IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF

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

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

FEDERAL STATUTE

STATUTES

TABLE OF AUTHORITIES

JURY INSTRUCTIONS

TABLE OF AUTHORITIES

Page(s)

COURT RULES

TEXT AND OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	No. S05520
Plaintiff and Respondent,	)	San Diego County Superior
v.	)	Court No. CR82086
BILLY RAY WALDON, ALSO KNOWN AS N.I. SEQUOYAH,	)	
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant Billy Ray Waldon, aka N.I. Sequoyah, hereby submits his Reply to the Respondent's Brief (hereinafter RB).[1]

The trial of this capital case serves up a smorgasbord of error, primarily swirling around issues of Appellant's competence to stand trial and section 1368 proceedings,[2] the unusual and complicated aspects of his

[1] In this reply, Appellant addresses some of the specific contentions made by respondent, but does not reply to those arguments by respondent that are addressed adequately in Appellant's Opening Brief (hereinafter AOB). The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the AOB, does not constitute a concession, abandonment or waiver of the point by Appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects Appellant's view that the issue has been presented adequately.

[2] All statutory citations are to the Penal Code unless otherwise noted.

mental state and delusions as related to his relationship with counsel and his self-representation, and the trial court's unprincipled and inappropriate rulings connected to those issues notwithstanding the trial judge's own recognition that Appellant's chosen defense once he was pro se was irrational and, in the words of the judge, "insane." Rather than addressing the big picture, Respondent's Brief defends seriatim each item on the lengthy list of errors in the AOB, typically contending that each issue was waived/forfeited, did not amount to error, did not cut at the fundamental fairness of Appellant's trial, and did not prejudice Appellant either singly or in combination.

With respect to Appellant's competence trial, Respondent again takes the piecemeal approach and argues that if this Court determines that either structural or prejudicial error occurred, the appropriate remedy is a remand with the guilt and penalty judgments intact, inviting the trial judge to consider making a retrospective determination, 20-plus years after the fact, based solely on the record, as to whether Appellant was competent when tried. The glaring flaw in this suggestion is not only that the evidence bearing on the competence determination was undeveloped, but also that the guilt and death sentence lack a whit of reliability given Appellant's self-representation during trial, including his presentation of the defense and mitigation cases that reached the jury.

The government provides very little discussion of the governing legal precedents. In essence, it is clear from the Respondent's Brief that it cannot see the forest for the trees, and it urges this Court similarly to ignore the woodland thicket of error that is this case, when doing so would be an egregious mistake. The fundamental constitutional principles of due process, the right to a fair trial with the assistance of counsel, and a reliable

penalty trial will not allow this Court to do so. Therefore, the competence, guilt, and penalty judgments must be reversed and the case remanded for a new trial if Appellant now is competent to stand trial.

Given the factual and legal complexity of this case, Appellant's Reply groups the arguments in the AOB around seven focal points: (1) the competence trial (Section A, correlating to AOB pp. 75-290); (2) the trial court's determination that Appellant could represent himself (Section B, correlating to AOB pp. 291-445); (3) errors in the appellate court's rulings, (Section C, AOB pp. 446-502); (4) the trial court's manner of handling Appellant's actions as a self-represented defendant, which included ignoring continuous reminders of Appellant's mental state and neglecting to declare a doubt while labeling Appellant's defense delusional, vesting control in the hands of "Advisory Counsel," abridging Appellant's right to present a defense, and allowing inherently prejudicial courtroom practices (Section D, AOB 533-774); (5) the trial court's allowing a mentally impaired capital defendant to represent himself (Section E, AOB 804-825); (6) the constant changing of trial court judges assigned to the case (Section F, AOB 775-803); and (7) whether the trial court had jurisdiction after the Court of Appeal issued the alternative writ on the competence petition (Supplemental AOB 1-31). No reply will be made with respect to pages 503-532 and 825-841 of the AOB.

* * * * *

SECTION A

COMPETENCE PROCEEDINGS

Bedrock principles under the federal constitution mandate that a criminal defendant cannot receive due process and a fair trial unless he possesses a sufficient command of his mental faculties to be "competent" to face trial and sentencing. In this case these principles were violated because Appellant's competence trial was replete with error. Therefore, this Court must reverse the competence, guilt and penalty verdicts and remand for the trial court to start anew with prosecuting the charged crimes, if Appellant is found to be presently competent to stand trial.

Argument sections I-VI of the AOB all relate to the competence proceedings, a jury trial that was held before trial of the criminal charges. Argument section I shows structural error based on the trial court's giving of an erroneous competence instruction that, inter alia, failed to state that a competent defendant must be able to assist counsel in a "rational" manner, and urges that a limited remand for a retrospective competence hearing would be inadequate under the facts of the case. Section II shows that the trial court's failure to rule on Appellant's motion under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), followed by the unheard and unresolved motion taking center stage in the competence trial and the jury hearing an incomplete and inaccurate statement of law concerning representation, self-representation, and the control of the defense, led to a constructive denial of counsel during competence proceedings.[3] Argument section IV proves that the trial court's labeling Appellant as a "competent" witness before the jury,

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[3] Argument section III of the AOB contains a factual summary in support of sections IV, V, and VI, and raises no legal contentions.

and then instructing the jury with BAJI No. 2.02, undermined the jury's factfinding role in the competence trial. Argument section V shows that other instructional errors (especially the giving of CALJIC No. 2.21 suggesting that Appellant's key expert should be distrusted) combined with the erroneous definition of competence, flawed instruction under *Marsden*, *Faretta v. California* (1975) 422 U.S. 570 (*Faretta*), and *People v. Frierson* (1985) 39 Cal.3d 803 (*Frierson*), and instruction with BAJI No. 2.02, created prejudicial error requiring reversal under either the *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) or *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) standard. Argument section VI proves that other non-instructional errors in the competence trial (the court's refusing to grant a continuance so attorney Geri Russell could be available, its limiting defense counsel's attempt to cross-examine the district attorney who testified, its allowing the jury to learn of the nature of the criminal charges and that Appellant had attempted to escape) provide further basis for reversal of the competence verdict.

Below, Appellant regroups some of these issues and arguments to facilitate clarity of consideration of why reversal is required under either a structural error or harmless error analysis. In section A.I, Appellant focuses on the flawed version of CALJIC No. 4.10 given to the jury as structural error, in section A.II, Appellant addresses Appellant's unheard *Marsden* motions and their impact in the competence trial as structural error. In section A.III, Appellant analyzes how these errors, other instructional errors, and errors unrelated to instruction given to the jury, were not harmless under the relevant tests and standards.

I. The Trial Court Gave the Competence Jury a Flawed Version of CALJIC No. 4.10, and its Omission of the Key Term of Rationality from the Definition of Competence in the Instruction Amounted to Structural Error Requiring Reversal Without Consideration of Prejudice

Argument section I of the AOB centers on errors in the trial court's instruction to the jury defining competence. Appellant shows first that California's definition of competence to stand trial violates federal due process principles by adding a "mental disease or defect" element into the *Dusky v. United States* (1966) 362 U.S. 402 (*Dusky*) standard and failing to require that a competent defendant have the "present" ability to understand proceedings in a both a "rational and factual" manner. (AOB 81-103.) Respondent's brief (RB 73-78) counters that the "mental disease or defect" requirement is implicit in *Dusky*; and that California's competence statute has been upheld in *People v. Stanley* (1995) 10 Cal.4th 764, 816 (*Stanley*), *People v. Dunkle* (2005) 36 Cal.4th 861 (*Dunkle*), and other cases. Respondent also cites the Court of Appeal's statement in *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 849 that an adult's incompetence to stand trial must arise from a mental disorder or developmental disability. In reply, Appellant concedes that this Court's precedent is contrary to his argument at AOB 81-103 (see fn. 30 at 98) but requests that this Court revisit its holdings and acknowledge that section 1367 and CALJIC No 4.10 are flawed statements of competence to stand trial under the *Dusky* standard. The AOB and RB adequately frame this legal issue, although the harm of the asserted error is discussed in section III.b.5, *post*.

Second, Argument section I of the AOB points out the version of CALJIC No. 4.10 given to Appellant's competence jury, and then shows

that the instruction was egregiously flawed because it omitted the key term of "rationality" and failed to require the jury find that the defendant could assist counsel in a rational manner. (AOB 103-111.) Here it is Appellant who relies on *Stanley* and *Dunkle*, which uphold CALJIC No. 4.10 as written and, by inference, dictate that the trial court's instruction *omitting* words incorporating the rationality requirement significantly misstated the requirements of *Dusky*. In rebuttal, Respondent argues that there is no reasonable likelihood that the jury misconstrued the instructions as a whole (RB 81-83), citing *Boyde v. California* (1990) 494 U.S. 370, 380-381 and *Brown v. Payton* (2005) 544 U.S. 133, 144.

However, as explained in the AOB at 112-128, an instructional error at a competency trial related to the definition of competence and the standard of proof must be analyzed as federal constitutional error of a structural nature, requiring reversal without consideration of prejudice. This is so because, one, the flawed competence instruction raised the defendant's burden of proof in establishing incompetence to stand trial in violation of due process under *Cooper v. Oklahoma* (1996) 517 U.S. 348, 369 (*Cooper*); two, the defective instruction rendered the trial fundamentally unfair and an unreliable mechanism for testing Appellant's competence (*Neder v. United States* (1999) 527 U.S. 1, 9 (*Neder*); *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282 (*Sullivan*)); and three, the state's failure to follow its own procedures for determining competence deprived Appellant of the "adequate hearing" required under the United States Constitution, and, as such, federal due process was abridged under the precedent stated by the United States Supreme Court in *Pate v. Robinson* (1966) 383 U.S. 375 (*Pate*).

Respondent's Brief altogether fails to address Appellant's first and foremost argument that the competence instruction's omission of any reference to rationality amounts to structural error, based on the United States Supreme Court's holding in *Cooper, supra*, 517 U.S. 348. *Cooper* addressed a capital defendant's right not to be put on trial when he or she is more likely than not incompetent, under the Due Process Clause of the Fifth and Fourteenth Amendments to the federal constitution. The state of Oklahoma applied a presumption of competence and also placed on criminal defendants the burden of establishing incompetence to stand trial by clear and convincing evidence. The high court reversed the judgment without consideration of prejudice, stating that the "fundamental character of the defendant's right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel mandates constitutional protection." (*Id.* at p. 368.)

The Supreme Court in *Cooper* said that the function of a standard of proof under the Due Process Clause and in the realm of factfinding is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." (*Cooper, supra*, at pp. 362-363, quoting *Addington v. Texas* (1979) 441 U.S. 418, 423.) Under this reasoning it is clear that our societal values require a juror to find a criminal defendant *incompetent* to stand trial even if the juror lacks an elevated "degree of confidence" in finding that fact – all the defendant must prove is that he or she is incompetent by a preponderance of the evidence, and thus only that narrow class of cases in which the evidence on either side is "equally balanced" will be resolved by a presumption of competence. According to

Cooper this is what constitutional due process guarantees, when a defendant's competence is in doubt. (*Id.* at pp. 355-356, 366-367, citing *Medina v. California* (1992) 505 U.S. 437,[4] (*Medina*), *inter alia.*)

Under the *Cooper* and *Medina* precedents, the presumption of competence can be determinative only for that "narrow class of cases" where the evidence on either side is "equally balanced" – thus, under the holdings of these cases, federal due process allows a state to impose on a defendant the burden of proving incompetence by a preponderance of the evidence, but it cannot raise the burden *above* that standard. When Judge Levitt instructed Appellant's competence jury with a statement of the *Dusky* standard that omitted the *sine qua non* of rationality, he made Appellant's burden of proof higher than the *Dusky* standard, because the jury was allowed to find him competent so long as he could "assist counsel" at all, instead of requiring that he be able to do so "in a rational manner" (i.e., "effectively"). (*Cooper*, *supra*, at p. 368 ["The test for competence to stand trial ... is whether the defendant has the present ability to understand the charges against him and communicate effectively with defense counsel."].)

Judge Levitt's instruction that a defendant who can assist or communicate with counsel, but cannot do so effectively or in a rational

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[4] In *Medina* the United States Supreme Court addressed a capital defendant's claim on appeal that California's rule imposing a presumption of competence and requiring the defendant to establish incompetence by a preponderance of evidence violated due process under the federal constitution, and rejected it. (505 U.S. at p. 453.) The Court in *Medina* noted that the allocation of the burden of proof to the defendant would affect competence determinations only in a narrow class of cases where the evidence is in equipoise – "that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent" – and, because of that limited effect, the rule did not offend due process.

manner, is competent allows the state to put to trial a defendant who is "more likely than not incompetent" under the correct, *Dusky* standard, and therefore it is "incompatible with the dictates of due process." (*Cooper, supra*, at p. 369.) This Court should reverse for that error as a structural matter, just as the Court in *Cooper* reversed the judgment without any discussion of the harmlessness of the error in that case. Respondent's Brief says nothing even in an attempt to rebut Appellant's arguments under *Cooper*.

Instead, Respondent turns directly to Appellant's second argument for structural error (RB 83), viz., that the burden of proof in a competence trial is analogous and comparable in importance to the "beyond a reasonable doubt" burden of proof standard in a guilt trial, and therefore the flawed jury instruction caused structural error along the lines of *Sullivan v. Louisiana, supra*, 508 U.S. 275. (AOB 116-120.) To this argument, Respondent counters that structural error applies only in a very limited class of cases, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *Johnson v. United States* (1997) 520 U.S. 461, 468-469; *Gideon v. Wainwright* (1963) 372 U.S. 335 [total deprivation of the right to counsel]; *Tumey v. Ohio* (1927) 273 U.S. 510 [lack of an impartial trial judge]; *Vasquez v. Hillery* (186) 474 U.S. 254 [unlawful exclusion of grand jurors of defendant's race]; *McKaskle v. Wiggins* (1984) 465 U.S. 168 (*McKaskle*) [the right to self-representation at trial]; *Sullivan, supra*, 508 U.S. 275 [erroneous reasonable-doubt instruction to the jury]. (RB 83.)

