SUPREME COURT COPY

In the Supreme Court of the State of California

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

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

BILLY RAY WALDON a.k.a. N. I. SEQUOYAH,

Defendant and Appellant.

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

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

SUPPLEMENTAL RESPONDENT'S BRIEF

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DEATH PENALTY

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ARGUMENT

THE TRIAL COURT DID NOT ACT IN EXCESS OF JURISDICTION IN REINSTATING CRIMINAL PROCEEDINGS ONCE WALDON WAS FOUND COMPETENT TO STAND TRIAL

In his Supplemental Opening Brief, Waldon contends the trial court acted in excess of jurisdiction in going forward with the criminal trial while the writ petitions challenging his competency determination were pending. (Supp. AOB 1-29.) He further contends that the remedy for the alleged error is not only reversal of the competency determination, but of the conviction and sentence. (Supp. AOB 29-30.) Waldon's claim is without merit. Nothing in Penal Code[1] section 1368 requires the stay of criminal proceedings after a defendant is determined to be competent while review of that determination is obtained by writ petition. During the writ proceedings, both this Court and the Court of Appeal denied his request for a discretionary stay, and Waldon cannot show this was error or that this Court or the Court of Appeal was required to stay the proceedings below. Finally, Waldon forfeited this claim by failing to seek review of the lower courts' denial of his stay requests. His remedy now is to raise the issues related to the competency determination on direct appeal, not reversal of the conviction.

A. Proceedings

During pretrial proceedings, on May 22, 1987, after the trial court declared a doubt as to Waldon's competency to stand trial, criminal proceedings were suspended under section1368. (20A RT 35-36.) On September 21, 1987, the jury found that Waldon was competent to stand

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

trial. (31A RT 1193; 5 CT 882.) Criminal proceedings were reinstated. (7 CT 1420.)

On October 30, 1987, Waldon's counsel moved for judgment notwithstanding the verdict and for new trial, raising several of the same issues now raised on appeal. (6 CT 1230-1231; 7 CT 1232-1267, 1275-1288, 1297-1309.) The prosecution filed its written opposition. (7 CT 1310-1381, 1383-1386.) After hearing the motions, on December 23, 1987, the trial court denied the motions for new trial and judgment notwithstanding the verdict. (MH5 RT 1-8; 7 CT 1423.)

On January 19, 1988, defense counsel filed a petition for writ of mandate, case no. D007429, raising many of the same issues raised in this direct appeal, contending that the trial court abused its discretion in denying the motions for judgment notwithstanding the judgment and for a new trial. (56 CT 11918-11996.) In the petition, defense counsel requested a stay of all trial proceedings. (56 CT 11924, 11930; see also 7 CT 1395-1397; 62 CT 13958-13960, 13975-13976.) The prosecution joined in the request for a stay. (7 CT 1394; 62 CT 13952.) On February 11, 1988, the Court of Appeal denied the stay request, stating:

> The issue of judicial economy, however, is properly left to the trial court in the management of its calendar. The trial court will decide whether it is prudent to postpone trial when it determines the appropriate trial date for this case. The request for stay is denied without prejudice to further consideration following the trial court's ruling.

(7 CT 1394.)

Meanwhile in the trial court, in proceedings addressing Waldon's requests to relieve counsel and to represent himself, defense counsel submitted points and authorities arguing that the issues raised in the competency writ must be resolved before addressing the issues related to Waldon's representation. (8 CT 1535-1540.) On February 24, 1988, the

Court of Appeal denied the petition, finding there was no error in denying the motions for judgment notwithstanding the judgment and for new trial. (7 CT 1398.)

On March 15, 1988, defense counsel filed a petition for review of this decision (55 CT 11638-11703), and requested this Court stay the criminal proceedings in the trial court (55 CT 11700). Counsel did not raise the issue of the Court of Appeal's denial of the stay request in the petition for review. In May 1988, this Court granted the petition for review, case no. S004854, and directed the Court of Appeal to issue an alternative writ to be heard in that court. The Court did not order a stay of proceedings. On May 25, the Court of Appeal issued the alternative writ. (7 CT 1399; 73 CT 15745; 73 CT 15747.)

Defense counsel filed another petition for writ of mandate and request for stay in this Court, S006786, seeking an order directing the Court of Appeal to resolve the competency writ first, before addressing the writs related to Waldon's motion for self-representation or defense counsel's motion to be relieved. (See 72 CT 15573-15575 [discussing petition for writ of mandate][2].) On August 11, 1988, this Court denied the application for stay and petition for writ of mandate. (45 CT 9918; 62 CT 13808.)

Defense counsel submitted supplemental briefing to the Court of Appeal on August 19, 1988, contending that the competency issues must be resolved before addressing Waldon's request to represent himself. (62 CT 13791-13793.)

