IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT COPY

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. BILLY RAY WALDON, ALSO KNOWN AS N.I. SEQUOYAH, Defendant and Appellant.	No. S025520 San Diego County Superior Court No. CR82986

COPY

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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

HONORABLE DAVID GILL

SUPREME COURT
FILED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(s)

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES

PAGE(s)

TABLE OF AUTHORITIES

PAGE(s)

TABLE OF AUTHORITIES

PAGE(s)

TABLE OF AUTHORITIES

PAGE(s)

TABLE OF AUTHORITIES

PAGE(s)

STATUTES

CONSTITUTIONS

COURT RULES

TABLE OF AUTHORITIES

PAGE(s)

TEXT AND OTHER AUTHORITIES

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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

I.

BECAUSE THE TRIAL COURT ACTED IN EXCESS OF JURISDICTION IN MOVING FORWARD WITH THE TRIAL BEFORE THE WRIT PROCEEDINGS IN CONNECTION WITH THE COMPETENCY TRIAL WERE RESOLVED, THE JUDGMENT AND SENTENCE MUST BE REVERSED

A. Introduction

After a trial pursuant to Penal Code sections 1368, et seq., appellant was found competent to stand trial. Defense counsel's motion for a new trial was denied. Counsel pursued collateral relief by way of petition for writ of mandate in the Court of Appeal, Fourth Appellate District, Division One (hereafter "Court of Appeal"), alleging numerous serious errors requiring that appellant be granted a new competency trial. Ultimately, the Court of Appeal, following an order by this Court to do so, issued an alternative writ ordering respondent San Diego County Superior Court to show cause why appellant should not be granted the relief requested in the petition, i.e., given a new competency trial. Over the objection of defense

counsel, the trial court refused to stay the trial proceedings while the issues in the Court of Appeal regarding appellant's competence to stand trial were resolved. In so doing, the trial court acted in excess of its jurisdiction. Reversal of appellant's convictions and sentence of death are required.

B. Procedural Facts

Appellant detailed the procedural facts relating to this issue in his opening brief and reiterates them only as needed. On March 10, 1987, appellant moved to represent himself and to relieve counsel.[1] (73CT 15715.)[2] At the request of defense counsel Geraldine Russell, Judge Elizabeth Zumwalt appointed Dr. Mark Kalish to examine appellant on the question of whether he could knowingly, intelligently and voluntarily waive his right to counsel. (2CT 389-392.) On May 22, 1987, Dr. Kalish testified that he had reservations about appellant's competence to stand trial and Judge Zumwalt declared a doubt about appellant's competence to stand trial. (20A-1RT 30, 35-36.)

On September 21, 1987, following a trial before Judge Jack Levitt, appellant was found competent. (31ART 1193.) Defense counsel Charles Khoury filed a motion for a judgement notwithstanding the verdict and for a new trial. (6CT 1230-7CT 1274.) Mr. Khoury asserted that there was no substantial evidence to support the verdict. (7CT 1269-1274.) He alleged that appellant's substantial rights were denied and that appellant was

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[1]Appellant did not cite *Faretta v. California* (1975) 422 U.S. 806 or *People v. Marsden* (1970) 2 Cal.3d 118, but the parties referred to the motion as appellant's *Faretta* and *Marsden* motion.

[2]Appellant uses the following abbreviations. "CT" refers to the clerk's transcript on appeal. "ART" refers to the transcript of proceedings from June 18, 1986 to May 2, 1990. "RT" refers to the reporter's transcript on appeal beginning April 9, 1990.

entitled to a new trial because of these errors. (7CT 1248).[3] Later, Mr. Khoury filed supplemental points and authorities, in which he added three additional grounds for relief. (7CT 1275-1288.)[4] On December 10, 1989,

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[3]Mr. Khoury asserted 14 grounds for relief: (1) the judge committed error by refusing to inform counsel that the jurors wished to see exhibits and in not allowing counsel to be heard (7CT 1234-1235); (2) the judge erred by refusing to grant a mistrial after the prosecutor referred to an attempted escape in front of the jury (7CT 1235); (3) the judge allowed the jury to be informed of the underlying capital charges against appellant; (4) the judge improperly limited the examination and cross-examination of psychiatric witnesses by appellant's counsel (7CT 1235-1238); (5) the court erred in refusing to allow a continuance to petition this Court on the issues of calling appellant to the stand and of instructing on the consequence of the verdict (7CT 1238-1239); (6) the court erred in allowing appellant to be called and examined before the jury without determining in advance whether appellant would testify (7CT 1239-1241); (7) the court erred in refusing to admit medical records and writings of appellant (7CT 1241); (8) the judge erred in refusing to instruct on the consequences of the verdict (7CT 1242); (9) the judge erred in giving a prosecution jury instruction calling attention to appellant's failure to testify (7CT 1242); (10) the judge erred by instructing that defendant was presumed competent (7CT 1242-1243); (11) the judge erred in allowing a deputy district attorney to testify and in restricting trial counsel's cross-examination and summation with respect to that witness (7CT 1243-1244); (12) the judge erred in allowing portions of the pretrial transcript to be read where appellant refused to assert mental competence or incompetence unless represented by counsel (7CT 1244-12145); (13) the judge erred in allowing the jury to be informed of all of appellant's court appearances prior to a doubt being raised about his competence, by allowing it to be told of the trial date, and by restricting counsel's summation (7CT 12146); and (14) there was insufficient evidence to support the verdict (7CT 1246-1238).

[4]These additional grounds were: (1) the court improperly instructed the jury by excluding the words "in a rational manner" in describing the ability to assist counsel (7CT 1275-1276); (2) the testimony of prosecution expert witnesses Drs. Vargas and Strauss should be stricken (7CT 1276-1278); and (3) the court refused to give jury instructions dealing with the testimony and qualifications of expert witnesses (7CT 1278-1279).

he added two grounds for relief. (7CT 1297-1304.)[5] Judge Levitt denied the defense motions without explanation. (7CT 1423.)

On January 19, 1988, defense counsel filed a Petition for Writ of Mandate and Application for Stay in the Court of Appeal, Case No. D007429.[6] (56CT 11918-11996.) On February 24, it denied the petition for

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[5]The additional grounds were: (1) the judge erred in giving CALJIC No 2.21 (7CT 1297-1298); and (2) he erred by denying the motion to continue (7CT 1298-1300).