Respondent then relies on the general rule as stated in *People v. Flood* (1998) 18 Cal.4th 470 (*Flood*). (*Id.* at pp. 502-503 ["an instructional error that improperly describes or omits an element of an offense, or that raises an improper presumption or directs a finding or a partial verdict upon

a particular element, generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution."].) (RB 83.) However, *Flood* applies as precedent when the erroneous instruction affects a "single element" of a crime (in that case, whether the individuals pursuing the defendant were "peace officers"), not when the error involves a misdescription of the burden of proof in a criminal case. The general rule stated in *Flood* does not apply in this case. Indeed, this Court in *Flood* explicitly limited its holding to the facts before it, while acknowledging that some types of instructional error might mandate structural error review. It said: "We have no occasion in this case to decide whether there may be some instances in which a trial court's instruction removing an issue from the jury's consideration will be the equivalent of failing to submit the entire case to the jury – an error that clearly would be a 'structural' rather than a 'trial' error." (*Id.* at p. 503, citing *Rose v. Clark* (1993) 478 U.S. 570, 577-578 (*Rose*).)

Just as the erroneous beyond a reasonable doubt instruction in *Sullivan* "vitiate[d] *all* of the jury's findings," the trial court's instruction to Appellant's competence jury without including the term "in a rational manner" altered the burden of proof and vitiated the jury's sole finding (viz., that Appellant was competent), and violated federal constitutional due process as well as Appellant's state right to trial by jury in a competence proceeding. In *Sullivan*, the instruction unconstitutionally lowered the burden of proof, and therefore *Chapman* did not apply. (*Id.*, 508 U.S. 275.) Since *Cooper* makes clear that the defendant's burden of proof in a competence trial implicates due process (in the same way the prosecutor's burden of proof beyond a reasonable doubt does in a guilt trial), the error

should be considered structural along the same line of analysis. The failure to tell the jury of the fundamental core of the *Dusky* standard – rationality – is unlike the omission of an element of a charged offense in a criminal case (see *Neder*, *supra*, 527 U.S. 1, 8-9); rather, it is like a misdescription of the burden of proof beyond a reasonable doubt in a guilt trial. (*Sullivan, supra*, 508 U.S. 275.)

The case for structural error might have been less clear, absent this Court's recent decisions in *People v. Aranda* (2012) 55 Cal.4th 342 (*Aranda*), and *People v. Lightsey* (2012) 54 Cal.4th 668 (*Lightsey*). Respondent argues that *Aranda* "does not support" Appellant's argument for structural error because that case applied harmless error review under *Chapman*. (RB 84-85.) Respondent's reasoning is correct as far as it goes, but it does not go far enough. This Court in *Aranda* made clear that where a trial court had *omitted* the reasonable doubt instruction, the error was subject to harmless error review, but if the instruction had *misdescribed* the burden of proof, it would have vitiated all of the jury's findings and been structural error under *Sullivan*. (55 Cal.4th 342, 365.) Thus, in this case where the trial court did not *omit* the competence instruction but rather *misdescribed* the burden of proof (by describing the element as whether the defendant had the ability to assist counsel, whether in a rational manner or not), under the rationale in *Aranda* the error is structural rather than one subject to harmless error review. This reasoning is drawn out at greater length in the AOB at 122-125.

Moreover, as also explained in the AOB (125-128), the holding in *Lightsey* provides additional reinforcement for a conclusion of structural error. This Court in *Lightsey* explained that the same structural defect principles at play in a criminal trial ["Without these basic protections, a

criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair"] also warrant a rule of per se reversal for a defendant who had been through a competence trial without counsel. (54 Cal.4th 668, 700-701, citing *Fulminante*, *supra*, 449 U.S. 279, 310.) Thus, *Lightsey* squarely applied the federal constitutional precedents of *Holloway v. Arkansas* (1978) 435 U.S. 475, 489, *Mickens v. Taylor* (2002) 535 U.S. 162, 166, and *Arizona v. Fulminante, supra*, 449 U.S. 279, 310 (case law from criminal guilt trials), in reviewing an appeal from a competence trial, utilizing a structural error analysis and citing *Rose*, *supra*, 478 U.S. 570, 597, and *Neder, supra*, 527 U.S. 1, 8-9. This Court should do the same thing here, applying the federal constitutional precedent of *Sullivan* (which involved a criminal guilt trial) in reviewing Appellant's claim of error from misdescription of the burden of proof in his competence trial, utilizing a structural error analysis and reversing without consideration of prejudice.

Here, as in *Lightsey*, the flawed competence instruction affected the very composition of the record; it was not limited to a "discrete period" nor did it relate to only a single item of evidence. It cut to the core of the proceedings and its effect was wholesale and cannot be compartmentalized, just as the deprivation of counsel in Mr. Lightsey's competence trial had a wholesale effect and required reversal without consideration of prejudice. Also, here, as in *Lightsey*, there was no subsequent competence trial, and subsequent proceedings to determine Appellant's competence to represent himself could not shed light because the defendant was not represented by counsel there either – thus, any finding therefrom "would have been unreliable." (54 Cal.4th 668, 702.)

Respondent argues that Appellant's claim on appeal is forfeited because defense counsel did not object to the version of CALJIC No. 4.10 given to the jury or request that the omitted language be given. (RB 80.) True, defense counsel Khoury did not object to the flawed instruction during the competence trial; however, a failure to object will not bar a court from reviewing instructions that affect a defendant's substantial rights. (§ 1259; *People v. Croy* (1985) 41 Cal.3d 1, 13, fn. 6 [rejecting waiver argument under section 1259, stating "[t]he appellate court may also review any instruction given, refused, or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"], citing *People v. Harris* (1981) 28 Cal.3d 935, 956, *People v. Hannon* (1977) 19 Cal.3d 588, 600, and *People v. Roehler* (1985) 167 Cal.App.3d 353, 394-395.)

It cannot be gainsaid that the right to be competent when tried and sentenced to death, as related to state and federal constitutional guarantees of due process, a fair trial, and a reliable capital verdict, is among the most substantial of rights to which a criminal defendant is entitled. (*Cooper v. Oklahoma, supra*, 517 U.S. 348, 354 ["The deep roots and fundamental character of the defendant's right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel mandate constitutional protection under the Due Process Clause."]; *People v. Lewis* (2006) 39 Cal.4th 970, 1047 [the criminal trial of a mentally incompetent person violates due process]; *People v. Ary* (2004) 118 Cal.App.4th 1016, 1020 [failure of trial court to employ procedures to protect against the trial of an incompetent defendant deprives the defendant of due process right to a fair trial, requiring reversal of the conviction]; *Pate*

v. Robinson, supra, 383 U.S. 375; *People v. Samuel* (1981) 29 Cal.3d 489 (*Samuel*); *Drope v. Missouri* (1975) 420 U.S. 162, 171 (*Drope*).

Another exception to the general rule of forfeiture should be considered as well – this Court has discretion to review legal claims in the absence of an objection at trial, even where an objection usually would be required to preserve the issue for appeal. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) This is a pure question of law presented by undisputed facts, and it presents a constitutional issue related to the enforcement of a penal statute (§ 1367), the error fundamentally affects the validity of the judgment, and important issues of public policy are at stake. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394, abrogated in part on other grounds, *People v. French* (2008) 43 Cal.4th 36, 47, fn. 3; see also *Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [appellate court can review a question of law that arises on undisputed facts]; *Fisher v. City of Berkeley* (1984) 37 Cal.App.3d 644, 654 [review is appropriate if an important question is raised].) The constitutional due process protections at stake in a competence hearing pose such an issue, and this Court should review the errors in the *Dusky* instruction.

Respondent cites *People v. Valdez* (2004) 32 Cal.4th 73, 113 (RB 80), but the case is distinguishable. Therein, this Court made much of the fact that the language omitted from a jury instruction, as to which defense counsel did not object, was not "an element" of the special circumstance charge and was only "clarifying language." (*Id.* at p. 113, citing *People v. Hart* (1999) 20 Cal.4th 546, 622 [regarding forfeiture of complaint about omitted "clarifying language"].) Here, in contrast, the language omitted from the jury instruction defining competence to stand trial was the fundamental requisite of rationality, a cornerstone of the federal

constitutional definition.

Respondent additionally relies on *People v. Lang* (1989) 49 Cal.3d 991, 1024, *People v. Andrews* (1989) 49 Cal.3d 200, 218, and *People v. Guiuan* (1998) 18 Cal.4th 558, 570 (RB 72, 80) for the premise that where an instruction "correctly although generally or incompletely" states the pertinent legal principles, a defendant is precluded from challenging the instruction on appeal unless he requested elaboration or amplification. Respondent reasons that the instruction was "correct" because it told the jury to assess whether Appellant could assist an attorney in conducting his defense. But practically any defendant can "assist" an attorney in conducting his defense, for example, by attending trial in a suit and tie and refraining from hurling invectives at the judge and jury. That is not the "assistance" contemplated by *Pate* and *Dusky* and the instruction was *incorrect* where it omitted any reference to the notion of rationally assisting (i.e., cooperating or communicating effectively with) a lawyer in preparing and presenting a defense. Appellant's substantial and fundamental right to be competent when tried was at stake, and the court had a responsibility to instruct the jury on the heart of the competence standard, whether or not defense counsel requested "elaboration."

Respondent also quotes *Henderson v. Kibbe* (1977) 431 U.S. 145, 154 (RB 73): "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.") However, that decision addressed claims made in a habeas corpus action collaterally attacking the verdict, where the standard of review is one of deference to this Court's rulings. It has no precedential or persuasive value to a direct capital appeal such as this. Furthermore, as argued herein and at greater length in the AOB, this is indeed a *rare* case.

As for Appellant's third argument for structural error, that the trial court by giving the flawed competence instruction butchering the *Dusky* standard failed to provide an adequate procedure (viz., the procedure outlined in sections 1367-1368), the Respondent's Brief says nothing and therefore Appellant sees no need to go beyond his argument in the AOB. (See AOB 120.)

Thus, for the reasons explained at greater length in the AOB, the trial court's jury instruction misdescribing the *Dusky* standard for competence to stand trial amounted to structural error requiring reversal of the competence verdict.

Respondent's arguments against reversal of the competence verdict under *Boyde v. California, supra*, and *People v. Huggins* (2006) 38 Cal.4th 275 (RB 81-82, 86-87) will be taken up in the discussion of whether the competence instructional error was prejudicial, in section III.b.5, *post.*

II. The Trial Court Erroneously Refused to Hear and Resolve Appellant's Motions for *Marsden* Relief, Which Led to a Constructive Denial of Counsel in the Competence Proceeding, Which Was Structural Error

Argument section II at 141-191 of the AOB sets forth the errors in connection with Appellant's representation by counsel that combined to a constructive denial of counsel requiring reversal per se under *United States v. Cronic* (1984) 466 U.S. 648 (*Cronic*) and its progeny without a showing of prejudice. First, the trial court refused to hear Appellant's *Marsden* motions both before and after a doubt was declared regarding his competence to stand trial, which was error. Next, the unheard and unresolved *Marsden* motions had huge significance in the competence proceedings, when the trial court's appointed expert Dr. Mark Kalish based his opinion of Appellant's competence in part on Appellant's problems with

his attorneys and his resulting desire to go pro per. As a result, the unheard and unresolved *Marsden* motions in the unique context of this case had an overall effect of denying Appellant counsel in the section 1368 proceeding, a structural error. (*United States v. Cronic*, *supra*, 466 U.S. 648.)

a. Refusal to Hear the *Marsden* Motions Before and after Declaration of a Doubt Regarding Appellant's Competence under Section 1368, Through Conclusion of the Competence Trial, Was Error

In February of 1987, Appellant, while represented by Geraldine Russell and Charles Khoury as appointed counsel, submitted to the trial court and served on all counsel a motion requesting the trial court to "dismiss Geraldine Russell and any other attorney(s) of record for the defendant" and grant him pro se status, on the ground that numerous longstanding "problems" with his attorney(s) had not resolved and Appellant saw "no other way of acquiring legal research, legwork, advice, cooperation, and investigation necessary for his defense." (73CT 15715.) The trial court filed the motion, which cited neither *Marsden* nor *Faretta*, on March 10, 1987. (*Ibid.*) The trial court set a hearing on March 27, later continued to April 10, on the motion for self-representation and appointed advisory counsel Landon to assist on the motion, ignoring Appellant's implicitly-stated desire for substitute counsel. (10ART 17-18, 10ART 23-24.) On April 6, Appellant filed a request in the form of a letter to Judge Haden and/or Gill, specifically asking for a *Marsden* hearing and complaining about both Landon, as advisory counsel, and Russell, as trial counsel. (67CT 14971-14972.) On April 10, Judge Zumwalt heard the March 10, motion and, upon the urgings of the prosecutor, decided to proceed on the *Faretta* issues while ignoring those under *Marsden* concerning Appellant's relationship with Russell. (12ART 1-27.) Zumwalt

appointed Dr. Kalish to do a psychiatric examination in connection with Appellant's *Faretta* request. (12ART 33; 2CT 389-397.)

Regarding the April 6, 1987, letter to Judge Haden and/or Gill, Zumwalt ruled on April 17, again at the urging of the prosecutor, that it would not be included in the court file at that time because Appellant was represented and lacked standing to file pro se documents. (13ART 17-21.) On April 30, Zumwalt convened a hearing on the self-representation issue, over Appellant's objection that he was not receiving effective assistance of counsel and he had requested a "*Marsden* hearing." (14ART 37.) Zumwalt refused to consider any issue other than the *Faretta* request. (14ART 37-38.) On May 22, Appellant submitted to Zumwalt another document demanding an immediate *Marsden* hearing with respect to his representation by both Russell and Khoury. (20ART 12; 67 CT 14975.) Zumwalt admitted that the document unequivocally demanded a *Marsden* hearing, but she refused to consider the request at that time and filed the document over Russell's objection while admitting that she barely had read it. (20ART 12-14.) Zumwalt also again refused to hear issues raised in Appellant's April 6, 1987, letter to Judge Haden and/or Gill. (20ART 14-18.) Later during the same hearing, after Russell elicited testimony from Dr. Kalish on his views of Appellant's competence under section 1368, Judge Zumwalt declared a doubt and suspended proceedings for a mental competence examination. (20ART 34-36.) This occurred over the prosecutor's objection that declaring a doubt at Russell's behest was wrong, where Appellant claimed he had a conflict of interest with Russell and sought to have her relieved. (20ART 32-34.)

