In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DAVID SCOTT DANIELS,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S095868

Sacramento County Superior Court, Case No. 99F10432
The Honorable James L. Long, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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IX. THE *FARETTA* DECISION IS CONTROLLING PRECEDENT THAT EXTENDS TO GUILT AND PENALTY PHASES OF A CAPITAL TRIAL

Appellant contends that the trial court erred when it permitted him to represent himself during the guilt and penalty phases of trial because the right of self-representation must yield to important constitutional interests, including the right to a fair trial and a reliable penalty determination. (SAOB 1-2, see SAOB 2-14.)[1] Appellant acknowledges that this Court has rejected the same or similar challenges, but repeats them here for reconsideration by this Court and in order to preserve them for federal review. (See SAOB 2, citing *Street v. New York* (1969) 394 U.S. 576, 582.) None of appellant's contentions warrant reconsideration by this Court. Accordingly, the judgment and sentence should be affirmed.

Nearly forty years ago, in *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), the United States Supreme Court found implied in the Sixth Amendment a right of self-representation that prevents states from haling a defendant into its criminal courts and forcing a lawyer upon him when he wants to conduct his own defense. (*Id.* at pp. 807, 821.) The Supreme Court construed a defendant's right to the assistance of counsel as a tool that was not to be thrust upon an unwilling defendant. (*Id.* at p. 820.) That being the case, unless a defendant had agreed to representation, the defense presented would not be the defense guaranteed to him by the Constitution, as it is not his own defense. (*Ibid.*) The Supreme Court found support for this notion in both history and the common law. (*Id.* at pp. 821-832.)

Faretta addressed the natural tension between a defendant's right to a fair trial and the right to self-representation (*Faretta, supra*, 422 U.S. at pp. 832-833), a tension which persists to this day (see *Indiana v. Edwards*

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[1] "SAOB" refers to the Supplemental Appellant's Opening Brief.

(2008) 554 U.S. 164, 178; *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152 (dis. opn. of Scalia, J.)). The Supreme Court found it "undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," but noted that compulsory counsel would not be consistent with the Framer's intent. (*Faretta, supra,* 422 U.S. at pp. 833-834.) The Court noted that a defendant's "choice must be honored out of 'that respect for the individual which is the lifeblood of the law'" because the defendant "will bear the personal consequences of a conviction." (*Id.* at p. 834, quoting *Illinois v. Allen* (1970) 397 U.S. 337, 350-351.)

As appellant recognizes, *Faretta* remains the law of the land (SAOB 2; *People v. Butler* (2009) 47 Cal.4th 814, 824); consequently, a trial court cannot force counsel upon an unwilling defendant in a capital case during the guilt or penalty phases of trial (*People v. Dent* (2003) 30 Cal.4th 213, 218 [guilt phase]; *People v. Clark* (1990) 50 Cal.3d 583, 617 [penalty phase]), unless he lacks the mental competency to conduct trial proceedings (*Edwards v. Indiana, supra,* 554 U.S. 164). Recently, in *People v. Taylor* (2009) 47 Cal.4th 850, this Court rejected defendant's claim that the right of self-representation must give way to the constitutional requirements that the death penalty be imposed through a fair and reliable procedure. (*Id.* at p. 865.) This Court reasoned,

> We have explained that the autonomy interest motivating the decision in *Faretta*—the principle that for the state to "force a lawyer on a defendant" would impinge on "'that respect for the individual which is the lifeblood of the law'" [citation]—applies at a capital penalty trial as well as in a trial of guilt. [Citation.] This is true even when self-representation at the penalty phase permits the defendant to preclude any investigation and presentation of mitigating evidence. [Citations.] A defendant convicted of a capital crime may legitimately choose a strategy aimed at obtaining a sentence of death rather than one of life imprisonment without the possibility of parole, for some

> individuals may rationally prefer the former to the latter. [Citation.] Moreover, a rule requiring reversal when a capital defendant chooses self-representation and presents no mitigating evidence could easily be misused by a knowledgeable defendant who wished to embed his trial with reversible error. [Citation.]
>
> Nor does the likelihood or actuality of a poor performance by a defendant acting in propria persona defeat the federal self-representation right. The *Faretta* court explicitly recognized the probability defendants will be ill-served by waiving counsel and relying on their own "unskilled efforts," but nonetheless held the defendant's choice "must be honored." [Citation.] "The high court, however, has adhered to the principles of *Faretta* even with the understanding that self-representation more often than not results in detriment to the defendant, if not outright unfairness. [Citations.] Under these circumstances, we are not free to hold that the government's interest in ensuring the fairness and integrity of defendant's trial outweighed defendant's right to self-representation." [Citation.]

