcia

DECLARATION OF SERVICE

Re: *People v. David Scott Daniels*

Sacramento Superior Ct No.99F10432
Supreme Court No. S095868

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California 94607. I served a copy of the attached:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the Attorney General
Attn: Larenda Delaini
P.O. Box 944255
Sacramento, CA 94244-2550

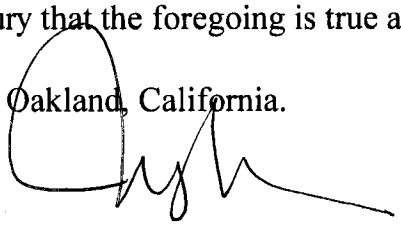
Habeas Corpus Resource Center
303 Second Street, Suite 400
San Francisco, CA 94105

David Scott Daniels
P.O. Box K-90141
San Quentin, CA 94974

Each said envelope was then, on February 7, 2014, sealed and deposited in the United States mail at Oakland, California, Alameda county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on February 7, 2014, at Oakland, California.



DECLARANT