Next, the case was assigned to Judge Levitt for competence proceedings under section 1368. On July 15, 1987, Appellant orally

advised Levitt of his previous requests for a *Marsden* hearing but Levitt said peremptorily that Russell and Khoury would continue to represent Appellant. (24ART 1-5.) When the competence proceeding convened on August 17, Appellant again asserted his constitutional right to effective assistance of counsel and asked to be heard, but Judge Levitt ignored the request for a hearing. (24ART 17-22.) On August 24, Appellant sought a writ in the Court of Appeal, Case No. D006737, claiming that he was receiving ineffective assistance of counsel. The Court of Appeal denied the writ petition as premature on the ground that a pending request on representation directed to the trial court had not been ruled upon. (5CT 860, 875.)

On September 16, 1987, the prosecutor brought the Court of Appeal ruling to the attention of Judge Levitt and suggested that he hold a hearing on Appellant's complaints about his attorneys. (29ART 803-804.) At first, Judge Levitt dismissed the prosecutor's position as incomprehensible, stating that there was "nothing" pending before him "with regard to inability of counsel or anything else." (*Ibid.*) Khoury argued that the court could not hear the motion because criminal proceedings were suspended. (28ART 804.) Appellant asked again to be heard on the subject of ineffective assistance, and Levitt said he recalled that Appellant had made an "oral request" in July, which the judge had denied because he felt "Mr. Khoury was highly competent." (*Id.* at 807-809.) Levitt emphasized the need for Appellant to make any *Marsden* request in "writing," filed a document submitted then in court by Appellant as "Exhibit G," and denied the motion because it stated no basis for finding that Khoury was incompetent, while continuing to ignore Appellant's request to be heard on the matter. (*Id.* at 810-817.) Appellant then filed a petition for mandamus

in the court of appeal, stating that the competence proceeding was nearly over and he still had not received a hearing on his motion for substitution of counsel. (62CT 14035-14036.) The Court of Appeal denied the writ without prejudice to Appellant presenting the arguments on appeal after the competence trial ended. (*Id.* at 14034.)

On September 21, 1987, the jury returned a verdict that Appellant was competent to stand trial. (31ART 1193.) Shortly thereafter, defense counsel informed the trial court that Appellant was seeking the appointment of new counsel and a *Marsden* hearing. On September 24, the prosecutor reminded the trial court that Appellant's pro per motion was pending when the criminal proceedings were suspended for the competence determination, and that Appellant also had requested a *Marsden* hearing; Appellant verbally reiterated his request for a *Marsden* hearing. (32ART 4.) On September 30 before Judge Haden, Appellant again requested a *Marsden* hearing while also saying that his second request would be for pro per status. (34ART 3-8.) Haden assigned the case back to Judge Levitt, and at a hearing before Levitt the same day, Appellant again requested a *Marsden* hearing and "appointment of effective assistance of counsel." (33ART 9.) Appellant again requested a *Marsden* hearing on February 11, 1988. (36ART 1.) Judge Zumwalt appointed Benjamin Sanchez as advisory counsel for purposes of both the *Marsden* and *Faretta* motions. (39ART 30-32.)

Judge Zumwalt finally convened a *Marsden* hearing on March 2, 1988, outside the presence of the prosecutor and with Appellant, Russell, Khoury, and Sanchez present. (42ART 207.) During the hearing, Appellant told Judge Zumwalt that he "withdrew" his *Marsden* motion, largely to prevent Russell from "revealing privileged information regarding

defense strategy" to the court, while explaining that he still wanted counsel relieved. (42ART 212-214.) Judge Zumwalt denied the *Faretta* motion. (42ART 1574-1575.) Judge Zumwalt also denied Appellant's motion to dismiss his attorneys, finding that "Attorneys Russell and Khoury have properly represented Waldon and will continue to do so; the breakdown in the attorney-client relationship will not make it impossible for Waldon to be properly represented by these able and experienced counsel ...." (8CT 1575.) Several days later, Russell moved to be relieved as counsel (8CT 1583-1587) and Judge Zumwalt heard and denied that motion on March 30, finding that there was no conflict of interest that would prevent Russell from representing Appellant effectively or warrant relieving her. (48ART 531.)

Both Appellant and the prosecutor filed petitions for writ of mandate challenging Zumwalt's denial of the *Marsden* and *Faretta* motions. Russell filed a petition for writ of mandate seeking independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) on the *Marsden* and *Faretta* rulings, and challenging the denial of her motion to be relieved as counsel. (10CT 1921.) The Court of Appeal issued an alternative writ and consolidated the proceedings, and later after hearing ruled that any error regarding denial of the *Marsden* and *Faretta* motions could be raised on appeal and *Wende* review was inappropriate. (10CT 1923.) The Court of Appeal granted the writ on Russell's motion to withdraw, on the ground that there had been a complete breakdown of communications between Appellant and Russell for "the vast majority of the time" since February of 1987. (10CT 1925.)

The Court of Appeal noted that a defendant's willful refusal to cooperate with his attorney does not constitute grounds for removal of

counsel (10CT 1925, citing *People v. Floyd* (1970) 1 Cal.3d 694, 704-705), yet stated that in the context of this case, the complete breakdown in communications, which stemmed in part "from disagreement between Appellant and Russell over Appellant's refusal to have his mental state and psychiatric history used in his defense," did deprive Appellant of the effective assistance of counsel. (10CT 1925-1926.) It directed the trial court to remove Russell and appoint substitute counsel. On remand, the trial court appointed Allen Bloom solely to represent Appellant in continuing to seek self-representation status (66ART 9-15), and eventually in November 1989, the trial court granted Appellant *Faretta* status and he represented himself for the remainder of the criminal pretrial and trial proceedings. (84ART 64.)

Judge Zumwalt erred in the spring of 1987 by insisting that the *Faretta* motion must come first and refusing to hear Appellant's *Marsden* motion until after self-representation issues were resolved. That the *Marsden* request should have been heard first follows from the principal that the right to counsel is paramount over the right to self-representation. As explained in the AOB at 158-159, this is so because the right to counsel "secures the protection of many other constitutional rights as well." (*People v. Marshall* (1997) 15 Cal.4th 1, 23 (*Marshall*), citing *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 889 and other cases.) The United States Supreme Court has concluded that trial courts must "indulge every reasonable inference against waiver of the right to counsel," but it "has not extended the same kind of protection to the right of self-representation." (*Marshall*, 15 Cal.4th at pp. 20-21.) The trial court's duty to inquire into the reasons the defendant believes his or her attorney is incompetent arises when the defendant provides "at least some clear indication" that he or she

wishes to substitute counsel. (*People v. Martinez* (2009) 47 Cal.4th 399, 417.) Appellant did that here. The trial court erred under *Marsden* by failing to give Appellant the opportunity to explain the reasons for his dissatisfaction with appointed counsel. (*People v. Vera* (2004) 122 Cal.App.4th 970, 980.)

More importantly, though, Judge Levitt erred by refusing to hear Appellant's request for substitution after a doubt was declared, and then denying the motion based on procedural niceties and subjective impressions without giving Appellant an opportunity to explain his complaints. A motion for substitute counsel for a criminal defendant must be heard and addressed at any stage of the proceedings – indeed, the court must hear a *Marsden* motion even if made *after* it has declared a doubt regarding the defendant's competence to stand trial and before section 1368 proceedings are completed. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 87 (*Stankewitz II*)[5]; *People v. Taylor* (2010) 48 Cal.4th 574, 600-601 (*Taylor*) [trial court erred when it brushed aside request for substitution of counsel in the belief that the question of defendant's competence to stand trial first had to be resolved, citing *Stankewitz II*]; *People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1069 (*Solorzano*); *People v. Govea* (2009) 175 Cal.App.4th 57, 59 (*Govea*).)

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[5] In *Stankewitz II*, this Court explained that its holding, that a *Marsden* motion must be heard even after a trial court has declared a doubt as to whether the defendant is competent to stand trial, was implicit in its prior treatment of the case and its published decision in *People v. Stankewitz* (1982) 32 Cal.3d 80 (*Stankewitz I*). (*Stankewitz II*, *supra*, 51 Cal.3d 72, 88.)

As this Court stated in *Marsden*:

> [A] judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney. A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention "is lacking in all the attributes of a judicial determination."

(*Marsden, supra*, 2 Cal.3d 118, 124, quoting *Spector v. Superior Court* (1961) 55 Cal.2d 839, 843.)

Judge Levitt refused to grant a *Marsden* hearing at which Appellant could have explained his problems with counsel, instead resting on technicalities: first, that the motion was not written; second, that the written motion showed no basis for substitution; and third, that the judge's own in-court observations proved counsel's representation to be adequate. The trial court abused its discretion because, by any definition, it simply refused to hear Appellant's *Marsden* motion. As this Court explained in *Marsden*:

> [A] trial court cannot thoughtfully exercise its discretion in this matter without listening to [the defendant's] reasons for requesting a change of attorneys. A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom. Indeed, "[w]hen inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record: whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise

choice of trial tactics and strategy."

(*Marsden, supra*, 2 Cal.3d 118, 124, quoting *Brubaker v. Dickson* (9th Cir. 1962) 310 F.2d 30, 32.)

While Judge Levitt did not affirm, explicitly, Khoury's erroneous contention that the court lacked jurisdiction to hear the *Marsden* complaint (see *Stankewitz II, supra*, 51 Cal.3d 72, 87, and *Taylor, supra*, 48 Cal.4th 574, 600-601), his out-of-hand disregard for the substitution request based on procedural technicalities and subjective impressions suggests that he believed that Khoury was correct. After Appellant complained again and again that counsel was not representing him, or at least not effectively, Levitt refused any meaningful hearing and continued to insist: "There is nothing before me pending with regard to inability of counsel or anything else. I'm not going to do a thing unless it's appropriately presented to me." (29ART 804.) When Appellant asked the judge how to make his request more "appropriate," Levitt switched tracks and focused on whether the July request had been written or oral, stating that it was "only" oral and that he had denied it based on his opinion that Khoury was "highly competent." (29ART 808-809.) The trial court rested on procedural niceties, while sending the message that it was legally precluded from advising the defendant of procedural requirements.

A *Marsden* motion is not required to be in writing. (See, e.g., *Taylor, supra*, 48 Cal.4th 574, 596, 600 [trial court erred in brushing aside the defendant's oral complaints about counsel and his claim to have "fired" her, rather than hearing the *Marsden* issue].) Judge Levitt could have helped Appellant correct any procedural defects in his request for substitution. There is "no statute or authority which precludes a judge from

advising a defendant as to the procedures for effectively challenging the competence of his attorney ... " (*Marsden*, *supra*, 2 Cal.3d 118, 125.) This Court continued:

> To the contrary ... this court [has] commended judges who consider it part of the judicial function to aid and advise defendants appearing before them without counsel. Although a trial judge may not be required to aid a defendant who represents himself, it is a common practice in both civil and criminal cases for trial judges, by advice and suggestion, to assist persons who represent themselves .... It is in the highest tradition of American jurisprudence for the trial judge to assist a person who represents himself as to the presentation of evidence, the rules of substantive law, and legal procedure, and judges who undertake to assist, in order to assure that there is no miscarriage of justice due to litigants' shortcomings in representing themselves, are to be highly commended.

(*Id.* at pp. 125-126, quotations omitted.)

Here, as in *Marsden*, "although defendant was represented by counsel, he was groping for the proper manner in which to demonstrate the alleged lack of competence of his attorney, and the trial judge would have been well within the bounds of judicial propriety in giving any helpful suggestion which might have aided defendant in the presentation of his complaint." Also, here, as in *Marsden*, "the judge was not being called upon to offer advice, but only to listen to defendant's reasons for requesting different counsel." (*Ibid.*)

In response to the AOB, Respondent does not contest that Appellant made repeated motions and requests for hearings under *Marsden* between February and September of 1987, and that Judge Levitt eventually denied Appellant's claims that he was receiving ineffective assistance of counsel on September 17, 1987, without a hearing. (RB 89-92.)

Instead, Respondent contends that the "delay" in hearing Appellant's *Marsden* motions was harmless, because after section 1368 proceedings ended with a verdict of competence, Appellant had an opportunity to be heard as to his "alleged conflict with counsel," and although the trial court denied *Marsden* relief, Russell eventually was allowed to withdraw as counsel and Appellant "received everything he sought" because he was allowed to represent himself in the criminal trial. (RB 88-89.)

Respondent argues that Appellant "fails to show that he was prejudiced by the delay in hearing his [*Marsden*] motion" and the delay was "harmless beyond a reasonable doubt." (RB at 88, 96.) Respondent is incorrect, because whether Appellant sought or received *Marsden* relief after the competence trial ended is irrelevant to the fact that he had a right to a *Marsden* hearing and the consideration of *Marsden* relief with respect to his representation by counsel *during the competency proceedings*.

Respondent seems to argue that the *Marsden* motion lacked merit, quoting at length from Judge Zumwalt's written findings that there was no breakdown in the attorney-client relationship warranting *Marsden* relief. (RB 93-94, quoting from 8CT 1572-1575.) Respondent argues "as the trial court found below, any perceived conflict was attributable solely to Waldon's refusal to cooperate with counsel." (RB 101.) However, Judge Zumwalt's findings that there was no breakdown in the attorney-client relationship or irreconcilable conflict warranting *Marsden* relief were *reversed* by the Court of Appeal as an abuse of discretion, when the reviewing court granted the writ challenging denial of Russell's motion to withdraw, and determined that there was a breakdown of communication of such magnitude that it jeopardized Appellant's right to the effective assistance of counsel. (10CT 1925.)