(*People v. Taylor, supra,* 47 Cal.4th at pp. 865-866.) "It follows that the state's interest in ensuring a reliable penalty determination may not be urged as a basis for denying a capital defendant his fundamental right to control his defense by representing himself at all stages of the trial." (*People v. Clark, supra,* 50 Cal.3d at p. 618.) Appellant does not offer any persuasive reason why this Court should revisit or disapprove of its prior decisions rejecting the assertion that the *Faretta* decision does not extend to capital cases. (See *People v. Taylor, supra,* 47 Cal.4th 850; *People v. Blair* (2005) 36 Cal.4th 686, 736-740; *People v. Koontz* (2002) 27 Cal.4th 1041, 1074; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365.) Thus, the instant claim should also be rejected.

X. SINCE CALIFORNIA LAW IS SUBJECT TO THE UNITED STATES CONSTITUTION AND THE *FARETTA* DECISION, PENAL CODE SECTION 686.1 CANNOT BE GIVEN EFFECT

Appellant contends that the convictions, special circumstance findings, and death verdict must be reversed because the trial court

erroneously permitted him to waive counsel in violation of Penal Code section 686.1, which he claims should be given effect because the *Faretta* decision does not apply to capital cases. (SAOB 17.) Appellant recognizes that this Court has already rejected the same challenges, but repeats them here for reconsideration by this Court and to preserve the contentions for federal review. (SAOB 18, 23-24, citing *Street v. New York, supra,* 394 U.S. at p. 582.) None of appellant's contentions warrant reconsideration by this Court. Thus, the judgment and sentence should be affirmed.

A. Although California Does Not Provide Criminal Defendants with a Statutory Or Constitutional Right of Self-Representation, California Law Is Subject to the Sixth Amendment, Which Prevents States from Forcing a Lawyer on an Unwilling Defendant

As appellant accurately notes (SAOB 18), California Penal Code section 686.1 provides, "Notwithstanding any other provision of law, the defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings." According to the historical notes, the Legislature passed section 686.1, effective June 7, 1972, out of concern that "persons representing themselves cause unnecessary delays in the trials of charges against them; that trials are extended by such persons representing themselves; and that orderly trial procedures are disrupted. Self-representation places a heavy burden upon the administration of criminal justice without any advantages accruing to those persons who desire to represent themselves." (*People v. Johnson* (2012) 53 Cal.4th 519, 526; see *People v. Dent, supra,* 30 Cal.4th at p. 224 (conc. opn. of Chin, J.)

Shortly after Penal Code section 686.1 became effective, this Court decided *People v. Sharp* (1972) 7 Cal.3d 448 (*Sharp*), and held that neither the California Constitution nor the Penal Code confer a right to self-representation. (*Id.* at pp. 459, 463-464.) *Sharp* "remains good law as to the California Constitution and Penal Code." (*People v. Taylor, supra,* 47

Cal.4th at p. 872, fn. 8.) Of course, courts should give effect to California law when they can. (*People v. Johnson, supra,* 53 Cal.4th at p. 526.)

However, California law is subject to the United States Constitution, including the Sixth Amendment. (*People v. Johnson, supra,* 53 Cal.4th at p. 526.) *Faretta* invalidated section 686.1 as to the guilt and penalty phases of a capital trial. (*People v. Clark, supra,* 50 Cal.3d at p. 618, fn. 26). Given *Faretta* and its progeny, section 686.1 "cannot be given effect" (*People v. Johnson, supra,* 53 Cal.4th at p. 526) and "[t]he courts of this state properly ignore" that section today (*People v. Dent, supra,* 30 Cal.4th at p. 224 (conc. opn. of Chin, J.)).[2] Thus, the trial court's failure to enforce Penal Code section 686.1 was not error. (See SAOB 25-26.)