[6]The petition alleged that the denial of the Motion for Judgement Notwithstanding the Verdict had been error because the evidence supported a judgement of incompetence to stand trial. (56CT 11932-11959.) The petition also alleged that 17 errors at the trial required a new trial. These errors were: (1) The trial judge erred in permitting the jurors to be informed of the underlying charge (56CT 11962-11964); (2) the trial judge erred in refusing to allow a mistrial after the prosecution referred to appellant's alleged attempted escape in front of the jury (56CT 11965-11966); (3) the judge erred in limiting the examination and cross-examination of witnesses by appellant's counsel (56CT 11966-11969); (4) the court erred in refusing to allow a continuance to petition this Court on the issue of calling appellant to the stand and instructing the jury on the consequences of the verdict (56CT 11970); (5) the court erred in allowing appellant to be called to the stand and examined before the jury without a hearing to determine whether appellant would testify (56CT 11970-11973); (6) the court erred in refusing to admit medical records (56CT 11973-11975); (7) the judge erred in refusing to instruct on the consequences of a verdict (56CT 11975-11976); (8) the judge erred in instructing with BAJI No. 2.03 (56CT 11976-11977); (9) the trial court erred in instructing that appellant was mentally competent (56CT 11977-11978); (10) the court erred in permitting the testimony of a deputy district attorney, in limiting counsel's cross-examination of the deputy and in preventing counsel from dealing with that testimony in summation (56CT 11979-11982); (11) the trial court erred in permitting portions of the transcript to be read (56CT 11982); (12) the trial court erred in informing the jury about appellant's court appearances (56CT 11983-11984); (13) the trial court erred in excluding the words "in a rational manner" from the instruction describing the ability to assist counsel (56CT

(continued...)

writ of mandate, stating "there was no error in denying the motions for judgment notwithstanding the verdict and for new trial." (62CT 1206.)

Meanwhile, appellant's requests for self-representation and to relieve counsel moved forward before Judge Zumwalt. On February 23, 1988, defense counsel argued that appellant had a mental illness which adversely affected his judgment, reason, and powers of communication, such that he could not rationally make the decision to discharge counsel and that "[i]n terms of due process and fairness in the criminal justice system it is imperative that Mr. Waldon's mental status be resolved before proceeding further on the pending motion." (8CT 1535-1547.) The trial court held a hearing on appellant's *Faretta* and *Marsden* motions. On March 16, 1988, the judge denied the *Faretta* motion, finding that appellant was not capable of voluntarily waiving his right to counsel because of a mental illness. (8CT 1572-1575.) She also denied the *Marsden* motion. (*Ibid.*)

On March 15, 1988, defense counsel filed a Petition for Review and a Request for a Stay of the Proceedings in this Court, Case No. S004854,

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[6](...continued)
11984-11985); (14) the testimony of Drs. Vargas and Strauss should have been stricken as speculative (56CT 11985-11986); (15) the judge refused to give requested instructions regarding expert testimony (56CT 11987-11988); (16) the trial court erred in giving CALJIC No. 2.21 (56CT 11988-11989); and (17) the court erred in denying a continuance until lead counsel could be available (56CT 11989-11990). The petition argued that there was insufficient evidence to support the verdict (56CT 11991-11993) and that the judge committed error in refusing to inform counsel that the jurors wished to see exhibits which had not been admitted (56CT 11993-11995). The petition argued that the errors individually and collectively constituted a miscarriage of justice and required a new trial. (56CT 11995.)

from the denial of the petition for writ of mandate in D007429.[7] While that petition was pending in this Court, there were additional proceedings in the Court of Appeal and in the superior court. On March 25, 1988, Ms. Russell moved to be relieved as counsel. (8CT 1583.) She alleged that appellant suffered from a mental disorder which prevented him from cooperating with counsel, rendering it impossible for her to prepare for trial. (8CT 1585-1587.) She observed that because appellant had been found competent to stand trial, he would not get the help he needed "to allow him to adequately cooperate with counsel in order to properly prepare his trial." (72CT 11536.) The motion was denied by Judge Zumwalt. (48ART 530; 8CT 1602-1608.) Defense counsel filed a petition for writ of mandate seeking review of the decision, Case No. D007850. (72CT 15509-15540.) The prosecution also filed a petition for writ of mandate, Case No. D07873,

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[7]Defense counsel raised nine issues: (1) the court erred in allowing the jury to be informed of the nature of the underlying capital charges (55CT 11675-11680); (2) it erred in allowing appellant to be called before the jury without a hearing in advance to determine whether he would testify (55CT 11680-11683); (3) it erred in refusing to admit appellant's hospital records (56CT 11683-11686); (4) it failure to instruct on the results of a verdict of competency was error (56CT 11686-11688); (5) the trial court erred in instructing with BAJI No. 2.02 (56CT 11688-11689); (6) the trial court erred in allowing the prosecutor to testify, in restricting the cross-examination of that witness and in restricting the summation of counsel's testimony with regard to that witness (56CT 11689-11693); (7) the trial court improperly instructed the jury by excluding the words "in a rational manner" in describing the ability to assist counsel in conducting one's defense (56CT 11693-11694); (8) the trial court erred in giving CALJIC No. 2.21 (56CT 11695-11696); and (9) the trial court erred by denying the motion to continue the section 1368 trial until lead counsel could be available (56CT 11696-11699). The petition argued that the errors individually and collectively constituted a miscarriage of justice and required a new trial. (55CT 11699.)

seeking review of Judge Zumwalt's decision denying appellant's *Marsden* and *Faretta* motions. (45CT 9867-9912.)

Meanwhile on May 19, 1988, this Court granted defense counsel's petition for review in Case No. S004854, related to the competency trial:

> Petition for review granted. The matter is transferred to the Court of Appeal, Fourth Appellate District, Division One, with directions to issue an alternative writ to be heard before that court when the proceeding is ordered on calendar.

(62CT 13989.) On May 25, the Court of Appeal issued an alternative writ.[8] (7CT 1399.) The next day, it issued a separate order to show cause in Case Nos. D07859 and D07873. (9CT 1773.) On July 8, the prosecution filed an answer in Case No. D007429 (56CT 11998-12083) and on July 22, defense counsel filed a reply. (55CT 11802-11894.)

On August 19, 1988, defense counsel filed a supplemental letter brief in Case No. D007429 arguing that this Court's order to issue the alternative writ required that the Court of Appeal hear the case unless it was moot, and that the issues were not moot. (62CT 13816.) Counsel urged that the competency to stand trial issue "must be resolved before the competency to represent oneself is reached. The Supreme Court believed that there was a serious question as to the proper resolution of the competency to stand trial; that question is still unresolved." (*Ibid.*)[9]

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[8]The order read: "Pursuant to the order of the California Supreme Court filed May 19, 1988, let an alternative writ issue. The Superior Court of the County of San Diego is ordered to grant the relief prayed for or to show cause why such relief should not be granted." (7CT 1399.)