Respondent contends that no irreconcilable conflict between a defendant and his attorney exists if "the defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness." (RB 102, citing *People v. Crandell* (1988) 46 Cal.3d 833, 860, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365; *People v. Smith* (1993) 6 Cal.4th 684, 696; and *People v. Michaels* (2002) 28 Cal.4th 486, 523.) None of these three cases involve a situation like the one that occurred here, where the trial court declared a doubt as to Appellant's competence based in large part on his irrational distrust of his attorneys and his refusal to work out disagreements and cooperate with them. Moreover, the Court of Appeal took into account the rule that a defendant's willful refusal to cooperate with his attorney does not constitute grounds for removal of counsel (10CT 1925, citing *People v. Floyd, supra*, 1 Cal.3d 694, 704-705), and yet concluded that this case did not fit the precedent and here the breakdown of communication, stemming in part from Appellant's refusal to permit his mental state and psychiatric history to be used to defend him, did deprive him of the effective assistance of counsel. (19CT 1926).

The Court of Appeal assigned great weight to Appellant's apparent belief that Russell broke a promise not to use certain psychiatric records in pursuing his case, and to Russell's vigorous opposition, based on assertions of legal incompetence, to Appellant's efforts to represent himself. (*Ibid.*) That Russell had, at the time the Court of Appeal ruled, a concurrently pending petition challenging the trial court's competence determination was itself evidence of the disqualifying conflict between Russell and Appellant. (*Ibid.*) This appellate order and ruling is law of the case that the *Marsden*

motion could not be resolved through application of precedent concerning the defendant's "refusal to cooperate."

Respondent's brief admits that Judge Levitt "should have addressed Waldon's *Marsden* motion even though the criminal proceedings were suspended," under the holdings of this Court in *Stankewitz II, supra*, 51 Cal.3d 80, and *Taylor, supra*, 48 Cal.4th 574, and the decisions of the Courts of Appeal in *Solarzano, supra*, 126 Cal.App.4th 1063, and *Govea, supra*, 175 Cal.App.4th 57. Respondent contends, however, that Appellant received "everything he wanted," because after the competence trial he was granted *Faretta* status in November of 1989, and was allowed to represent himself during criminal pretrial proceedings and trial. (RB 98.) The brief implicitly concedes that there was constitutional error, and yet argues that reversal is not required because the record shows beyond a reasonable doubt that the defendant was not prejudiced by the trial court's failure to hold a *Marsden* hearing. (RB 97.) Respondent argues both that Appellant forfeited the error by withdrawing the motion before Judge Zumwalt in March of 1988, and that the error was harmless where Appellant later received *Faretta* status. (RB 98.) That Appellant made another *Marsden* request and later withdrew it, both *after* the competence trial ended cannot logically be treated as forfeiture of his right to seek substitute counsel *during* the competence trial and receive a hearing on that request. (AOB 178.) As for harmlessness as argued by Respondent at RB 98-99, citing *Solorzano*, *Govea*, and *Taylor*, Appellant will discuss that below in section A.III.

b. The Unheard and Unresolved *Marsden* Motions Were a Central Issue in the Competence Trial and the Prosecution Expert Witness Deputy District Attorney Ebert Testified Inaccurately on the Respective Roles of a Defendant and Counsel

As argued in the AOB at 168-178, the error in Judge Levitt's refusing to hold a *Marsden* hearing and leaving Appellant's desire for substitute counsel in place of Russell and Khoury unheard and effectively unresolved laid the groundwork for a constructive denial of counsel to Appellant under *Cronic* in the competency proceeding. Appellant's desire for different attorneys to represent him and the unheard *Marsden* motions were turning facts in the competence trial. (AOB 172-177.) Dr. Kalish, the central defense medical witness on incompetence, testified that Appellant's desire to represent himself was a factor in Kalish's opinion Appellant was incompetent to stand trial, and that Appellant wanted different lawyers and no other lawyers had been tried. (27ART 362, 555-565.) Evidence of the unheard *Marsden* request was introduced by stipulation and the prosecutor's argument reminded the jury that Appellant wanted different lawyers and no other lawyers had been tried. (31ART 1120-1124, 1129.) The only statement of law received by the competence jury regarding *Marsden*, *Faretta*, and *Frierson* came through prosecution expert Deputy District Attorney Ebert, and he gave an incomplete and misleading account of the governing legal principles. (AOB 179-186, discussing Ebert's testimony at 30ART 1030-1036, and further discussion, *post*.)

The AOB explains at pages 179-189 and 249-253 how Ebert's account of the law was incomplete and inaccurate. Respondent argues that Ebert's testimony was merely "tangential." (RB 105-106.) However, consideration of the evidence and argument in the competence trial as a

whole proves the significance played by Ebert's testimony, given that Judge Levitt failed to provide the jury with a complete and accurate statement of the law concerning representation, self-representation, and control of the case. (See further discussion in section III.b.6 addressing harmless error, *post.*)

Respondent contends that Ebert's testimony "was not erroneous or misleading" and consisted of "concise summaries of the holdings in *Marsden*, *Faretta*, and *Frierson*. (RB 108-109.) Respondent fails to analyze or discuss the governing precedent, and the endorsement of Ebert's statement of the law is ungrounded.

Regarding *Marsden*, as further discussed below, Ebert testified that it stands for a defendant's right to request substitution if dissatisfied with the performance of counsel appointed to represent him. (30ART 1032.) But Ebert neglected to tell the jury that the test for granting *Marsden* relief is not whether the defendant is dissatisfied, but whether appointed counsel, as determined by the trial court, is failing to provide the effective assistance required under the Sixth Amendment, that is, by meeting the threshold of what a reasonable attorney would do, to the defendant's prejudice. (*Strickland v. Washington* (1984) 46 U.S. 668 (*Strickland*).) Judge Levitt never held a *Marsden* hearing or determined whether Appellant was receiving effective assistance, and as a result the jury knew nothing about either the *Strickland* standard or whether Appellant's *Marsden* motion was justified under it – key matters related to the consideration of whether Appellant's frustration with counsel was reasonable or rational.

Regarding *Frierson*, Ebert testified that it stood for a wide-ranging rule that a defendant, even where represented by counsel, gets to control the decisions "made in the presentation" of his criminal case. (See further

discussion in section III.b.1, *post.*) In reality, the general rule was established as precedent in *People v. Robles* (1970) 2 Cal.3d 205, 214 (*Robles*) (which the Court of Appeal relied upon in its September 12, 1988 order, 10CT 1926 ["Ordinarily an attorney for a criminal defendant has the power to control the court proceedings subject to his not exercising that power to deprive the defendant of certain fundamental rights."].) An attorney representing a criminal defendant has power to control most aspects of the court proceedings, including the decisions of whether to call witnesses and/or present evidence and how to fashion a defense, but that power does not circumscribe a defendant's personal fundamental rights to testify on his own behalf, enter or withdraw a plea, trial by jury, and receive a speedy trial. (*People v. Brown* (1986) 179 Cal.App.3d 207, 215 [right to withdraw guilty plea]; *People v. Holmes* (1960) 54 Cal.2d 442 [right to trial by jury]; *People v. Gauze* (1975) 15 Cal.3d 709, 717-718 [right to enter plea of not guilty by reason of insanity]; *Robles, supra*, 2 Cal.3d at p. 215 [right to testify]; *Townsend v. Superior Court* (1975) 15 Cal.3d 774, 781 [constitutional right to a speedy trial].)

Thus, Ebert's testimony misstated the rule. Ebert did not say that a criminal defendant retained the right to exercise certain "fundamental rights" over the opposition of his attorney; rather, he said that the defendant "has the right to control fundamental decisions made in the presentation" of his case. (30ART 1031-1032.) On cross-examination, Ebert said that the "fundamental decisions" left in the control of the defendant included "whether or not the defendant ... would prefer to present a defense of some kind of mental deficiencies," because "[t]hose kinds of major decisions, as I understand the law, are left to the defendant." (30ART 1033.) With this testimony, Ebert wrongly stated the law, which dictates that it is counsel,

not the defendant, who controls the choice of the trial defense, including whether to present or abstain from presenting a mental defense. Thus, as stated by the Court of Appeal in this case, "[i]t is evident that, without more, an attorney's disagreement with a client on the use of a psychiatric defense does not create the type of conflict necessary to require a trial court to relieve the attorney." (10CT 1927.)

This Court's holding in *People v. Frierson, supra*, 39 Cal.3d 803 stands for an exception to the rule, that when a diminished capacity defense is the defendant's sole defense to guilt in a capital case and there is evidence to support it, counsel cannot decide over his client's objection to abstain from presenting that defense in the belief that doing so will strengthen the defendant's case in the sentencing phase after conviction. The exception is narrow. (See *People v. Burton* (1989) 48 Cal.3d 843, 856; *People v. Milner* (1988) 45 Cal.2d 227, 246.)

Moreover, once a trial court has declared a doubt as to the defendant's competence to stand trial, the rationale in *Frierson* and the *Robles* "fundamental rights" exceptions become inapplicable altogether. (*Shepherd v. Superior Court* (1986) 180 Cal.App.3d 23, 31 [*Frierson* does not apply when a doubt has been declared as to the defendant's competence to stand trial]; see also *People v. Masterson* (1994) 8 Cal.4th 965, 974 ["the person whose competence is in question cannot be entrusted to make basic decisions regarding the conduct of a competency proceeding"]; *People v. Hill* (1992) 67 Cal.2d 105, 115 fn. 4; *People v. Samuel, supra*, 29 Cal.3d 489, 495 ["[I]f counsel represents a defendant as to whose competence the judge has declared a doubt sufficient to require a section 1368 hearing, he should not be compelled to entrust key decisions about fundamental matters to his client's apparently defective judgment"]; *People v. Mickle* (1991) 54

Cal.3d 140, 183; *People v. Bolden* (1979) 99 Cal.App.3d 375, 379.) DDA Ebert said nothing about how the declaration of a doubt regarding the defendant's competence affected his rights under *Frierson*.

Similarly, DDA Ebert advised the jury that *Faretta* gives a criminal defendant the right to represent himself, even in a capital case. But he neglected to tell the jury that *Faretta* rights are of a lower priority than a criminal defendant's right to counsel (*People v. Marshall, supra*, 15 Cal.4th 1, 23), waiver of *Faretta* rights requires a valid waiver of counsel (*People v. Zatko* (1978) 80 Cal.App.3d 534), and *Faretta* rights are suspended altogether upon the trial court's declaration of a doubt about the defendant's competence to stand trial. (§ 1368; see *People v. Lightsey, supra*, 54 Cal.4th 668, 692.)

Respondent's brief (RB 105-106) suggests that DDA Ebert's testimony by its terms was limited to the standards applicable to criminal proceedings only. Respondent says that during Judge Levitt's discussion with counsel after the defense asked for an offer of proof when Ebert was called to testify, "[t]he prosecutor indicated that he would limit Deputy District Attorney Ebert's testimony to standards applicable to criminal proceedings and not competency proceedings" and "[t]he court indicated that he would admit the testimony for that purpose." (30ART 1026-1027.) Judge Levitt said "[h]e is really not telling them a mentally ill defendant can run his case ... [h]e's just telling what the law is. And if this witness tells the jury something that's not the law, that's something again." Khoury warned Judge Levitt that Ebert's testimony was "going to tend to greatly confuse this jury. And I feel it's prejudicial confusion." (30ART 1027.) But Levitt promised: "I don't think they will be confused. I'll make sure they are not confused." (30ART 1028.) Khoury told the judge that if Ebert

testified on *Frierson* then Khoury would need to bring in the case of *People v. Bolden* (1979) 99 Cal.App.3d 375, "which talks about that in a 1368 proceeding where the defendant is prima facie incompetent, the control goes to the attorney, and that's what *People v. Bolden* says." (30ART 1027-1028.)

What the jury heard, however, was not limited in the manner outlined by the prosecutor during the discussion on the offer of proof. Although the law casts a bright line between the *Faretta* and *Frierson* rights of a typical defendant and those of a defendant after a doubt has been declared regarding competence to stand trial, Ebert's testimony, the only statement of the law on the issue that the jury heard, failed to explain that.

Ebert testified that a defendant is "allowed to represent himself in a criminal case" under *Faretta*, irrespective of the seriousness of the charges; that *Frierson* "stands for the proposition that a defendant himself or herself has the right to control the fundamental decisions made in the presentation of that individual's" criminal case in chief; and that a *Marsden* hearing would allow a defendant to argue to the judge that his counsel is ineffective and he is seeking a different lawyer. (30ART 1031-1032.) The prosecutor asked Ebert whether Appellant had "from time to time" made requests "of whatever court he may have been appearing in or whoever he was addressing for a *Marsden* hearing," and Ebert responded "[t]hat is correct." (30ART 1032.)

On cross-examination, Khoury asked Ebert to expand on what "fundamental" decisions were left in the control of the defendant under *Frierson*. Ebert said that the right to testify was left within the prerogative of the defendant alone, and "[a]nother area would be in the area of mental defenses, as to whether or not the defendant himself would prefer to present

a defense of some kind of mental deficiencies." (30ART 1033.) Ebert inaccurately testified that *Frierson* was a case involving the mental competence of the defendant.[6] (30ART 1034.) Khoury asked whether a defendant, under the law, would be "allowed to make ... fundamental decision [s]" "in a situation where a defendant is prima facie incompetent," but the prosecutor objected to the question as irrelevant and as calling for conclusion and speculation, and the court sustained the objections. (*Ibid.*)

Thus, Ebert did testify about the law under *Frierson*, *Faretta*, and *Marsden* for a defendant in a criminal proceeding, but he did not explain that a *Marsden* motion would not be granted unless the court determined counsel was providing ineffective assistance to the defendant, nor that a defendant's rights under *Faretta* and *Frierson* were suspended with the declaration of a doubt of the defendant's competence to stand trial. Respondent's Brief asserts that "[t]o the extent that further explanation or amplification was required," Khoury had the opportunity to elicit the testimony from DDA Ebert (RB 109), but the record belies this assertion. The prosecutor objected to Khoury's efforts to cross-examine Ebert on relevance grounds, and Judge Levitt sustained the objections. (30ART 1033-1036.)