B. California's Interest in the Fairness And Reliability of Death Judgments Do Not Trump a Competent Defendant's Timely *Faretta* Request

Appellant is correct that the right of self-representation is not absolute, but none of the circumstances that warrant curtailment of the right were present here. (SAOB 19-20; see *Faretta, supra,* 422 U.S. at p. 834, fn. 46 [self-representation may be terminated if defendant engages in serious misconduct]; *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., supra,* 528 U.S. at p. 163 [no right to self-representation on direct appeal]; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 178-179 [standby counsel may be appointed over self-represented defendant's objection].) California's interest in fair and reliable death judgments did not warrant

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[2] When deciding *Faretta, supra,* 422 U.S. 806, the United States Supreme Court was aware that the California Court of Appeal had relied upon this Court's decision in *Sharp, supra,* 7 Cal.3d 448 to find that defendant had no federal or state constitutional right to self-representation. (See *Faretta, supra,* 422 U.S. at p. 812, fn. 6.) The United States Supreme Court was also aware that Penal Code section 686.1 required counsel in capital cases. (*Ibid.*)

denial or revocation of appellant's *Faretta* rights, even though appellant remained passive throughout the proceedings. (SAOB 20, 23-25; see *People v. Taylor, supra,* 47 Cal.4th at pp. 865-866.) Indeed, in *People v. Bloom* (1989) 48 Cal.3d 1194 (*Bloom*), when the jury returned guilty verdicts, defendant made a *Faretta* motion. (*Id.* at p. 1214.) He chose to proceed as "co-counsel" during the penalty phase. (*Id.* at p. 1215.) Defendant urged the jury to impose death, explained that he deserved to die, and said that he wanted to die. (*Id.* at pp. 1216-1217.) He also suggested that there were no mitigating factors, but said, "Every man on the jury, if you knew the facts on my life, you'd kill him too." (*Id.* at p. 1217.) The jury returned a death verdict. On appeal, defendant claimed that the death verdict was unreliable because he withheld substantial mitigating evidence. (*Id.* at p. 1227.) This Court rejected defendant's argument, finding practical and theoretical flaws as follows:

> A rule requiring a pro se defendant to present mitigating evidence would be unenforceable, as the court has no means to compel a defendant to put on an affirmative defense. [Citation.] The threat of appellate reversal would be not merely ineffective but counterproductive. A knowledgeable defendant desiring to avoid the death penalty could make a timely request for self-representation under *Faretta, supra*, 422 U.S. 806, and then decline to present any mitigating evidence at the penalty phase, secure in the knowledge that any death judgment would be reversed by this court, while a defendant genuinely desiring death could circumvent the rule by presenting a bare minimum of mitigating evidence. A rule so easily evaded or misused is clearly unsound. The sanction of appellate reversal is not the answer, nor has any alternative method been suggested to compel an unwilling defendant to present an effective penalty defense.
>
> While the United States Supreme Court has frequently stated that the Eighth Amendment and evolving standards of societal decency impose a high requirement of reliability on the determination that death is the appropriate penalty in a particular case [citations], the high court has never suggested that this

> heightened concern for reliability requires or justifies forcing an unwilling defendant to accept representation or to present an affirmative penalty defense in a capital case. Indeed, the lack of any legal or practical means to force a pro se defendant to present mitigating evidence, or indeed any defense at all, compels the conclusion that the death-verdict-reliability requirement cannot mean that a death verdict is unsound merely because the defendant did not present potentially mitigating evidence. Rather, the required reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. A judgment of death entered in conformity with these rigorous standards does not violate the Eighth Amendment reliability requirements. [Citations.]

(*Bloom, supra,* 48 Cal.3d at pp. 1227-1228, footnote omitted; see *People v. Teron* (1979) 23 Cal.3d 103 [self-represented defendant "bears no duty to present a defense"].)

