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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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