Appellant's arguments of instructional error related to Ebert's account of the law will be discussed below in section III.b.1. For the present discussion, the focus is on how Ebert's incomplete and inaccurate

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[6] As noted *ante*, *Frierson* in reality is case involving whether the defendant had a "diminished capacity" when committing the charged crimes, and has nothing to do with questions concerning the defendant's competence to stand trial. The competence of the defendant to stand trial was not at issue in the case.

testimony played a role in the constructive denial of counsel to Appellant under *Cronic*.

c. The Unheard and Unresolved *Marsden* Motions Led to a Constructive Denial of Counsel under *Cronic*

Appellant contends that the unheard and unresolved *Marsden* motions led to a constructive denial of counsel in the competence trial under *Cronic*, which Respondent denies. Respondent's Brief contends that Appellant was not constructively denied counsel in his competence trial under *Cronic*. Without specific reference to the facts of this case, Respondent argues at RB 100-102 that the test for constructive denial of counsel under *United States v. Cronic, supra*, 466 U.S. 648 is a narrow one under this Court's holding in *People v. Dunkle, supra*, 36 Cal.4th at p. 885, which should be applied only where "the attorney's failure is complete." *Dunkle* states that where "defense counsel was present and actively participating in" the trial, any purported ineffective assistance does "not reach the magnitude" of those circumstances "in which courts have concluded *Cronic* required reversal without a showing of prejudice." (RT 100, 109, quoting *Dunkle, supra*, at p. 931.)

The discussion in *Dunkle* on which Respondent relies is at 931-932 of that decision. Using *Bell v. Cone* (2002) 535 U.S. 685 as a bellwether, this Court in *Dunkle* held that when the issue is that an attorney, although present, failed to "test the prosecutor's case," the *Cronic* rule of automatic reversal applies only when the attorney's failure is "*complete.*" (36 Cal.4th 861, 931, emphasis in original.) However, that line of authority pertains only to appellate arguments focusing on what an appointed attorney did or did not do. (*Dunkle* at p. 931 [contrasting the case before it, where defense counsel, who appeared at a motion to modify the verdict and noted that he

had reviewed the prosecutor's proposed ruling and had nothing to add, was present at and actively participating in the penalty trial as a whole, with *People v. McKenzie* (1983) 34 Cal.3d 616, where defense counsel expressly refused to participate in the trial beyond appearing in the courtroom, and remained mute throughout the proceedings].) Here, Appellant does not claim *Cronic* error based on what Khoury *did or did not* do, but rather on what the trial court's rulings *made it impossible for him to do or not do.* The discussion at pages 931-932 of this Court's decision in *Dunkle* simply is not apposite.

Appellant's claim rests on the line of cases under *Cronic* where "circumstances [exist] that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." (466 U.S. 648, 658 & fn. 24, citing *Flanagan v. United States* (1984) 465 U.S. 259, 267-268; *Estelle v. Williams* (1976) 425 U.S. 501, 504 (*Williams*); *Murphy v. Florida* (1975) 421 U.S. 794; *Bruton v. United States* (1968) 391 U.S. 123, 136-137; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 351-352; *Jackson v. Denno* (1964) 378 U.S. 368, 389-391; *Payne v. Arkansas* (1958) 356 U.S. 560, 567-568; *In re Murchison* (1955) 349 U.S. 133, 136; *Wright v. Van Patten* (2008) 552 U.S. 120, 124 [complete denial of counsel is but one circumstance warranting the presumption of prejudice].)

Once such circumstance is where counsel was prevented from assisting the accused, at a critical stage of the proceeding. The Sixth Amendment requires not only the appointment of counsel for the accused, but also actual "assistance" of counsel "for [the accused's] defense." (*Cronic*, *supra,* 466 U.S. 648, 654, quoting *United States v. Ash* (1973) 413 U.S. 300, 309; *Avery v. Alabama* (1940) 308 U.S. 444, 446 [mere formal appointment does not satisfy the constitutional guarantee of assistance of

counsel].) Here, Khoury sought to assist Appellant by establishing his incompetence to stand trial, and to prove that Appellant's dissatisfaction with counsel was groundless and irrational. To prove that, counsel would have had to disclose attorney-client communications to the jury, or by showing that the *Marsden* motions had been heard and denied based on a determination that counsel was providing effective assistance. The first option is barred by the rules of professional conduct, and the second option was barred by the trial court's failure to hear and resolve the motions.

It would have been obvious to any reasonable judge familiar with the case that, by the time the competence trial took place in August of 1987, the die was irrevocably cast and Appellant was not going to acquiesce in being heard through Russell or her perceived agent, Khoury. The right to be heard that is at the core of due process under the federal constitution is of "little avail" unless it "comprehend[s] the right to be heard *by counsel.*" (*Cronic, supra,* 466 U.S. 648, 654, fn. 8, emphasis added, quoting *Powell v. Alabama* (1932) 287 U.S. 45, 68-69.) "'If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.'" (*Ibid.*, quoting *Powell, supra*, 287 U.S. 45, 68-69.) Even in Appellant's own mind, the unresolved *Marsden* issue precluded the competence issue from being developed and determined. For example, when the prosecutor called Appellant to the stand over Khoury's objection and asked Appellant whether he believed he was competent to stand trial, he replied that he could not answer the question until he had the effective assistance of counsel. (29ART 831.) By arbitrarily refusing to hear Appellant's reasons for his *Marsden* motions and consider whether

new counsel was required, Judge Levitt created a situation in which it was impossible for Appellant to be heard during the competence trial "by counsel, employed by and appearing for him." (*Cronic, supra*, 446 U.S. at p. 654, fn. 8.)

Moreover, while Khoury was able to put on some evidence of Appellant's incompetence during the section 1368 trial, the jury never had to consider that evidence, due to the short cut the prosecutor invited it to take – by simply concluding that the requirement of inability to assist *any* counsel was ipso facto not met because no other representation besides Russell/Khoury had been tried. It was a Catch-22: the jury could not find that Appellant was too mentally impaired to work with any counsel, because of the unsolved mysteries of whether Appellant had a reasonable basis for refusing to work with Russell and Khoury, viz., whether they were providing him with assistance that was truly effective under Sixth Amendment standards.

Respondent cites no cases involving a claim like Appellant's, where the trial court refused to hear the *Marsden* motion and then the unheard motions became the central issue in the competence trial. The unheard and unresolved *Marsden* motions created a situation that amounted to a constructive denial of counsel under *Cronic*.

As explained in the AOB at 178, the error was not that Judge Levitt failed to grant the *Marsden* motion, but rather that he never heard it and kept it effectively unresolved.[7] If Levitt had heard the motion, as a matter

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[7] While Levitt technically denied the *Marsden* motion on September 17, 1987, he did so without having heard Appellant's concerns and without reaching the merits of whether counsel was providing ineffective assistance, to Appellant's prejudice. When the prosecutor introduced evidence at the

of course he would have either decided to substitute counsel if Appellant's complaints were valid, or determined that Appellant's complaints were invalid because counsel was providing effective representation as required by the Sixth Amendment. Either way, Appellant's dissatisfaction with counsel, never assessed for its validity, could not have become the central issue in the competence trial. By refusing to hear, consider and address Appellant's concerns, the trial court squarely blocked the assistance that Khoury could have provided in section 1368 proceeding and handed the prosecution the key to its case for competence.

Respondent's Brief argues that the trial court did not abuse its discretion in admitting Ebert's testimony under Evidence Code section 801, because it related to "subjects that may have been outside of the average juror's common experience," which would have "assisted the trier of fact in understanding the other testimony presented." (RB at 108.) The AOB claims no error under section 801, however, and so this discussion in the RB is irrelevant.

Respondent argues that Appellant's claim is forfeited because Khoury made no objection, as required under Evidence Code section 353, regarding the erroneous admission of evidence from DDA Ebert as an expert witness. (RB 107.) This misstates the record; Khoury did object that the evidence was irrelevant and misstated the law, but the trial court overruled that objection. (30ART 1026.) More importantly, however, Appellant's claim is not that the judgment should be "reversed by reason of

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competence trial that a *Marsden* motion remained pending, neither defense counsel nor the court contradicted that and essentially it was true, given the frequency of Appellant's invocation of *Marsden*, and the single, completely perfunctory, judicial denial.

the erroneous admission of evidence." (Evid. Code, § 353.) Rather, Appellant contends in the AOB Argument, section II, that the trial court's erroneous failure to hear and resolve *Marsden* requests had burgeoning consequences in the context of his competence trial. The effect resulted in the constructive denial of counsel in the 1368 proceeding. Respondent's Brief fails to rebut this argument in any meaningful way.

III. Errors in Appellant's Competence Trial Require Reversal under the Harmless Error Standard of Review

If this Court rejects the AOB's contentions of structural error under *Sullivan v. Louisiana* (erroneous instruction), *Pate* (constitutionally inadequate proceedings to resolve doubt re competence), *Cooper* (burden of proof in competence proceeding), and *Cronic* (constructive denial of counsel), it must turn to the question of whether the errors in Appellant's competence trial were prejudicial. On that issue, this Court will see as discussed below that (1) the trial court's failure to hear and resolve the *Marsden* motion was prejudicial under *Marsden*, *Solorzano*, *Taylor,* and other cases; (2) jury instruction errors were not harmless, whether considered under the *Chapman* or the *Watson* standard; (3) Judge Levitt's admonition to Appellant in front of the jury that he was "competent" was prejudicial per se; and (4) other errors in the trial had a cumulative prejudicial effect on the competence verdict.

a. The Trial Court's Failure to Hear and Resolve the *Marsden* Motions Was Prejudicial under *Marsden*, *Solorzano*, *Taylor,* and Other Cases

Respondent's Brief appears to concede that the trial court erred by failing to hear Appellant's *Marsden* motions for new counsel and that the standard for harmless error review is under *Chapman*. (RB 97 [The "trial court should have addressed Waldon's *Marsden* motion even though the

criminal proceedings were suspended ... [h]owever, '*Marsden* does not establish a rule of per se reversible error'" and reversal is not required unless prejudice is shown beyond a reasonable doubt.].) In countering Appellant's *Marsden* related claims, Respondent's primary arguments are that the error made no difference because Appellant later, in spring of 1988, "withdrew" the motion for substitute counsel (while still seeking that Russell be removed) and Appellant "ultimately received everything he wanted" because he was granted *Faretta* status. (RB 97-98.)

Respondent cites *People v. Lloyd* (1992) 4 Cal.App.4th 724, *People v. Govea, supra,* 175 Cal.App.4th 57, *People v. Taylor, supra,* 48 Cal.4th 574, and *People v. Solarzano, supra,* 126 Cal.App.4th 1063. (RB 98-99.) *People v. Lloyd* is readily distinguishable from this case. Therein, the defendant made a *Marsden* motion before trial and the court refused to hear it, and the defendant then made another motion regarding his attorney on the second day of trial, which the court heard and resolved. (4 Cal.App. at pp. 730-731.) The reviewing court found that the failure to consider the initial *Marsden* motion was error, but the error became harmless when the defendant failed to reassert the reasons underlying the motion at the later hearing. (*Id.* at p. 732.) *Lloyd* is not like this case because therein the defendant's subsequent motion found by the reviewing court to have waived the error in refusing to hear the *Marsden* motion was made *during* the trial proceedings, not after they concluded. In this case, Respondent seeks to assert a waiver based on Appellant's subsequent *Marsden* motions *after* the competence proceeding ended. *Lloyd* provides no precedent for finding waiver here.

People v. Govea involved a *Marsden* motion made after a doubt was declared and before a competence trial was held. (175 Cal.App.4th 57, 59.) The trial court in *Govea* refused to hold a *Marsden* hearing pending a determination of the defendant's competence. The defendant later filed another written request to proceed with his *Marsden* motion, which the trial court heard and denied; a month later the trial court determined that the defendant was competent to stand trial. (*Id.* at p. 61.) On appeal, the court held that the trial court's initial refusal to hear the *Marsden* motion was error, but the error was harmless under *Chapman* because the *Marsden* request did receive a full hearing before the competence proceedings concluded. (*Id.* at p. 62.) This case is unlike *Govea* because the trial court here never heard Appellant's *Marsden* motion until months after the competence trial had ended.

People v. Taylor is not on point either. In *Taylor*, the trial court repeatedly rebuffed the defendant's *Marsden* motions, both before and after a doubt was declared about his competence to stand trial, but it eventually granted a full *Marsden* hearing during which both the defendant and his counsel spoke freely about the reasons for the defendant's dissatisfaction with counsel. (*Taylor*, *supra*, 48 Cal.4th 574, 597-598.) The trial court heard and denied the *Marsden* motion more than six weeks before the competence trial began. (*Id.* at p. 598.) Thus, this Court reasoned in *Taylor* that there was no reversible error, notwithstanding that the trial court later, after the competence hearing, did grant *Marsden* relief and remove the objected-to lawyer, since the trial court had allowed the defendant to communicate his complaints about counsel "*before* the competency proceedings occurred," and the developed record showed there was no abuse of discretion in "refusing substitution of counsel at that point." (*Id.* at

p. 601.) Here, in contrast, there was not a full *Marsden* hearing where Appellant and his attorneys spoke freely about Appellant's dissatisfaction with counsel, before the competence trial took place.

The facts in this case closely resemble those in *People v. Solorzano, supra*, 126 Cal.App.4th 1063. In *Solarzano*, the defendant's complaints about his counsel involved counsel's deficiencies in handling a competence hearing, and the trial court refused to hold any *Marsden* hearings while competence proceedings were pending. (*Id.* at p. 1067.) The defendant was found competent and thereafter made another *Marsden* motion, which the trial court heard and denied on the merits, and the defendant later was convicted on all counts in a guilt trial. (*Id.* at p. 1068.) On those facts, the court of appeal concluded that it could not find beyond a reasonable doubt that the error had not effected the competence hearing's outcome, which led to the possibility that the defendant was tried while incompetent in violation of due process. (*Id.* at 1071.) Thus, the reviewing court reversed the guilt verdict with a remand for a new trial. (*Id.* at pp. 1071-1072.)