[9]Defense counsel filed a petition for writ of mandate and request for stay with this Court, Case No. S006786, seeking an order for the Court of Appeal to re-calender the argument and to hear the Case No. D007429 first. (continued...)

On September 12, 1988, the Court of Appeal issued a decision in Case Nos. D007850 and D007873. It also addressed the competency writ. The court rejected the argument that the competency writ had to be decided first, reasoning that it was preferable to first determine the issue of self-representation, so as to not undermine whatever determinations might be made in the competency proceeding: "The procedure followed here further allows new counsel the opportunity to fully brief and argue all issues relating to the competency hearing including those that may not yet have been raised." (10CT 1932.) The Court of Appeal rejected the argument that it could not rule on the motions without a final determination of appellant's competence, asserting that it could act to assure appellant was properly represented. (10CT 1932, fn. 9.)[10] The court ordered Ms. Russell be relieved, and that

> [t]he superior court is further directed to appoint substitute lead counsel forthwith. Substitute counsel shall have thirty

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[9](...continued)
(See 72CT 15572 [referring to the petition, which is not in the record on appeal].) These were denied on August 11, 1988. (45CT 9918.)

[10]The court wrote:
Section 1368 subdivision (c) provides that once a 1368 hearing has been ordered, all proceedings in the 'criminal prosecution' (except as provided in § 1368.1) shall be suspended until the question of the present mental competence of the defendant has been determined. Until Waldon's mental competence is finally determined, section 1368, subdivision (c) would deprive the trial court of jurisdiction to *prosecute* Waldon. (See e.g. *People v. Pennington* (1967) 66 Cal.2d 508, 521; *People v. Tomas* (1977) 74 Cal.App.3d 75, 92.) However, the court is not deprived of all power to act and is in no way proscribed from relieving Russell and appointing substitute counsel to assure Waldon's adequate defense.
(10CT 1932, fn. 9, italics in original.)

> days following appointment to consult with his or her client and to file whatever additional briefing he or she deems necessary in writ proceedings in D007429 pending before this court.

(10CT 1933.)[11]

Appellant, who had previously been provided attorney Benjamin Sanchez as advisory counsel (see 39ART 30-31), also acted on his own. On December 12, 1988, appellant filed an Urgent and Emergency Petition for Writ of Habeas Corpus, Case No. D009282, challenging Judge Zumwalt's denial of his motion for self-representation. (52CT11025.241-11025.343.) On January 6, 1989, the Court Appeal denied the petition, stating that the issues therein not rendered moot by the opinion in Case Nos. D007850 and D0007873 "may be presented to the superior court by new counsel appointed pursuant to our decision." (51CT 11025.235.)

On January 9, 1989, Ms. Russell filed a motion in the trial court, opposing her removal as lead counsel (10CT 2007-2012), and asserting that the trial court was without jurisdiction to move forward with the prosecution until the still-pending competency issues were determined. (10CT 2010-2011.) Shortly thereafter, she was relieved. (See 24CT 5452.) On January 20, 1989, Judge Andrew Wagner appointed John Cotsirilos as counsel pursuant to the Court of Appeal's order (62ART 3); however, Mr. Cotsirilos declared a conflict and was relieved. (62ART 6-7.) At that same

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[11]Defense petitioned for rehearing (72CT 15552-15560), objecting that the Court of Appeal relieved counsel without deciding the competency issues and therefore it did not have jurisdiction. Counsel argued that by deciding a matter that was "critical" to the prosecution of the case, the court was proceeding despite the strictures of Penal Code section 1368. (72CT 15555-15556.) Rehearing was denied. (72CT 15603.) Counsel's petition for review was denied. (45CT 9917.)

hearing, Alan Bloom appeared and stated that he was willing to represent appellant solely on the question of counsel, and asserting that if the trial court ruled that appellant could represent himself, it would not have to appoint counsel pursuant to the Court of Appeal's order. He noted that appellant had previously asked to represent himself, and that this request had been denied, but the Court of Appeal had suggested that new counsel could again bring up the question of appellant's self-representation. (62ART 9-10.) Judge Wagner refused to appoint Mr. Bloom, stating that he believed that appellant needed counsel for all purposes. (62ART 10.)

Appellant's case was transferred to Judge Bernard Revak, and on February 2, 1989, Mr. Bloom repeated his request to be appointed solely on the representation issue. Judge Revak granted the request and appointed Mr. Bloom "to the limited extent of the Feretta [sic] motion . . . ." (64ART 15.) The judge rejected the argument that he should deal with the section 1368 question first, stating that he would first consider the question of appellant's self-representation and that if appellant represented himself the court would not have to deal with the issue of appointment of counsel. (64ART 17-18.)

On June 5, 1989, Mr. Bloom filed on appellant's behalf a "Motion to (1) Assign Counsel to Defendant's Case Who Will Take Direction From Defendant or (if That Motion is Denied); (2) Allow Defendant to Act as His Own Counsel and Appoint Advisory Counsel to Work Under Defendant's Direction." (11CT 2344-2354.) On June 22, 1989, the parties appeared before Judge Perry Langford for hearing. Charles Khoury also appeared. Mr. Khoury reminded Judge Langford that this Court had granted review on the issues presented in the competency writ. He emphasized that this Court transferred the case to the Court of Appeal with orders to issue an order to

show cause why appellant "should not be found incompetent to stand trial. That has never been resolved." (78ART 10.) He noted that when the Court of Appeal ordered Ms. Russell relieved, it also ordered that new lead counsel be appointed and that new counsel should be given "30 days to decide to come back and argue – to put back on calendar the order to show cause why Mr. Waldon [sic] should not be found incompetent under Penal Code section 1368. There has never been compliance with that court of appeal opinion." (*Ibid.*) Mr. Khoury asserted that "really no court has any jurisdiction to proceed until number one lead counsel has been appointed." (*Ibid.*) He also asserted that the trial court "can't have a Faretta motion, you can't have an individual represent himself when there is a pending penal code section 1368 hearing that has never been resolved. And that is the status in this case." (*Id.* at 11.)