On September 12, 1988, while the writ related to the competency proceeding was still pending, the Court of Appeal granted defense counsel Russell's petition for writ of mandate seeking to be relieved as counsel in case no. D007850. (10 CT 1920-1933.) The Court of Appeal rejected

[2] The petition itself is not in the record on appeal.

defense counsel's argument that the competency issues must be addressed before reaching Waldon's request for self-representation.

> At oral argument Russell and Khoury appeared to argue that we must decide the mental health issues first as the superior court was without jurisdiction to act until there was a final determination on Waldon's mental competence. Section 1368 subdivision (c) provides that once a 1368 hearing has been ordered, all proceedings in "the criminal prosecution" (except as provided in section 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.

(10 CT 1932, fn. 9.)

Defense counsel petitioned for rehearing, arguing that the Court of Appeal exceeded its jurisdiction in proceeding without deciding the competency issues despite section 1368. (72 CT 15552-15560.) The Court of Appeal denied rehearing; this Court denied review. (72 CT 15561-15584, 15603; 45 CT 9917.)

After Russell was relieved, Waldon again brought a *Faretta*[3] motion, and on November 3, 1989, was granted permission to represent himself at trial. (84A RT 64.) In February 1990, after giving Waldon several extensions of time in which to respond to the alternative writ (see 62 CT 13784-13786, 13789), the Court of Appeal discharged the writ and dismissed the petition in D007429, concluding that the trial court's finding

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

that Waldon was competent to represent himself rendered the petition challenging the competency finding moot. (62 CT 13783.)

B. After Waldon Was Found to Be Competent to Stand Trial, the Trial Court Was Not Required to Extend the Stay of Proceedings While Writ Proceedings Related to the Competency Finding Were Pending

Waldon suggests that when a trial court declares a doubt as to a defendant's competency to stand trial, proceedings must not only be stayed until a competency hearing is held, but that the stay of proceedings must continue in effect until that competency determination is reviewed via writ proceedings. He provides no authority that supports his contention.

Under section 1368, subdivision (c), "when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined." But here, a competency hearing had been held and Waldon's competence to stand trial had been determined—he was found to be competent. Nothing in section 1368 requires an automatic stay of proceedings while a defendant seeks extraordinary relief by writ of mandate challenging the trial court's denial of a motion for judgment notwithstanding the judgment.

That said, Waldon could have asked for a discretionary stay of proceedings from the trial court, but it is not clear that he ever did so. Waldon cites to instances in which defense counsel argued that the trial court lacked jurisdiction to move forward with other issues while the writ petition was still pending,[4] but does not claim to have requested a stay of

[4] Two of these instances were requests made by counsel after the Court of Appeal had ordered counsel relieved. (AOB 9-11, citing 10 CT 2007-2012; 78A RT 10-13, 38, 44.)

proceedings in the trial court. (See Supp. AOB 5-13.) Accordingly, Waldon cannot claim that the trial court erred in failing to grant such a stay.

But even if he had requested and been denied a stay in the trial court, any remedy would have been limited to seeking relief from the court of appeal by petition for writ of supersedeas or ancilliary to a writ petition on the merits. (*Reed v. Superior Court*) (2001) 92 Cal.App.4th 448, 455; *In re M.M.* (2007) 154 Cal.App.4th 897, 916.)

C. Although this Court or the Court of Appeals Could Have Stayed the Trial Proceedings, Neither Court Was Required to do so

As with the trial court below, there was no requirement that the Court of Appeal or this Court stay the proceedings below while Waldon's writ petition was pending. As set forth above, Waldon filed a petition for writ of mandate challenging the denial of his motion for judgment notwithstanding the verdict and for a new trial and requested a stay of proceedings below. However, a stay of proceedings, like writ relief in general, is discretionary and Waldon cannot show that this Court or the Court of Appeal erred in failing to stay the trial court proceedings.

Unlike civil appeals (see Code of Civ. Proc. § 916), there is no automatic stay of lower court proceedings while a petition for writ of mandate is pending. Instead, a petitioner may request that an appellate court issue a temporary stay of proceedings. (*In re Brandy R.* (2007) 150 Cal.App.4th 607, 609-610 [writ petition in juvenile dependency case did not automatically stay juvenile court hearing on petition to terminate parental rights]; see also Cal. Rules of Court, rule 8.846(a)(7).) Waldon could also have petitioned for writ of prohibition, seeking to prohibit the trial court from reinstating criminal proceedings, but he did not do so. (See Code of Civ. Proc., § 1104.)

An appellate court has discretion to issue a temporary stay to maintain the status quo pending the determination of a petition for extraordinary relief. (Code of Civ. Proc. § 923; *Markley v. Superior Court* (1992) 5 Cal. App.4th 738, 750, fn. 15.) Because such a stay is purely discretionary, Waldon cannot show that the Court of Appeal or this Court erred in denying the stay requests and allowing the trial court proceedings to continue while the petition was pending.