Respondent's Brief argues that Appellant's case is like *Govea* and *Taylor* rather than *Solorzano*, but this is nonsense. In the former cases the defendant's *Marsden* motion was heard and resolved before competency proceedings concluded, and there was no prejudice; in the latter case, the *Marsden* motion was not heard until after the defendant was found competent, which was reversible error under *Chapman*. This case is on all fours with *Solorzano*. As stated in *Solorzano*:

> On the issue of prejudice, *Marsden* is our guide. "On this record we cannot ascertain that [Solorzano] had a meritorious claim, but that is not the test. Because [he] might have catalogued acts and events beyond the observations of the trial judge to establish the incompetence of his counsel, the trial judge's denial of the motion

> without giving [him] an opportunity to do so denied him a fair trial. We cannot conclude beyond a reasonable doubt that this denial of the effective assistance of counsel did not contribute to [the finding he was competent to stand trial]. [Citing *Chapman.*]"

(*Solorzano*, 126 Cal.App.4th 1063, 1071, quoting *Marsden*, *supra*, at p. 126.)

Taylor, *Govea*, and *Lloyd* all involve *Marsden* motions initially unheard but later resolved in time for the defendant's concern about his present representation to be addressed. *Solorzano* shows the analysis pertaining to a case, such as this, where the *Marsden* motion was not heard until after the proceeding in which representation was challenged was over. (*Solorzano*, 126 Cal.App.4th 1063, 1070 ["[W]e decline ... to equate one court's denial of a moot motion after a hearing during reinstated criminal proceedings with another court's denial of a ripe motion without a hearing during competency proceedings."].)

Respondent makes no argument of harmlessness based on the strength of the evidence of incompetence during the section 1368 proceedings. In *Solorzano* the Attorney General did so argue, but the Court of Appeal declined to address it since the prosecution failed to "expand on the issue with ... citation to relevant authority." (*Solorzano, supra*, 126 Cal.App.4th at p. 1071, fn. 4.) In *Solorzano*, the two psychological evaluations received by the trial court both opined that he was competent to stand trial (*id.* at 1066), yet *Chapman* error still was found. (*Id.* at 1071.) Here, the sole psychological evaluation received by the trial court based on a recent mental examination was prepared by Dr. Kalish, who opined that Appellant was incompetent to stand trial. It cannot be said beyond a reasonable doubt that the denial of the effective assistance of counsel did

not contribute to the finding that Appellant was competent to stand trial.

Moreover, the preceding discussion of how the unheard and unresolved motion took on a life of its own as evidence in the competency trial (see section II.b, *infra*) in itself belies that the trial court's errors were harmless under *Chapman*. Dr. Kalish's opinion rested in part on Appellant's desire to represent himself because of his dissatisfaction with counsel; DDA Ebert misstated the relevant law concerning representation, self-representation, and control of the defense and the jury heard nothing to correct that; and the prosecutor argued to the jury that the defense had established merely Appellant's unwillingness to work with his present attorneys, not an inability to work with any attorney (since none besides Russell and Khoury had been tried). On the present record this Court must find reversible error.

b. Instructional Errors in the Competence Trial Were Not Harmless

The AOB sets forth numerous errors in the competence trial, many of them involving the trial court's instructions to the competence jury. In addressing instructional errors on review, this Court has made clear that the charge to the jury is to be considered as a whole. (*Estelle v. McGuire* (1991) 502 U.S. 62 (*McGuire*).) Therefore, Appellant in his Reply in sections III.b.1-4 will clock through the instructional errors besides the flawed *Dusky* instruction made in his competency trial. In section III.b.5, Appellant will establish that the *Dusky* instruction, BAJI No. 2.02, and CALJIC No. 2.21 errors, which affected the burden of proof, are not harmless under the *Chapman* "whole record review" standard stated in *Aranda*. In section III.b.6, Appellant will establish that the error in failing to give the *Marsden*, *Faretta*, and *Frierson* instructions is not harmless

under the regular *Chapman* "whole record review" standard. In section III.b.7, Appellant will establish that the failure to give any version of CALJIC No. 4.01 is either reversible per se or not harmless under the "whole record review" *Chapman* analysis.

1. The Trial Court Erred in Failing to Instruct on *Marsden*, *Faretta*, and *Frierson*

As explained above in section II.b, evidence in the competence trial brought into relevance the law concerning a criminal defendant's representation, desire for self-representation, and control over the defense under the precedents of *Marsden*, *Faretta*, and *Frierson*. The prosecution's expert witness DDA Ebert testified on the subject, but his account of the law was incomplete and inaccurate, especially as pertaining to the rules after a trial court has declared a doubt concerning the defendant's competence to stand trial.

Appellant's first argument concerning Ebert's testimony (AOB 186-189, 249-250) explains that permitting an expert who is an attorney to testify what the law is usurps the proper role of the judge. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155 [there are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law].) Respondent concedes as much at RB 108, citing *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1017, and *Amtower v. Phonton Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1598-1599. The RB asserts forfeiture under Evidence Code section 353 for failure to object to the admission of Ebert's testimony, and argues that the trial court did not abuse its discretion under Evidence Code section 801 by admitting the testimony. (RB 107-108.) Appellant previously has addressed these arguments.

In fact Khoury did object that Ebert's testimony was irrelevant, misstated the law, and would confuse the jury, but the trial court admitted it over defense objection. (30ART 1026-1028.) As for section 801, Appellant's point is not that the trial court abused its discretion by allowing the jury to hear the evidence. Rather, Appellant emphasizes that Ebert's testimony was an incomplete and inaccurate legal statement concerning a defendant's representation, self-representation, and control of the defense, which amplified the impact of the unheard *Marsden* motions resulting in the constructive denial of counsel under *United States v. Cronic, supra*, 466 U.S. 648.

Appellant's second argument concerning Ebert's testimony, which Respondent fails to address at all, is that the trial court breached its duty to instruct on the general principles of law governing the case. (AOB 252.) Jury instructions provide jurors with the law applicable to the claims and defenses presented in a particular case, and the jury is then bound to accept and apply this "law" to the facts (as it determines from the evidence) in arriving at a verdict. (See Code Civ. Proc., § 608; *Redo y Cia v. First Nat'l Bank* (1926) 200 Cal. 161, 166; *Duff v. Schaefer Ambulance Service, Inc.* (1955) 132 Cal.App.2d 655, 678, 679.)

Judge Levitt's instructions to the competence jury did nothing to correct the inaccuracies and fill in the critical gaps in Ebert's description of the law under the three cases, or help the jury understand the relative roles of a defendant and his attorney once the trial court declares doubt concerning the defendant's competence to stand trial.

A defendant's right to accurate and adequate jury instructions is guaranteed by due process and the right to a fair trial under the federal constitution. (See *Bollenbach v. United States* (1946) 326 U.S. 607, 612.)

The Sixth Amendment embodies "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." (*Washington v. Texas* (1967) 388 U.S. 14, 19.)

The trial court's instructional duties vindicate the foregoing federal constitutional principles:

> It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citations.]

(*People v. St. Martin* (1970) 1 Cal.3d 524, 531; *People v. Breverman* (1998) 19 Cal.4th 142, 155; *People v. Rogers* (2006) 39 Cal.4th 826, 866, citing *People v. Blair* (2005) 36 Cal.4th 686, 744.)

This Court has "consistently stressed the broader interests served by the sua sponte instructional rule ... [I]nsofar as the duty to instruct applies regardless of the parties' requests or objections, it prevents the strategy, ignorance, or mistakes of either party from presenting the jury with an unwarranted all-or-nothing choice, encourages a verdict ... no harsher or more lenient than the evidence merits." (*People v. Breverman, supra*, 19 Cal.4th 142, 155, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 324, internal quotations omitted.) Thus, the rule "protects the jury's truth-ascertainment function" and promotes policies that "reflect concern [not only] for the rights of persons accused of crimes [but also] for the overall administration of justice." (*Ibid.*, quoting *Wickersham, supra*, 32 Cal.3d at p. 324, internal quotations omitted.)

Here, accurate instructions on *Faretta*, *Marsden*, and *Frierson* were "closely and openly connected" to the facts before the competence court and were "necessary for the jury's understanding of the case." Dr. Kalish, the trial court's appointed psychiatric expert who had given Appellant a recent mental examination, testified that Appellant's desire to represent himself under *Faretta* was a factor in the doctor's opinion regarding his competence to stand trial. (27ART 406.) The prosecutor elicited testimony from DDA Ebert that the right of a defendant to represent himself is absolute, that Appellant had sought substitution of counsel under *Marsden* but his request went unheard, and that the law gives a represented criminal defendant the right to control "fundamental decisions" in the case and override his attorney's choice of the defense. Attacking the validity of Dr. Kalish's opinion that Appellant's desire to control the case was a symptom of paranoia, the prosecutor argued to the jury: "Dr. Kalish assumed that Mr. Waldon's desire to control the case was a symptom of paranoia despite the fact that it was brought out by Deputy District Attorney Ebert's testimony a defendant retains the constitutional right to make fundamental decisions in this case even where he is represented by an attorney." (31ART 1124; 31ART 1125 [stating courts had said that a defendant's right to self-representation was "absolute"].) The prosecutor further argued that the defense had not met its burden to show incompetence to stand trial because the evidence showed only that Appellant did not want to assist his present attorneys, not that he would be unable to assist any attorney appointed to represent him. (31ART 1144-1145, 1150.)

Under the circumstances, Judge Levitt's failure to fulfill his sua sponte duty to instruct the jury on the legal principles applicable to the facts of the case was error; whether the error was harmless is discussed in section

III.b.6, *post*.

2. The Trial Court Erred in Giving BAJI No. 2.02

As argued in the AOB at 230-240, the trial court instructed the competence jury with BAJI No. 2.02 over defense objection, and doing so was error.

The prosecutor called Appellant as a witness in the competence trial, after a defense petition for writ of mandate to prevent that from happening was denied by the Court of Appeal. (54ACT 11482; 5CT 877.) After taking the stand as ordered to do by the trial court (7CT 1410), Appellant refused to be sworn and told the court's clerk that he could answer questions only if he first received "the effective assistance of counsel." (29ART 830.) Judge Levitt told Appellant that he must affirm or swear, but Appellant said "my answer stands." (*Ibid.*) The prosecutor began questioning Appellant, but he did not respond, and Judge Levitt said "Mr. Waldon, you are a competent witness ..." and then said "Mr. Waldon apparently chooses not to testify." (29ART 830-831.)

BAJI No. 2.02, as read to the jury, stated: "If weaker and less satisfactory evidence is offered by a party when it was within that party's power to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (31ART 1094; 5CT 922.) The prosecutor argued to the jury that BAJI No. 2.02 favored a finding against Appellant, because he had kept his own experts in the dark by refusing to talk to them and had "refused to talk to" the jury when called to the stand. (31ART 1101-1102.) He argued:

> Mr. Waldon [ ] had it within his power to talk to the psychiatrists, had it within his power to talk to you, refused to do so. So he's the one that bears the onus, that bears the burden of proving his in competence [*sic*] and to enable the

> psychiatrists to present stronger evidence concerning that issue.

(*Id.* at 1103.)

A trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground in *People v. Breverman, supra*, 19 Cal.4th 142, 177), and has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." (*People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10, overruled on another ground in *People v. Flood, supra*, 18 Cal.4th 470, 485-487.) "It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference. [Citation]." (*People v. Hannon* (1977) 19 Cal.3d 588, 597.)

As argued in the AOB at 231, BAJI No. 2.02 should not be given in the absence of a showing that the "party" that offered weaker evidence in fact was in possession of, or had access to, the claimed "higher" evidence that it was withholding. (*People v. Marshall* (1996) 13 Cal.4th 799, 836, fn. 5, citing *People v. Taylor* (1977) 67 Cal.App.3d 403, 412; *People v. Von Villas* (1992) 10 Cal.App. 4th 201, 245, citing *People v. Saddler* (1979) 24 Cal.3d 671, 681 [instruction should not be given when it is impossible for the party to produce the evidence].) Appellant's silence on the stand did not amount to a "party" offering evidence – he was called by the prosecutor, not the defense, and once on the stand he refused to be sworn or to answer questions.

The prosecutor argued that the instruction also pertained to appellant's non-responsiveness to questions during psychiatric examinations (31ART 1103), suggesting that it was within the power of Appellant, as a "party," to provide stronger and more satisfactory evidence via the testimony of Doctors Kalish and Norum by cooperating in their attempted mental examinations. A criminal defendant whose competence has been declared in doubt by the court, but who has never personally asserted that he is incompetent is *unlike* a defendant who gives self-serving testimony at trial about the facts of the charged crime yet remains silent about other facts within his knowledge. (Compare *People v. Richardson* (1978) 83 Cal.App.3d 853, 864, overruled on another ground in *People v. Saddler, supra,* 24 Cal.3d 671, 682; *Williamson v. Superior Court* (1978) 21 Cal.3d 829, 835-836.) Moreover, Khoury's evidence in the competence trial was that it was Appellant's incompetence itself that led him to battle his attorneys and refuse to cooperate in mental examinations, and thus it was impossible for the "party" to produce the evidence the prosecution claimed it withheld. (*People v. Saddler, supra*, 24 Cal.3d 671, 681 [instruction should not be given when it is impossible for the party to produce the evidence].)

As urged in the AOB at 235, "BAJI No. 2.02 is not appropriately given where the defendant as to whom a doubt has been declared is not cooperating with his counsel during a competency trial." By giving an instruction on which the prosecution argued that the jury should distrust the defense's case because Appellant refused to testify and cooperate in mental examinations, "the court was in effect instructing the jury to conclude that [A]ppellant had not proved his case because [A]ppellant was simply voluntarily not cooperating." (*Ibid.*) The instruction raised the defense

burden of proof for establishing incompetence, by directing the jury to assume Appellant's actions were driven by reason – which was the very issue the jury was convened to decide.