Judge Langford observed that the matter before him was not really a *Faretta* motion. Rather, it was a motion to assign two counsel to appellant's case, both of whom would take direction from appellant. (78ART 11.) Mr. Khoury interjected that the trial court could not consider such a motion either "with the Supreme Court of California having issued an order to show cause why this man should not be found incompetent." (*Ibid.*) Judge Langford agreed that it was "a contradiction in terms, you have to decide that he is competent before you can decide whether he's competent in order to allow a Faretta motion." (78ART 12.) However, he would not reconsider Judge Revak's decision to resolve the counsel issue before addressing appellant's competency writ. (78ART 13.) Judge Langford then denied appellant's motion to have two counsel who would be under his direction (78ART 26-35), and turned to appellant's request to represent himself and to be appointed advisory counsel. Judge Langford

asserted that this part of appellant's motion brought back the problem Mr. Khoury posed: "[this] very clearly poses the problem of what we were discussing earlier, the issue of, can I let him make a Faretta motion when there is a pending issue as to his competency." (78ART 38.) There was then an exchange between Mr. Bloom and the judge, where Mr. Bloom asserted that the judge did not need to address competency issues because there were none before him, only the *Faretta* issue. (*Id.* at pp. 38-39.)

Mr. Khoury then addressed the court:

> [O]ne factor I do want to clarify, and is that this is – this is an order to show cause that the Supreme Court of California has issued through the court of appeal. And it's not going to go away unless some lawyer, whether it be Mr. Waldon [*sic*] as his own lawyer, which he can't really do dismisses it. It's not something – there has to be affirmative action and it's an anomally [*sic*] and you just can't do it."

(78ART 44.) However, Judge Langford disagreed and, without further discussion, the parties turned to the *Faretta* motion.

Later, the case was transferred to Judge Louis Boyle. (79A-2RT 1.) Mr. Bloom explained to Judge Boyle that he was assigned only "for the purpose of assisting [appellant] in his efforts to become pro per." (79A-3RT 3.) Judge Boyle asked if there was anything pending from the 1368 proceeding. Mr. Bloom said "[i]t is very remotely, possibly pending. It is not pending in this court and may be pending in some sorts of writs." (79A-3ART 5.) Judge Boyle said the issue would be decided after the counsel issue. (*Ibid.*) He declined to review the previous 1368 proceedings. (73A-3RT 9.) Judge Boyle directed appellant to submit witness affidavits on the *Faretta* issue (79ART 7), positing that the affidavits would address appellant's "competency to represent himself," but Mr. Bloom corrected the judge's terminology, insisting the question was "whether or not [appellant

could] understand those rights and waive those rights with regard to having other counsel." (80ART 16.) On November 3, 1989, Judge Boyle found that appellant was able to read and write, had made a request to represent himself and was "competent to make that request," and granted the *Faretta* motion. (84ART 64.)

Representing himself, appellant then sought an extension of time from the Court of Appeal to file pleadings in the competency writ proceedings. After appellant's fourth request for an extension of time, the Court of Appeal denied the request and dismissed the writ, stating:

> The alternative writ is discharged and the petition is dismissed as moot. In issuing this order, we are aware the alternative writ was issued at the direction of the Supreme Court. Since issuance of the writ, however, the petitioner has been determined competent to represent himself, rendering these proceedings moot.

(62CT 13783.) Appellant ultimately represented himself at trial.

C. A Court Which Holds a Competency Hearing Violating Principles of Fairness and Due Process Acts in Excess of Jurisdiction

A court is required to hold a competency hearing when substantial evidence of the accused's incompetence has been introduced. (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1020, citing *People v. Stankewitz* (1982) 32 Cal.3d 80, 90-91, *People v. Laudermilk* (1967) 67 Cal.2d 272, 283.) Evidence is substantial if it raises a reasonable doubt about the defendant's competence to stand trial. (*Ibid.*, citing Pen. Code, § 1368, *People v. Jones* (1991) 53 Cal.3d 1115, 1152.) Once there is such a reasonable doubt, the trial court must suspend proceedings "until the question is determined at a sanity proceeding." (*Ibid.*, citing *People v. Tomas* (1977) 74 Cal.App.3d 75, 88.) As the court of appeal in *Ary* noted, the consequences of a failure

to hold such a hearing are severe:

> Under section 1368 of the Penal Code the trial court has no power to proceed with the trial once a doubt arises as to the sanity of the defendant. In trying defendant without first determining at a hearing his competence to stand trial, the court both denie[s] to defendant a substantial right [citations] and pronounce[s] judgment on him without jurisdiction to do so. In such cases the error is *per se* prejudicial. [Citation.]

(*Id.* at p. 1021.) *Ary* also explained: "Indeed, once a doubt has arisen as to the competence of the defendant to stand trial, the trial court has no jurisdiction to proceed with the case against the defendant without first determining his competence in a section 1368 hearing, and the matter cannot be waived by defendant or his counsel. [Citations.]" (*Ibid.*)

Earlier, in *People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, (hereafter "*Marks*"), this Court clarified the jurisdictional issues arising when a trial court tries a defendant following violation of the section 1368 mandate to suspend proceedings and hold a hearing when there is substantial evidence of incompetence. This Court explained that once a court declares a doubt about a defendant's competence to stand trial,

> the trial court suffers an inability 'to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.' [Citations omitted.] Thus, while the court retains jurisdiction over the cause [fn. omitted], it acts in excess of that authority in failing to hold a competency hearing.

(*Id* at p. 68.) *Marks* noted that it violates due process to try a defendant without a meaningful inquiry into the issue of competence to stand trial once a defendant presents sufficient evidence of incompetence (*id.* at p. 69, citing *Pate v. Robinson* (1966) 383 U.S. 375, 377) and observed that it had previously held that error in section 1368 cases "'goes to the legality of the proceedings because 'conviction of an accused person while he is legally

incompetent violates due process . . . .'"" (*Ibid,* citing *People v. Laudermilk, supra*, 67 Cal.2d at p. 282, quoting *Pate v. Robinson, supra*, 383 U.S. at p. 378, *People v. Hale* (1988) 44 Cal.3d 531, 539.) *Marks* also cited the United States Supreme Court holding "that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." (*Ibid.*, citing *Drope v. Missouri* (1975) 420 U.S. 162, 172.) The Court then held that a trial court acts without jurisdiction because its authority is constitutionally and statutorily restricted to holding a competency hearing before proceeding with any other matters. When the court fails to discharge this obligation, the resultant denial of due process is "'so fundamental and persuasive that [it] require[s] reversal without regard to the facts or circumstances of the particular case. [Citations.].'" (*Id.* at p. 70, citing *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681-682, *Gideon v. Wainwright* (1963) 372 U.S. 335, 344-345, *People v. Sarazzawski* (1945) 27 Cal.2d 7, 16.) The Court concluded that in the case before it the trial court had acted "in excess of jurisdiction" by depriving the defendant of a fair trial when it failed to hold a competency hearing. (*Ibid.*)

The implication of *Marks* is that whether a trial court acts in "excess of jurisdiction" is determined by whether the court conducted a section 1368 proceeding that resulted in a denial of the defendant's right not to be tried while incompetent, as well as his right to an adequate competency hearing. This Court's opinion in *People v. Leonard* (2007) 40 Cal.4th 1370 makes this clear. In that case, the defendant invoked Penal Code section 1370.1 which directs, that if a defendant is suspected of having a developmental disability, the director of the regional center for the developmentally disabled *shall* be appointed to examine him and

recommend a residential facility or hospital. Since Leonard's epilepsy made the appointment mandatory under the statute, he asserted that there was error in not so doing. (*People v. Leonard*, *supra*, 40 Cal.4th at pp. 1387-1388.) This Court held that failure to appoint the director of the regional center did not deny the defendant due process or prejudice him in the proceedings leading to a finding that he was competent. (*Id.* at pp. 1388-1391).