Waldon's argument is premised upon his contention that the Court of Appeal was required to resolve the competency writ on the merits before the criminal case could proceed to trial. But unlike an appeal, relief through writ review is deemed extraordinary, equitable and wholly discretionary. (See *Roden v. Amerisource Bergen Corp.* (2005) 130 Cal.App.4th 211, 213 [observing that "extraordinary relief is supposed to be extraordinary" and "not available as a matter of course."].) As one California appellate court has explained,

> Writ relief, if it were granted at the drop of a hat, would interfere with an orderly administration of justice at the trial and appellate levels. Reviewing courts have been cautioned to guard against the tendency to take " '... too lax a view of the "extraordinary" nature of prerogative writs ...'" [citation] lest they run the risk of fostering the delay of trials, vexing litigants and trial courts with multiple proceedings, and adding to the delay of judgment appeals pending in the appellate court. [Citations.]

(*Omaha Indem. Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1272).

The Court went on to add that,

> "If the rule were otherwise, in every ordinary action a defendant whenever he chose could halt the proceeding in the trial court by applying for a writ of prohibition to stop the ordinary progress of the action toward a judgment until a reviewing tribunal passed upon an intermediate question that had arisen. If such were the rule, reviewing courts would in innumerable cases be converted from appellate courts to nisi prius tribunals." (*Mitchell v. Superior Court* (1958) 50 Cal.2d 827, 833-834 [330 P.2d 48] (conc. opn. of McComb, J.).)

(*Id.*)

Waldon further contends that the trial court was required to stay proceedings once the Court of Appeal issued the alternative writ in case number D007429. (See Supp. AOB 20-23.) This Court's order directing the Court of Appeal to issue the writ did not order a stay of the criminal proceedings below, nor did the Court of Appeal's order issuing the alternative writ. In writ of mandate proceedings, an alternative writ commands the respondent to do the act requested by the petitioning party or to show cause why that act has not been performed. (Code Civ. Proc. § 1087.) An order by this Court directing the court of appeal to issue an alternative writ does not constitute a determination that petitioner is correct on the merits; it merely determines that writ relief is the only adequate avenue for review. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1389, fn. 4.)

Once an alternative writ has issued and a return has been filed, the matter becomes a "cause" and a written opinion must be filed whether or not relief is granted. (Cal. Const. Art. VI, § 14; *Palma v. United States Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-178, 203.) However, as with the instant case, the court may "dissolve" its alternative writ and dismiss the petition for mootness where the facts upon which the alternative writ was issued no longer exist. (See *Twentieth Century Fox Film Corp. v. Superior Court* (2000) 79 Cal.App.4th 188, 193.)

D. Even Assuming the Proceedings Should Have Been Stayed, This Claim Was Not Preserved on Appeal, and Reversal of the Conviction Is Not an Appropriate Remedy

As with his claim that the Court of Appeal erred in dismissing the writ petition (see AOB 198-199), Waldon is not entitled to relief on his claim that the Court of Appeal erred in failing to stay the proceedings below because he failed to seek rehearing or review of the appellate court's failure

to grant the stay request. (See *Barbee v. Appellate Department of Superior Court in and for Los Angeles County* (1930) 209 Cal. 435.) By failing to seek rehearing or review of the Court of Appeal's decision, Waldon has failed to preserve his challenge to the decision. (See Cal. Rules of Court, rule 8.490 [finality of order denying petition for writ of mandate or prohibition].)

The gist of Waldon's argument here and in his opening brief, is that the Court of Appeal should have been required to address his claims related to the competency proceedings on the merits, and that the criminal proceedings should not have been reinstated until such writ review was complete. That is not the rule, but even if it was, his remedy now is not reversal of the conviction, but rather to raise the underlying claims on direct appeal and have them heard on the merits. And as set forth more fully in Respondent's Brief, those claims are without merit. (See RB at 71-150.

Dated: April 7, 2015

Respectfully submitted,

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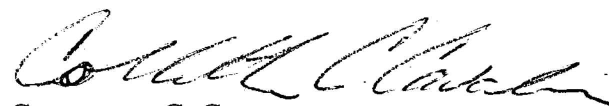

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENTS SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 2, 562 words.

Dated: April 7, 2015

KAMALA D. HARRIS
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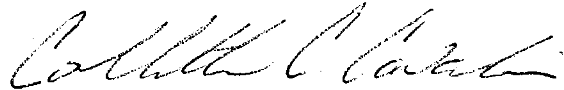

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. BILLY RAY WALDON** No.: **S025520**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **April 8, 2015**, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on **April 8, 2015** to The San Diego District Attorney's Office service address da.appellate@sdcda.org by 5:00 p.m. on the close of business day.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **April 8, 2015**, at San Diego, California.

Jena Ray
Declarant

Signature

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