In opposing this argument, Respondent first contends that the standard for jury instruction error used in civil proceedings applies, and the judgment "may not be reversed on the basis of instructional error unless the error caused a miscarriage of justice." (RB 118, citing *Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1388.) Although a competence proceeding is civil in nature, precedent suggests that jury instruction errors in a competence proceeding are assessed under *Estelle v. McGuire, supra,* 502 U.S. 62, which states the test governing the assessment of jury instruction error in criminal trials. (See *People v. Dunkle*, *supra*, 36 Cal.4th 861, 899 [addressing claims of jury instruction error in a competence proceeding related to CALJIC Nos. 2.80, 1.00, 1.02, and 1.03 under a federal due process standard by asking whether there is a reasonable likelihood the jury would have understood the instruction in the manner defendant contends, citing *McGuire*]; *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274, fn. 5.)

Respondent argues that the instruction was warranted in this case because "Waldon's failure to cooperate with the court-ordered examination limited the experts in their assessment of his competence ... [and] Waldon could have presented evidence of his own competence or incompetence through his own testimony, but he declined to do so." (RB 118-119.) Respondent asserts that "[n]either the trial court nor the prosecution erred in pointing out to the jury the appropriate inferences to be drawn from Waldon's refusal to cooperate with the psychological evaluations." (RB 119.)

Respondent cites *Baqleh v. Superior Court* (2002) 100 Cal.App. 478, 506, for its finding that "where defendant refused to submit to mental examination in connection with competency hearing, court would be authorized, on motion of prosecution, to impose issue and evidence sanctions, including a disclosure to jury of defendant's refusal to comply with order." (RB 119.) Respondent is correct in contending that *Baqleh* is relevant here, but a close look at the case shows that it favors Appellant's position, not Respondent's.

In *Baqleh*, defense counsel informed the court when the defendant was brought in for arraignment that counsel had a doubt as to whether the defendant was competent to be arraigned. (*Baqleh, supra*, 100 Cal.App.4th at p. 482.) The court suspended proceedings and ordered that the defendant be evaluated by a Dr. French, a clinical psychologist. (*Id.* at p. 483.) French conducted clinical interviews with the defendant and administered psychological tests, and also reviewed documents from three defense mental health experts who opined that the defendant suffered mental retardation and developmental disabilities. (*Ibid.*) French wrote a report disagreeing with the three defense experts and opining that the defendant was not retarded, and that he had an adequate "capacity for cooperating with counsel in a rational manner." (*Ibid.*) After French submitted his report, the prosecution moved for an order compelling the defendant to submit to a psychiatric examination by a designated expert of its choosing, and for the interviews by that psychiatrist to be videotaped. (*Id.* at pp. 484-485.) The trial court issued the order requested by the prosecution, and ruled that if the defendant refused to submit to examination by the prosecution's expert, it could be used against him "at any further proceedings." (*Id.* at p. 485.)

Defendant *Baqleh* petitioned for writ of mandate/prohibition, which the Court of Appeal summarily denied while noting that the trial court would be bound by the judicially declared "rule of immunity set forth in *People v. Arcega* (1982) 32 Cal.3d 504 and *People v. Weaver* (2001) 26 Cal.4th 876." (*Baqleh, supra*, 100 Cal.App.4th at pp. 485, 497-498 [stating the holdings of *Arcega* and *Weaver* that because a criminal defendant cannot invoke the protections of the Fifth Amendment in connection with competence proceedings, federal constitutional principles mandate a prohibition against admitting his statements to a court-appointed psychiatrist or psychologist during competence proceedings, in the guilt phase of the trial].) The defendant/petitioner sought review by this Court, and it granted review and transferred the case back with directions to vacate the order denying mandate and issue an alternative writ. (*Id.* at p. 485.)

On remand, the Court of Appeal in *Baqleh* discussed the *Weaver* and *Arcega* judicially-declared immunity at length, and concluded that the trial court had authority to order the defendant/petitioner to submit to a competence examination by the prosecution's expert, but the trial court's order should be vacated because it was issued under the Penal Code rather than the Civil Discovery Act, which applies to discovery motions related to a competence hearing. The appellate court held that on remand, however, it would be permissible for the prosecutor to seek issuance of a similar order under Code of Civil Procedure (CCP) section 2032(b), and if the defendant refused to submit to an examination ordered thereunder, the prosecutor could seek imposition of issue and evidence sections specified in subdivision (f) of CCP 2032.

The present case does not involve the introduction of evidence from a section 1368 mental examination at the guilt or penalty phase, nor does it

involve an invocation of the Fifth Amendment as a ground for refusing to participate in a court-ordered mental examination. Appellant never invoked the Fifth Amendment; he simply failed to respond to questions posed to him by professionals conducting mental examinations. The doctors who conducted the mental examinations (Kalish, Norum, and Vargas) testified at the competence trial about Appellant's silence when questioned during the examination, with no objection from the defense. Similarly, Appellant took the witness stand when called by the prosecution in compliance with Judge Levitt's order, and he remained silent when questioned but he did not invoke Fifth Amendment protections.

The question here presented is whether it was error for Judge Levitt to instruct the jury with BAJI No. 2.02, thus imposing an evidentiary sanction for Appellant's silence when questioned by the doctors and on the stand. Respondent cites no authority for the trial court giving BAJI No. 2.02 in this situation. To the extent that CCP 2032 would authorize a court to order issue, evidentiary, or terminating sanctions against a defendant who refused to take part in a section 1368 mental exam, the civil discovery mechanism was never invoked by the prosecutor in this case, nor were findings made or remedies under the statute ordered by Judge Levitt. Furthermore, this is not a case, like *Baqleh*, where the defendant was responsible for placing his own competence in issue; Judge Zumwalt declared a doubt and Appellant was at odds with his attorney's decision to introduce evidence of incompetence. The Court of Appeal in *Baqleh* noted the factor of whom had placed competence in issue as being relevant. (*Baqleh, supra*, 100 Cal.App.4th at p. 499.)

In essence, by giving the requested instruction Judge Levitt imposed an evidentiary sanction or adverse presumption for Appellant's silence on

the stand and during the mental examinations. This was error because BAJI No. 2.02 cannot be used in that manner, unless perhaps under the authority and processes outlined in CCP 2032. This case is not the first time that Judge Levitt exceeded his authority in imposing evidentiary sanctions in a competence proceeding; he did the same thing during competence proceedings in the court of the prosecution of Richard Vincent Mayes in 1985 and 1986, leading to reversal of the judgment of conviction based on a due process violation in the competence proceeding. (*People v. Mayes* (1988) 202 Cal.App.3d 908, 919 & fn. 7 (*Mayes*).)

In *Mayes*, Judge Levitt barred a defendant from presenting evidence on his competence to stand trial because of the defendant's failure to cooperate with the state's expert during a court-ordered mental examination by Dr. Hansen. Hansen's testimony gave a clear inference that the defendant was competent and merely uncooperative. The appellate court noted that the course of proceedings showed there was substantial evidence casting doubt on the defendant's present mental competence (causing the trial court to declare a doubt, suspend trial, and order a competence trial, "in spite of Hansen's testimony that [the defendant] was simply uncooperative." (*Mayes, supra*, 202 Cal.App.3d at p. 915.) The court of appeal determined that Judge Levitt had erred and his mistake was not harmless beyond a reasonable doubt, and thus it reversed the conviction, reasoning:

> The courts must strike a rational balance between the defendant's right to present evidence and the public interest in complete and truthful disclosure of critical facts. With these principles in mind, we believe a court's authority to impose evidentiary sanctions in the context of a mental competency hearing is limited to the need to protect the ability of the party with the burden of proof to put on its case. (See, *Pope v.*

> *United States* (1967) 372 F.2d 710.) We distinguish *Taylor v. Illinois* [(1988) ... 484 U.S. 400 ...] and *United States v. Nobles* (1974) 422 U.S. 225, two cases employing evidentiary sanctions for the accused's failure to comply with discovery rules, because both involve testimony of third party witnesses and neither concerns the question presented here of the defendant's right not to discuss certain matters with the state.

(*Mayes, supra*, at p. 918.)

The Court of Appeal in *Mayes* stated that this state's courts "must be governed by our constitutional system and not by our frustration with those self-centered defendants who are intent on using the system for their own purposes [footnote omitted]." (*Mayes, supra*, at p. 918.) To counter the risk that the fact-finding process could be skewed by a manipulative defendant's presentation of mental health experts as "hired guns," the court urged "trust in the ethical commitment of mental health professionals and the ability of the factfinder, whether judge or jury, to properly assess the credibility of these witnesses in determining the defendant's competency to stand trial." (*Ibid.*) It further noted that where a trial court holds the view that a defendant's lack of cooperation with a mental examination suggests the pretense of incompetence, its remedy is to conclude that the defendant is competent and terminate the competency proceedings without going on to the second stage, a competency trial.

The court in *Mayes* reasoned:

> It is both illogical and unfair to condition Mayes' presentation of expert testimony in the second stage, the competency trial, on his lack of cooperation with the court-appointed psychologist in the first stage where the court itself concluded there had been a prima facie showing of mental incompetence. Furthermore, the failure to cooperate with court-appointed psychiatrists or psychologists at any stage of the proceeding may be a symptom of the mental incompetence

> at issue rather than merely an artful stratagem by the competent defendant to establish incompetence.

(*Mayes*, 202 Cal.App.3d at p. 919.)

This case is very much like *Mayes*. It was both illogical and unfair for Judge Levitt to "condition" the jury's consideration of defense evidence of Appellant's competence on Appellant's lack of cooperation during mental examinations and when called as a prosecution witness. Appellant personally never contended that he was incompetent – it was the court that declared the doubt, and then defense counsel, over Appellant's objection, presented the case for incompetence at trial. In the competence trial Dr. Kalish, Dr. Norum, and Dr. Ebert opined that Appellant's failure to cooperate with court-appointed psychiatrists and psychologists was a symptom of his mental incompetence, rather that "merely an artful stratagem by the competent defendant to establish incompetence."

The premise behind BAJI No. 2.02 is that a decision to present weaker evidence instead of stronger is the product of a tactical decision made by trained counsel based on the evidence, thus warranting the inference that the weaker evidence offered deserves distrust. However, Appellant's refusal to answer questions on the stand or during mental examinations in this case *was not a tactical decision by trained counsel*, but rather the decision of a mentally compromised defendant intent on being found competent and having a Cointelpro defense presented at trial.

In *Lightsey*, this Court addressed how a defendant's individual conduct, contrary to the guidance of counsel, during competence proceedings often works against the objective of ensuring a fair trial and protecting the right to present a defense. Thus, a reliable competence determination does not center on the views and desires of the defendant, as

to whom a doubt of competence has been declared, but on the efforts of an "advocate expressly tasked with promoting the defendant's right to a fair trial." (*Lightsey*, *supra*, 54 Cal.4th at p. 697.) That fundamental premise is at the root of the guarantee that key decisions in competence proceedings are entrusted to counsel, and not to the "client's apparently defective judgment." (*People v. Samuel, supra*, 29 Cal.3d 489, 495.) "The decision of a possibly incompetent defendant not to contest the issue of his or her own competence is ... inherently suspect, especially when, as in the instant case, the evidence before the court is in conflict regarding the defendant's mental competence." (*Lightsey*, *supra*, at p. 697.) Moreover, "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.*) "[W]hen evidence indicates that the defendant may be insane it should be *assumed* that he is unable to act in his own best interests." (*Ibid.*, emphasis added, quoting *People v. Hill, supra*, 67 Cal.2d 105, 115, fn. 4.) Giving BAJI No. 2.02 in the circumstances of this case rests on the opposite assumption, that Appellant's silence during mental examinations and on the stand stemmed from pretense and manipulation, and that the case presented by his counsel, the "advocate expressly tasked with promoting" his right to a fair trial, should be penalized therefor.

As many courts, including this one, have recognized on many occasions, that a defendant whose competence is in question takes umbrage at the declaration of doubt and tries to thwart an inquiry to establish his incompetence is a *symptom* of incompetence to stand trial, not of the counterpoint. This situation is one to which the reasoning of BAJI No. 2.02 simply cannot be applied. As the United States Supreme Court stated in *Medina*:

> The rule announced in *Pate* was driven by our concern that it is impossible to say whether a defendant whose competence is in doubt has made a knowing and intelligent waiver of his right to a competency hearing. Once a competency hearing is held, however, the defendant is entitled to the assistance of counsel, [citations], and psychiatric evidence is brought to bear on the question of the defendant's mental condition [citations]. Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant's ability to participate in his defense. [Citations.]

(*Medina, supra,* 505 U.S. at p. 450.)

The due process principles of protecting the fair trial rights of defendants whose competence is in question are grossly compromised by the giving of BAJI No. 2.02 in a competence trial. A competence jury clearly should not be instructed to assume a willful suppression of evidence based on a conflict between a defendant as to whom a doubt of competence has been declared and his attorney concerning the defendant's mental state. Giving BAJI No. 2.02 to Appellant's competence jury was error.

3. The Trial Court Erred in Giving CALJIC No. 2.21

Appellant's Opening Brief, pages 259-262, argues that the trial court further erred by instructing the competence jury with CALJIC No. 2.21, that a witness "willfully false in one material part of his testimony is to be distrusted in others." (31ART 1092). The instruction was given over defense objection. (29ART 913)

CALJIC No. 2.21 is not a correct statement of the law unless there is an evidentiary basis for it. (See *People v. Allison* (1989) 48 Cal.3d 879, 895 [no error to give CALJIC No. 2.21 when there is an evidentiary basis to

support it].) The instruction properly is given when there is a contradiction in the testimony, such that a finding that one witnesses's testimony necessarily creates the probability that a witness for the other side was "willfully false," for example when one witness testifies that the defendant is lame and disabled from running, while a prosecuting witness testifies that the defendant ran toward her and then away from her. (See *People v. Lescallet* (1981) 123 Cal.App.3d 487, 492.)