> This Court noted *Marks*' reversal for failure to hold a hearing when there was substantial evidence of incompetence and reasoned as follows: "[H]ere, the trial court's error was less egregious [than the error in *Marks*]: it failed to appoint the director of the regional center . . . to evaluate defendant. Given the . . . statutory purposes of this evaluation that we have just described, defendant's ensuing murder convictions and death sentence need not be reversed *unless the error deprived him of a fair trial to determine his competency.*"

(*Id.* at p. 1390, italics added.) In Leonard's case, the failure to follow the statute did not deprive the defendant of a fair competency trial because, although the regional center director was not appointed, three doctors who were appointed had considered and testified about the disability. (*Id.* at pp. 1390-1391.) Although this Court found that the trial court's failure was not a violation of its mandate under section 1368, the clear implication of *Leonard* is that when a procedure *does* deprive the defendant of a fair competency trial, then the court acts in excess of jurisdiction within the meaning of *Marks, supra.* This is true even in cases where the trial court held a competency hearing. This interpretation of *Marks* is also consistent with this Court's holding in *People v. Lightsey* (2012) 54 Cal.4th 668, 696-670, which reversed the defendant's competency finding even though the defendant had a hearing, on the grounds that he was not represented at that hearing.

D. Proceeding in Appellant's Case Before the Resolution of the Writ Proceedings Was in Excess of Jurisdiction

The trial court acted in excess of jurisdiction when it moved forward in appellant's case prior to the Court of Appeal's resolution of the issues related to the competency trial.

1. Mandamus Proceedings

It is critical to understand the procedural posture the trial court was in once the Court of Appeal issued the alternative writ. The writ of mandamus is a "broad remedy to compel the performance of ministerial duty." (8 Witkin, Cal. Proc. (5th ed. 2008) Writs, § 23, p. 902.) "A writ of mandate may be issued by any court to any inferior tribunal . . . to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . . ." (Code Civ. Proc., § 1085, sub. (a).) In mandate petitions filed by a defendant in a criminal case, the respondent is the tribunal which issued the challenged order. The government is the real party in interest. (*Palma v. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.) The petitioner bears the burden of pleading and proving the facts upon which the claim is based. (*California Correctional Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1153-1154.) The party seeking a writ of mandate must plead a prima facie case, i.e., facts that establish what relief is desired, the grounds for relief, and that the party meets the requirements for obtaining a writ. (Cal. Civil Writ Practice (Cont.Ed.Bar 2004 Supp.) § 7.1, p. 236; *Sipper v. Urban* (1943) 22 Cal.2d 138, 141; *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 330 [plaintiff's must aver the specific facts from which the conclusions entitling them to relief would follow]; *In re Kristin W.* (1990) 222 Cal.App.3d 234, 248 [appellate court must first determine

whether the petitioner has made a prima facie case for relief].)

A reviewing court can dismiss a petition if it is procedurally defective or if it fails to allege a prima facie case. (*Gomez v. Superior Court* (2012) 54 Cal.4th 293, 30.) When the reviewing court decides to hear the petition on the merits, it issues an alternative writ or an order to show cause. (Code Civ. Proc., § 1087.) The alternative writ commands the lower tribunal to "do or refrain from doing something, or in the alternative, show cause why it should not be ordered to do so." (1 Bonneau et al., Appeals and Writs in Criminal Cases (Cont.Ed.Bar 3d ed. 2011) § 8.64, p. 8-55; Code Civ. Proc., § 1087.) The issuance of an alternative writ conclusively determines that appeal is an inadequate remedy. (*Langford v. Superior Court* (1987) 43 Cal.3d 21, 27; 8 Witkin, Cal. Proc. 5th (2008) § 120, p. 1200.) Generally, an alternative writ issues "only if the appellate court is convinced the superior court erred or the issues raised warrant full consideration in a written opinion." (*Rayna R. v. Superior Court* (1993) 20 Cal.App.4th 1398, 1407.)

The issuance of a writ of mandate involves "consideration of its effect in promoting justice." (*Bartholomae Oil Corp. v. Superior Court of San Francisco* (1941) 18 Cal.2d 726, 730.) In criminal cases, mandate is used to rectify error before a constitutionally defective trial is undertaken that would require reversal and another trial of the case. (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 558; see 1 Bonneau et al., Appeals and Writs in Criminal Cases (Cont.Ed.Bar 3d ed. 2011) § 7.16, pp. 7-15-7-16.) It is appropriate to review through mandate orders which are likely to "'substantially affect a defendant's right to a fair trial.'" (*Ibid,* citing *Maine v. Superior Court* (1968) 68 Cal.2d 386, 389, 390; see, e.g., *Yorn v. Superior Court* (1979) 90 Cal.App.3d 669, 673 [mandamus lies to review

an order denying defendant counsel of choice]; *People v. Mena* (2012) 54 Cal.4th 146, 155 [mandate lies to compel the prosecution to conduct a pretrial lineup]; *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1124 [mandamus appropriate to determine what protective orders are needed to protect a defendant's constitutional rights]; *Packer v. Superior Court* (2014) 60 Cal.4th 695, ___ [2014 WL 6982580 at *15] [mandamus appropriate to determine whether prosecutor must recuse himself].)

When the reviewing court has issued an alternative writ of mandate to review a lower court's order, the court indicates that the petitioner has made a prima facie showing of "an abuse of discretion or possible abuse of discretion." (*Coy v. Superior Court* (1962) 58 Cal.2d 210, 221.) The requirements of the alternative writ are that the respondent do the act demanded in the prayer for relief or show cause at a specified time and place why it has not done so. (*Wilson v. Los Angeles County Civil Service Commission* (1951) 103 Cal.App.2d 426, 430; *Dare v. Board of Medical Examiners* (1943) 21 Cal.2d 790, 797.) If the respondent court does not do the act prayed for, the burden is then upon the real party in interest to show that it can rebut the prima facie case. (*Darbee v. Superior Court, San Mateo County* (1962) 208 Cal.App.2d 680, 686.)