The same considerations apply here. The death verdict was rendered only after the prosecutor discharged its burden of proof at the guilt phase and presented aggravating evidence at the penalty phase that substantially outweighed the relevant mitigating evidence. Although appellant did not present evidence at the penalty phase, the court, as trier of fact, considered evidence of appellant's drug use that was presented during the guilt phase as a potentially mitigating circumstance, and also considered appellant's apologies to the victims' families and showing of remorse when selecting the appropriate punishment. (2RTS 468-469.) The trial court followed the demanding guidelines of California's death penalty law throughout the proceedings. And, the trial court could not compel appellant to present a defense, offer mitigating evidence, or forego his right to self-representation. (*People v. Clark, supra,* 50 Cal.3d at p. 618.) Accordingly, California's

interests in the fairness and reliability of a death judgment were satisfied. (*Bloom, supra,* 48 Cal.3d at p. 1228; see *People v. Lang* (1989) 49 Cal.3d 991, 1029-1030 [death judgment not to be regarded as unreliable merely because defense counsel agreed to defendant's request that his grandmother not be called to testify at the penalty phase].)

Appellant further contends that the trial court could have revoked his *Faretta* status, noting that "revocation of *Faretta* status is not uncommon in capital cases in this state." (SAOB 22.) His contention is unavailing. As an initial matter, even if true, "[a] finding of *no* error in one situation is not tantamount to the finding of error in another." (*People v. Clark* (1992) 3 Cal.4th 41, 116, italics in original.) Moreover, the cases that appellant relies upon are distinguishable and do not demonstrate that the trial court could have revoked his *Faretta* status here, given that the denial of a timely *Faretta* request by a competent defendant is per se reversible error. (See *McKaskle v. Wiggins, supra,* 465 U.S. at p. 177, fn. 8; *People v. Butler, supra,* 47 Cal.4th at p. 824.)

For example, in *People v. Bloom, supra,* 48 Cal.3d 1194, after the jury returned a guilty verdict, defendant moved to represent himself. (*Id.* at p. 1203.) The trial court granted the motion but, following an incident of violence in jail, the trial court revoked defendant's *Faretta* status. (*Ibid.*) Before the motion to modify the death verdict, the trial court reinstated defendant's *Faretta* status. (*Id.* at p. 1217.) On appeal, defendant urged that the trial court should not have granted his midtrial motion for self-representation. (*Id.* at p. 1220.) Consequently, this Court did not have occasion to address the propriety of the trial court's revocation following the violent incident in jail. Further, appellant's case did not involve any incidents of violence which may have justified the trial court revoking his *Faretta* status. Thus, *Bloom* does not suggest that the trial court could have revoked appellant's *Faretta* status.

In *People v. Clark, supra,* 3 Cal.4th 41, another case cited by appellant, a pro per defendant engaged in a "rambling discourse" with the court during a motion to recuse the district attorney. (*Id.* at pp. 113-114.) The trial court twice warned defendant not to abuse his pro per status. (*Ibid.*) When the trial court ordered the jury brought into the courtroom and told defendant he could continue with his cross-examination, defendant responded, "Your Honor, the defense stands mute throughout the rest of the trial." (*Id.* at p. 114.) The trial court appointed counsel, finding defendant's actions to be a renunciation of his pro per status. (*Ibid.*) The following day, after defendant had reconsidered his position, the trial court gave defendant another chance to represent himself. (*Ibid.*) On appeal, defendant contended that the trial court had improperly revoked his *Faretta* status. (*Ibid.*) This Court disagreed. (*Ibid.*) It found that defendant's stated intent to stand mute was not motivated by a desire to withhold a defense, which defendant could have done. (*Id.* at pp. 114-115.) Instead, it was designed to inject error or pressure the court into reconsidering its rulings. (*Id.* at p. 115.) In contrast, here, appellant did not engage in any disruptive behavior, and there is no evidence that he decided to stand mute out of a desire to obstruct the court or to inject error. Thus, *Clark* does not support appellant's contention that the trial court could have revoked his *Faretta* status.

Because California law is subject to the federal Constitution and the *Faretta* decision, Penal Code section 686.1 cannot be given effect to force counsel on an unwilling and competent defendant. To have done so would have been per se error. Moreover, California's interest in fair and reliable death judgments was satisfied here, and did not warrant denial of appellant's timely *Faretta* request.

CONCLUSION

For the foregoing reasons, and those submitted in the Respondent's Brief, the judgment and death sentence should be affirmed, with modification to the abstract of judgment reflecting the appropriate sentence for second degree murder on count XXI, imprisonment for 15 years to life.

Dated: July 7, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 2,922 words.

Dated: July 7, 2014

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. David Scott Daniels** No. **S095868**

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.

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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 July 7, 2014, at Sacramento, California.

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