Unless otherwise provided by law, "the petitioner always bears the burden of proof in a mandate proceeding brought under Code of Civil Procedure section 1085." (*Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 106.) "The normal purpose of mandamus is to compel an action, no stay is needed; i.e., while the proceeding is under consideration, no action is ordered and the status quo remains." (8 Witkin, Cal. Proc. (5th ed. 2008) Writs, § 191, p. 1095.)

It is clear that, after granting a petition for review, this Court has the

authority to order that a matter be transferred to the court of appeal, with orders to issue the alternative writ. (Cal. Rules of Ct., Rule 8.258(d); see *Packer v. Superior Court, supra*, 2014 WL 6982580 * 3.) The transfer from this Court to the court of appeal conclusively establishes all findings as "necessary to the issuance of an alternative writ." (*Atlantic Richfield Co. v. Superior Court* (1975) 51 Cal.App.3d 168, 172.) "Those findings include the propositions that petitioner possesses no other adequate remedy to pursue its contentions by motion in the trial court [citation omitted], and that the issues raised on the petition for writ were properly raised in the trial court [citation omitted]." (*Ibid*; *Department of General Services v. Superior Court* (1978) 85 Cal.App.3d 273, 279.)

Once the matter has been transferred to the court of appeal, that court must exercise its jurisdiction, "once that jurisdiction has been properly invoked," meaning that it review and correct error in a trial court proceeding. (*Leone v. Medical Bd. of Cal.* (2000) 22 Cal.4th 660, 666, 669.) The appellate court must judge the petition on its procedural and substantive merits. (*Id.* at p. 669.)

2. Because the Court of Appeal Issued the Alternative Writ in a Petition Raising Critical Issues About Appellant's Competence, the Trial Court Was in Excess of Its Jurisdiction in Proceeding Prior to Completion of Writ Proceedings

In appellant's case, this Court transferred the case to the Court of Appeal with orders to issue the alternative writ. The petition upon which that writ was based raised numerous issues relating to the constitutionality of appellant's competency trial. Appellant's issues included claims that the jury was misinstructed on the burden of proof, that the trial court directed a verdict on appellant's competence, and that a deputy district attorney gave

erroneous testimony on the issue of appellant's right to dictate the course of the litigation, to name just a few.[12] This Court's order directing the issuance of an alternative writ was, in effect, this Court's holding that the petition had potential merit, or at least, that the issues in the petition demanded consideration and a written opinion. (*Rayna R. v. Superior Court, supra*, 20 Cal.App.4th at p. 1407; cf. 9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 946, p. 1000.) Moreover, it was a "conclusive finding" that appellant's claim that his section 1368 trial was unconstitutional could not adequately be addressed on appeal, i.e., after appellant's trial was over. (*Langford v. Superior Court, supra*, 43 Cal.3d 21 at p. 27.) Once the real party in interest filed its reply in the case, a cause under the California constitution relating to the unconstitutionality of that trial was created which the Court of Appeal was required to address in a written opinion. (*Palma v. U.S. Industrial Fasteners, Inc., supra*, 36 Cal.3d at p. 178.) The respondent San Diego County Superior Court either had to provide appellant with a new competency trial or show cause why it was not required to do so and that the trial was, in fact, constitutional. Obviously, the trial court did not give appellant a new section 1368 trial, so the show

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[12]Appellant has shown in his opening brief why these errors require reversal of the competency verdict. (See Appellant's Opening Brief, Arg. I, pp. 75-139 [Errors in Jury Instructions Defining Competence to Stand Trial Violated Appellant's Right to Due Process and a Fair Trial and Require Reversal of the Conviction and Sentence]; Arg. IV, pp. 223-240 [The Trial Court Erred in Stating in Front Of the Jury That Appellant Was a Competent Witness, and Then Instructing the Jury That the Defense Position Should Be Distrusted Based on Appellant's Silence on the Stand]; Arg V, pp. 241-262 [Multiple Instructional Errors During Appellant's Competency Trial Violated Appellant's Rights to Due Process and a Fair Trial and Require a New Competency Proceeding; Arg VI, pp. 263-290 [Other Non-instructional Errors Marred the Competency Trial].)

cause order dictated that there be additional proceedings in the Court of Appeal involving respondent superior court. The open legal questions about appellant's mental competency were unresolved until additional proceedings were held. All this was ignored by the trial court when it proceeded in appellant's case, even though defense counsel made the circumstances of the writ proceeding abundantly clear.

It is well established that subjecting a mentally incompetent person to a criminal trial violates due process. (*Dusky* v. *United States*, *supra*, 362 U.S. 402; *People v. Lewis* (2006) 39 Cal.4th 970, 1047; *Cooper v. Oklahoma* (1996) 517 U.S. 348, 354.) The United States Supreme Court has held "that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." (*Drope v. Missouri, supra,* 420 U.S. at p. 172.) A procedure whereby a trial court under a legal obligation from this Court to respond to significant issues regarding the constitutionality of a competency trial, proceeds to trial in spite of those issues, is not a procedure "adequate to protect a defendant's right not to be tried or convicted while incompetent." Under *Marks, supra*, and *People v. Leonard*, *supra*, 40 Cal.4th 1370, a court acts in excess of its jurisdiction under section 1368 if it holds proceedings that violate due process and deny the appellant his right to a fair competence proceeding. The trial court violated due process and the right to a fair proceeding when it moved forward in the case after this Court made a prima facie finding that appellant's competency trial was unconstitutional and ordered respondent to show cause. This process violated appellant's due process rights and is clearly in "excess of the jurisdiction" of the superior court.

The criminal proceedings remained suspended throughout the writ

process because the result of the jury trial was not final while review was pending. Under Penal Code section 1368, subdivision (c), "all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined." Although appellant had a hearing, given the alternative writ, his mental competence had not been "determined." There was nothing final about the jury's verdict in the case once the Court of Appeal found that appellant had made a prima facie case that his rights had been violated. Indeed, the Court of Appeal was required to have additional proceedings and issue an opinion in which it reviewed the alleged errors on the issue (*Leone v. Medical Bd. of Cal.*, *supra*, 22 Cal.4th at pp. 666, 669) because the trial court's ruling that appellant was not entitled to a new trial had been thrown into doubt.

In *People v. Jones* (*supra*) 53 Cal.3d at p.1153, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn.1, this Court held that when there has been a competency hearing, a trial court need not suspend proceedings unless presented with a "substantial change of circumstances or with new evidence casting doubt on the validity of that finding." The contrapositive is also true: if there is new evidence casting doubt on the validity of the finding, a trial court must suspend proceedings. This is true at any stage of the proceedings prior to sentencing. (*People v. Melissakis* (1976) 56 Cal.App.3d 52, 62.) Here, the trial court was not required to hold a new competency proceeding given the Court of Appeal's order; however, the on-going legal proceedings at a minimum constituted evidence casting doubt on the validity of the competency trial, so that the trial court was required not to proceed to try appellant. (See *People v. Sundberg* (1981) 124 Cal.App.3d 944, 957 [trial court's failure to grant a continuance so that there could be further examination to determine if

second competency hearing was needed was a denial of his rights under section 1368].) Moreover, this Court's remand order, ordering the respondent to show cause why a new competency trial shouldn't be held, makes sense only if the proceedings were still suspended. Otherwise, the remand order would have also have had to require the trial court to begin competency proceedings from the beginning, i.e., to require the court to determine whether a doubt should be declared again.

Requiring the court to allow resolution of the issue of appellant's competence before proceeding to trial is consistent with the purpose of section 1368. Recently, this Court held that the purpose of section 1368 is to assure that the defendant meets the minimum standard of mental competence under *Dusky v. United States* (1960) 362 U.S. 402. (*People v. Lightsey*, *supra*, 54 Cal.4th at p. 698.) The purpose of section 1368 is also to assure that the defendant receives the competency hearing he is due under *Pate v. Robinson*, *supra*, 383 U.S. 375. (*People v. Blair* (2005) 36 Cal.4th 686, 711 [equating state law and due process requirements for suspending criminal proceedings when there is substantial evidence of a doubt about the defendant's competence to stand trial]; *People v. Ary* (2011) 51 Cal.4th 510, 517 [California law reflects the constitutional requirements of *Dusky* and *Pate*].) It is counter to these goals to permit the trial court to proceed when there remain significant doubts about the competency of the defendant to stand trial.

The immediate task facing the trial court after the alternative writ was issued in this case was consideration of appellant's *Faretta* motion. However, so long as there is a doubt about the defendant's ability to stand trial, there can be no proceedings on a motion for self-representation. (*People v. Horton* (1995) 11 Cal.4th 1068, 1108 [when trial was suspended

after the court's declaration of doubt as to competence, under state statutory provisions, the court lacked jurisdiction to rule on a *Faretta* motion]; *People v. Robinson* (2007) 151 Cal.App.4th 606, 616 [concluding that "If the court has a reasonable doubt as to the defendant's competency to stand trial, that doubt should extend to the defendant's competency to waive counsel and represent himself."]; see *People v. Poplawski* (1994) 25 Cal.App.4th 881, 890-891 [discussing the court's duty to sua sponte reconsider pro se status where there is substantial evidence bringing competency into doubt]; *Pate v. Robinson, supra*, 383 U.S. at p. 384 ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."].) When an alternate writ has issued from a petition alleging serious errors in the competency trial, there is obviously continuing doubt about the defendant's ability to stand trial and the trial court is without jurisdiction to rule on an issue relating to self-representation. For appellant to be granted his *Faretta* rights the issues about his mental competency had to be resolved – which they were not.

Requiring the trial court to address the remaining issues of appellant's competency to stand trial prior to moving forward on appellant's trial is also consistent with the use of mandate to address issues of fairness in criminal trials. The issuance of the alternate writ meant that the Court of Appeal was required to consider the petition on the merits because this Court had examined the facts and found that the claims had preliminary merit. (*In re Kristin W., supra*, 222 Cal.App.3d at p. 248.) Given that the competency writ challenged the fundamental fairness of the competency trial and it's result, it follows that the writ presented substantial questions whether appellant had a fair trial – which it is the purpose of mandamus to

address in criminal cases. (*Smith v. Superior Court*, *supra*, 68 Cal.2d at p. 558.) The order to issue the alternate writ was also this Court's determination that the issues should be addressed by the Court of Appeal in the near term, and certainly prior to the appeal of any trial verdict. (*Langford v. Superior Court*, *supra,* 43 Cal.3d at p. 27.) It is the purpose of mandamus in criminal cases to rectify errors before trial. (*Smith v. Superior Court*, *supra*, 68 Cal.2d at p. 558.) In short, the issuance of the alternative writ was tantamount to a finding that a criminal trial without a resolution of the issues raised by the petition would create the danger that appellant would be tried while incompetent, in violation of core constitutional rights.

Appellant's petition for writ of mandate requesting a new competency trial was in essence also a petition for writ of prohibition asking that the trial court be refrained from proceeding to trial prior to holding a constitutionally adequate competency hearing. (Cal. Code of Civil Proc., § 1102 ["The writ of prohibition arrests the proceedings of any tribunal . . ., when such proceedings are without or in excess of the jurisdiction of such tribunal . . . ."]) In prohibition cases, "issuance of the alternative writ or order to show cause directing the lower court to refrain from further proceedings, operates as a stay." (1 Bonneau et al., Appeals and Writs in Criminal Cases (Cont.Ed.Bar 3d ed. 2011) § 8.5, p. 8-8, citing Code Civ. Proc., § 1104 and *Guardianship of Walters* (1951) 37 Cal.2d 239, 244.) A writ of prohibition is the appropriate instrument to terminate a prosecution for violation of a statute that is unconstitutional. (*Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 427.) It is also the appropriate instrument to stop a trial held in violation of the constitution. (See, e.g., *Barriga v. Superior Court* (2012) 206 Cal.App.4th 739, 749-750 [prohibition used to prevent trial in violation of double jeopardy rights]; *Barber v. Municipal Court* (1979) 24 Cal.3d 742-

759-760 [writ of prohibition granted and charge dismissed because law enforcement interfered with the right to counsel]; *Peer v. Municipal Court* (1982) 128 Cal.App.3d 733, 738 [prohibition used to require the prosecution to give notice of what acts it intends to rely on].)

In appellant's case, defense counsel sought to refrain the trial court from holding an unconstitutional trial because appellant's rights to a competency proceeding which met the requirements of due process had been violated. Defense counsel denominated its pleading a petition for writ of mandate, not a petition for writ of mandate and prohibition. However, "[a] petition for extraordinary relief that mislabels the remedy will not be denied, if the petition is otherwise meritorious." (1 Bonneau et al., Appeals and Writs in Criminal Cases (Cont.Ed.Bar 3d ed. 2011) § 7.4, p. 7-5, citing *Neal v. State* (1960) 55 Cal.2d 11, 15, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 334; *Powell v. Superior Court* (1957) 48 Cal.2d 704, 705; *Jackson v. Superior Court* (1980) 110 Cal.App.3d 1102, 1004.)

Allowing a possibly incompetent defendant to determine the course of the litigation of the competency proceedings results in a competency proceeding which is inherently unreliable. As this Court pointed out in *Lightsey, supra*, where a defendant is represented by counsel,

> the trial court, as well as other observers of the proceedings, may presume such actions are reasonable tactical choices made by trained counsel based on the evidence. The decision of a possibly incompetent defendant not to contest the issue of his or her own competence is entitled to no such credit. Indeed, such a decision ought to be considered inherently suspect, especially when, as in the instant case, the evidence before the court is in conflict regarding the defendant's mental competence.

(*People v. Lightsey, supra,* 54 Cal.4th at p. 697, citing *People v. Samuel*

(1981) 29 Cal.3d 489, 495, and *Bundy v. Dugger* (11th Cir.1987) 816 F.2d 564, 566, fn. 2.) *Lightsey* pointed out that even "if a defendant were to assert that he or she was *incompetent,* allowing such a defendant to attempt to prove his or her own incompetence would be nonsensical." (*Ibid,* italics in original.) When there is evidence that the defendant is incompetent, it must be assumed that the defendant is "unable to act in his own best interests." (*Ibid*, citing *People v. Hill* (1967) 67 Cal.2d 105, 115, fn. 4.) The alternate writ in this case should have been addressed prior to proceedings conducted by a defendant who could very well have been unable to act in his best interests. Because of the trial court's failure to address the competency question promptly, the Court of Appeal dismissed the competency writ following litigation of that writ by a potentially incompetent defendant not acting in his best interests. This would have been easily prevented had the trial court stayed the proceedings until the writ issues were decided. Indeed, all of appellant's trial proceedings are unreliable because they were conducted by a defendant who had been granted the right to self-representation while there were significant questions about his competency to stand trial. (Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope* (1993) 47 U. Miami L. Rev. 539, 552 ["[T]he bar against adverse adjudication in cases involving incompetent defendants serves as a prophylactic protection against erroneous convictions. Just as the assistance of competent counsel is regarded as a prerequisite of reliable adjudication, so too is the participation of a competent defendant."].)

Finally, suppose the criminal proceedings went forward during the pendency of the competency writ and the defendant was ultimately convicted, and then, years later, the reviewing court found that there were grounds to reverse the competency determination – just as had been alleged

in the petition. This Court in *Lightsey* held that if there is reversible error at a competency proceeding, then the remedy is to reverse the competency determination and remand to the trial court when it is feasible to have a retrospective competency determination *nunc pro tunc*. (*People v. Lightsey*, *supra*, 54 Cal.4th at p. 709-710.) Determinations about the competence of the defendant would take place many years (even decades, as in this case[13]) after the initial trial – when it is highly unlikely that the evidence relating to the defendant's competency would be available. Such a procedure, where a trial court attempts to assess competency many years after the relevant dates, particularly after a previous competency trial in which the constitutional validity of the trial is in serious question, certainly creates the danger that appellant will be tried while not competent and in violation of his right to a competency hearing that satisfies the dictates of due process. A rule which promotes the prompt resolution of constitutional issues relating to the competence of a defendant to stand trial, at least in the unusual circumstance when this Court has ordered a court of appeal to issue an alternative writ on the issue, avoids these deficiencies.

E. Reversal is Required

The trial court's actions in appellant's trial before the issues presented in the competence writ were resolved was in excess of the trial court's jurisdiction under Penal Code section 1368, et seq. In proceeding notwithstanding the writ, the trial court violated appellant's state and federal constitutional rights to due process and a fair trial, to a fair competency trial, and to not be tried when incompetent; the error also compromised his related rights to effective assistance of counsel, and to a reliable, non-arbitrary

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[13]Appellant's competency trial was in 1987.

determination of guilt and penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15; *Pate v. Robinson, supra*, 383 U.S. at pp. 386-387; *Dusky v. United States, supra,* 362 U.S. 402.) In addition, sections 1368, et seq, confer a statutory right to a competency hearing, which, in turn, becomes an element of federal due process such that the right cannot be denied without violating federal constitutional rights. Appellant's right to federal due process was denied insofar as appellant's rights to a hearing under state statutory law was denied. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.) When a court acts in excess of jurisdiction, reversal is mandatory. (*People v. Pennington, supra*, 66 Cal.2d at p. 521; *People v. Ary, supra*, 118 Cal.App.4th 1016 at p. 1021.) Thus appellant's convictions and sentence must be reversed.

In *People v. Lightsey, supra*, 54 Cal.4th at p. 710, this Court held that the remedy for a competency trial that was held in violation of a defendant's statutory rights was a remand to the trial court for a hearing on whether a retrospective competency hearing was feasible. Assuming arguendo, that *Lightsey* applies when a trial court acts in excess of its jurisdiction under section 1368, appellant showed in his opening brief that reversal of appellant's convictions is required because a retrospective competency proceeding is not feasible in this case. (AOB, pp. 133-139.) Even if *Lightsey* controls, the error here demands reversal.

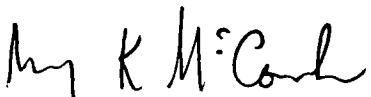
CONCLUSION

For all of the reasons stated above, the entire judgment - the verdict of competence to stand trial, the convictions, the special circumstance findings, and the sentence of death - must be reversed.

DATED: January 20, 2015

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



MARY K. McCOMB
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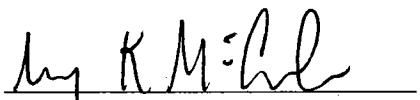
Attorneys for Appellant

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

I, MARY K. McCOMB, am the Supervising Deputy State Public Defender assigned to represent appellant BILLY RA Y WALDON, also known as N.I. SEQUOYAH, in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office computer software. On the basis of that computer-generated word count, I certify that this brief is 9,484 words in length.

DATED: January 20, 2015



MARY K. McCOMB
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DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Billy Ray Waldon (N.I. Sequoyah)**
Case Number: **Supreme Court Crim. No. S025520**
San Diego County Superior Court No. CR82986

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 770 K Street, Suite 1000, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

by enclosing it in envelopes and
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NI Sequoyah (B. Waldon), H27800
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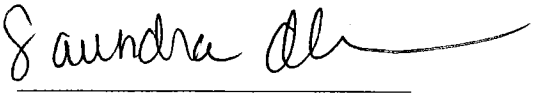
5-EB-81
San Quentin, CA 94975

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 20, 2015, at Sacramento, California.



SAUNDRA ALVAREZ