In opposing the defense motion for a new trial based on the trial court giving this instruction, the prosecution argued that CALJIC No. 2.21 properly was given because expert witnesses had given conflicting evidence, so that the competence trial was a "battle of the experts," so that either the prosecution's experts or defense experts must have been lying. (7CT 1378.) There is no basis to infer that an expert witness's opinion is "willfully false," simply because an opposing expert gives opinion testimony conflicting with it. A jury's responsibilities in assessing expert opinion testimony involve consideration of the expert's knowledge, skill, experience, training, education, and "the facts and information on which the expert relied in reaching that opinion." (CALCRIM No. 332.) An appropriate instruction for Judge Levitt to give might have stated: "If the expert witnesses disagreed with one another, you should weigh each opinion against the other's. You should examine the reasons given for each opinion and the facts or other matters on which each witness relied. You may also compare the expert's qualifications." (*Ibid.*)

This is especially so given the context, in which it was the *court* that declared a doubt as to Appellant's competence, based on Dr. Kalish's testimony regarding Appellant's competence to represent himself. This showed that Judge Zumwalt, at least, found Kalish to be credible and that

his opinion was corroborated by Appellant's statements, filings, and behavior that Zumwalt observed the spring of 1987. Kalish and Vargas were both court-appointed experts on mental issues, and were vetted as being ethical professionals worthy of trust by the court. This too dispels the factual predicate that the opinion of one of these "battling" experts was "willfully false" warranting Judge Levitt's decision to give CALJIC No. 2.21.

Respondent argues (RB 125) that CALJIC No. 2.21 is a correct statement of the law, citing *People v. Beardslee* (1991) 53 Cal.3d 68, 94, but the issue is not whether the statement was *correct* but rather whether it was *relevant*. A trial court has a duty to "'refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.'" (*People v. Saddler, supra*, 24 Cal.3d 671, 681, quoting *People v. Satchel, supra*, 6 Cal.3d 28, 33 fn. 10; *People v. Mobley* (1999) 72 Cal.App.4th 761, 781 [citing *Saddler*].)

4. The Trial Court Erred in Refusing to Give the Defense's Requested Version of CALJIC No. 4.01

The AOB at 253-259 argues that the trial court erred by refusing to let the jury learn of the consequences of a verdict of legal incompetence. An instruction adapting CALJIC No. 4.01, "Effect of Verdict of Not Guilty by Reason of Insanity," is appropriate in a competence trial, when requested, for the same reasons it is appropriate in a sanity phase trial (to eliminate the danger that the jury's consideration of mistaken, erroneous factors may have resulted in an erroneous verdict).

Khoury asked Judge Levitt to give an adaptation of CALJIC No. 4.01, an instruction approved by this Court as "intended to aid the defense

by telling the jury not to find the defendant sane out of a concern that otherwise he would be improperly released from custody." (*People v. Kelly* (1992) 1 Cal.4th 495, 538, citing with approval *People v. Moore* (1985) 166 Cal.App.3d 540, 548-557, and *People v. Dennis* (1985) 169 Cal.App.3d 1135, 1140-1141.)

Respondent argues (RB 120-124) and Appellant concedes that this Court has rejected a claim that it is error for a trial court to refuse such instruction. (*People v. Dunkle*, *supra*, 36 Cal.4th 861, 896; *People v. Turner* (2004) 34 Cal.4th 406, 433; *People v. Marks* (2003) 31 Cal.4th 197, 221.) Nevertheless Appellant urges this Court to revisit the issue and find that refusal of the requested instruction was error. This Court in *Dunkle* addressed a claim the trial court erred by refusing to give an instruction explaining the consequences of a verdict of incompetence to stand trial, patterned after CALJIC No. 4.01, which informs the jury of the consequences of a verdict of not guilty by reason of insanity. In *People v. Moore* (1985) 166 Cal.App.3d 540, 555, the Court of Appeal held a defendant in sanity proceedings is entitled upon request to an instruction that a finding of not guilty by reason of insanity does not entitle the defendant to immediate release as would an ordinary acquittal. This Court in *Dunkle* "declined to apply *Moore* outside its original context," because an instruction patterned after *Moore* and CALJIC No. 4.01 would be "necessarily speculative" because "the outcome of any future efforts at restoring a defendant to competency is uncertain at the time when the jury must make its decision on competency." (*Dunkle*, *supra*, at p. 897.)

The rationale in *Dunkle* draws a distinction where none exists, because the outcome of future efforts to restore a defendant's competence is no more speculative than the likelihood that a court someday might find that

a defendant judged to be not guilty by reason of insanity has had his sanity restored and safely can be returned to society. Indeed, CALJIC No. 4.01 presumes that future mental health developments for the defendant are speculative, and directs the jury not to indulge in speculation on the issue. (CALJIC No. 401 ["Do not speculate as to if, or when, the defendant will be found sane."].)

When Appellant petitioned for mandate after Judge Levitt refused to give the requested instruction, the Court of Appeal denied the writ stating that the instruction as written was incomplete. (5CT 877-881.) Justice Butler disagreed with his colleagues on that issue, saying:

> As to the proposed instruction informing the jury its incompetency finding will not result in Waldon's release and return to the streets – I would also grant the writ. This 1368 proceeding does not concern guilt or innocence of the charged crimes. The jury should know the nature of its inquiries and the consequence of its holdings.

(5CT 880-881.)

Respondent argues that it is "unreasonable" to assume that jurors would vote for competence because they believed Appellant otherwise would be released from confinement. (RB 120.) To the contrary, there is nothing unreasonable in assuming that a lay jury might fear that Appellant, whom they knew was charged with murder and other dangerous crimes and facing a capital trial, might pose a future threat to society if it reached a verdict that he was incompetent to face trial. If the instruction was flawed as drafted, that is no excuse for refusing it because Judge Levitt could have corrected the flaws and given the instruction as warranted by the circumstances. So to was the proffered instruction in *Moore* flawed, yet the reviewing court outlined a recommended instruction for guidance, stated

that its holding would have prospective effect only, and reversed with an order that the sanity phase be retried. (*People v. Moore*, *supra*, at p. 543.) Prejudice from Levitt's refusal to give an instruction patterned after CALJIC No. 4.01 is discussed in section III.b.7, *post*.

5. The *Dusky*, BAJI No. 2.02, and CALJIC No. 2.21 Errors Affect the Burden of Proof, must Be Evaluated under the *Chapman* "Whole Record" Review Standard as Stated in *Aranda*, and Are Not Harmless

Argument sections IV and V of the AOB, especially 246-249, established that some of the trial court's instructional errors affected the burden of proof, and, assuming the errors are not structural, they are not harmless under the *Chapman* whole record review as illustrated by this Court's decision in *People v. Aranda, supra,* 55 Cal.4th 342. Respondent argues (RB 118) that a competence proceeding is civil in nature and thus the standard of review for instructional error is "miscarriage of justice" and the reviewing court "must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented." (*Ibid.*, citing *Baumgardner v. Yusuf, supra*, 144 Cal.App.4th 1381, 1388.) The *Watson* standard is similar to that applied in a civil case, where instructional error "is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' [Citations.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

Respondent contends that with respect to the error in the definition of competence, this court has "not resolved" whether the *Watson* or *Chapman* error standard would apply but that the error was harmless "under either standard." (RB 86.) Respondent cites *Huggins*, in which this Court

assumed without deciding that the higher beyond a reasonable doubt standard of *Chapman* would apply. (*People v. Huggins, supra*, 38 Cal.4th 175, 193.) In *Huggins*, this Court addressed an appellant's claim that the *Dusky* instruction in his competence trial omitted the word "and" between each of the three elements, and thus violated due process because considering the charge to the jury as a whole, there was a "reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. (*Ibid.*, quoting *Middleton v. McNeil* (2004) 541 U.S. 433, 437.) This Court, suspecting the word "and" was not truly omitted and only a clerical error in the record suggested otherwise, found that no such likelihood existed. (*Ibid.*)

In the alternative, this Court in *Huggins* found that the error was harmless whether considered under the *Watson* or the *Chapman* standard. (*People v. Huggins, supra*, 38 Cal.4th at p. 193.) On the prejudice standard, the Court noted that precedent was unresolved. (*Ibid.*, citing *People v. Johnwell, supra*, 121 Cal.App.4th 1267, 1274–1278 [applying *Chapman* to a constitutionally based claim of error in giving instruction regarding competency], *People v. Mickle, supra*, 54 Cal.3d 140, 198 (conc. opn. of Mosk, J.) [same]; *People v. Medina* (1990) 51 Cal.3d 870, 922 (dis. opn. of Broussard, J.) [same]; contrasting *People v. Marks* (2003) 31 Cal.4th 197, 222 [applying *Watson* to a claim of error for failing to give a proposed competence instruction that was not constitutionally based].) Justices Kennard and Werdegar dissented in *Huggins*, opining that a *Dusky* instruction omitting the word "and" would violate federal constitutional due process under *Cooper v. Oklahoma, supra*, 517 U.S. 348, 354, the error would need to be measured under the *Chapman* test, and whether the record accurately reflected what occurred at trial was a question for the trial court

to consider on remand. (*Huggins*, 38 Cal.4th 175, 255, 258-259 (dis. opn. Kennard, J.).)

Justice Mosk's concurrence in *People v. Mickle, supra*, 54 Cal.3d at p. 198, and Justice Broussard's dissent in *People v. Medina, supra*, 51 Cal.3d at p. 922, state that *Chapman* applies to review of a constitutionally based error in competence trial instruction, but do not explain why. As noted by this Court in *Huggins*, the competence trial instruction in *People v. Marks* was reviewed under *Watson* because it was not constitutionally based. (*People v. Marks, supra*, 31 Cal.4th at p. 222 [declining to extend *People v. Moore*, *supra*, 166 Cal.App.3d 540 beyond its original context].) In this case, the trial court's errors in giving the flawed *Dusky* instruction and instructing the jury with BAJI No. 2.02 and CALJIC No. 2.21 were constitutionally based and required *Chapman* review, because they raised Appellant's burden of proof in showing he was incompetent to stand trial.

The Court of Appeal in *Johnwell* clearly explains why. (*People v. Johnwell, supra*, 121 Cal.App.4th at pp. 1274-1275.) After determining that it was error for the trial court to instruct the jury in a competence trial with CALJIC No. 2.01 concerning circumstantial evidence, the Court of Appeal in *Johnwell* said that review must be under the *Chapman* standard based on society's high concern of the risk of an erroneous competence decision given the fundamental constitutional guarantee that a defendant be competent when tried. (*Id.* at 1274-1275.) It said: "[W]e conclude that the appropriate standard of prejudice in the instant case is the harmless-beyond-a-reasonable-doubt standard of *Chapman.* The right to a jury trial in a competency proceeding may be only statutory, but a defendant's right not to be put to trial when he or she is more likely than not incompetent, is constitutional." (*Id.* at 1276, citing *Cooper v. Oklahoma*, *supra*, 517 U.S. at

p. 369.)

In arguing for structural error based on the flawed *Dusky* instruction, see section I, *ante*, Appellant explains how the Supreme Court's holdings in *Cooper v. Oklahoma, supra*, 517 U.S. 348, 364-368, and *Medina v. California, supra*, 505 U.S. 437451, as well as the principles stated in *Pate v. Robinson, supra*, 393 U.S. 375, 386, permit a state to require a defendant to prove his incompetence to stand trial by a preponderance of the evidence, but the burden can be raised no higher. The right to be competent when tried must be jealously guarded, due to the "deep roots and fundamental character of the defendant's right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel ..." (*Johnwell, supra*, at p. 1277, quoting *Cooper, supra*, 517 U.S. at p. 368.) Thus, while overlooking that *Cooper* and *Medina* in fact granted reversal per se without any consideration of prejudice, the Court in *Johnwell* at least recognized that high court precedent on the due process right to be competent when tried mandates close scrutiny on review of errors affecting the burden of proof, under the *Chapman* rather than the *Watson* standard. So too does Justice Kennard's dissenting opinion in *Huggins* rest on *Cooper* in stating that instructional error affecting the burden of proof in a competence trial must be reviewed under *Chapman*. (*People v. Huggins, supra*, (dis. opn. Kennard, J.), 38 Cal.4th at p. 258-259.)

Just as the RB says nothing about *Cooper* in discussing Appellant's argument for structural error, it also says nothing about the significance of *Cooper* in addressing whether *Chapman* or *Watson* error applies. This Court should now hold, as it declined to do in *Huggins*, that instructional errors affecting the defendant's burden of proof in a competence proceeding

must be reviewed under *Chapman*. There is no principled basis for reaching the opposite conclusion. Moreover, that standard of review must pertain not only to the flawed *Dusky* instruction but also to trial court's errors in giving BAJI No. 2.02 and CALJIC No. 2.21 relating to how the jury should consider evidence bearing on competence, just as it applied to the erroneous circumstantial evidence instruction (CALJIC No. 2.01) in *Johnwell*. (*People v. Johnwell, supra,* 121 Cal.App.4th at p. 291.)

Because these errors relate to the burden of proof, this Court's decision in *People v. Aranda* establishes that the harmless error analysis under *Chapman* here should involve consideration of the whole record without taking into account the strength of the prosecution's case. "The reviewing court conducting a harmless error analysis under *Chapman* looks to the "whole record" to evaluate the error's effect on the jury's verdict." (*People v. Aranda, supra,* 55 Cal. 4th 342, 367, citing *Rose v. Clark, supra,* 478 U.S. at p. 583.) In this regard a *Chapman* harmless error analysis for instructional error typically includes review of the strength of the prosecution's case. (*Ibid.*, citing *Johnson v. United States* (1997) 520 U.S. 461, 470.) For example, a harmless error inquiry for the erroneous omission of instruction on one or more elements of a crime focuses "*primarily* on the weight of the evidence adduced at trial." (*Ibid.*, emphasis in original, citing *Neder*, 527 U.S. 1, 17 [error deemed harmless when a reviewing court conducts a thorough review of the record and "concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence"], and *People v. Mil* (2012) 53 Cal.4th 400, 417-419 [applying the same standard to evaluate the effect of the erroneous omission of instruction on two elements of an offense].)

Aranda held that the same harmlessness analysis is not appropriate when the error goes to an instruction relating to the burden of proof, that is, the reasonable doubt instruction in a criminal trial. "[I]f a reviewing court were to rely on its view of the overwhelming weight of the prosecution's evidence to declare there was no reasonable possibility that the jury based its verdict on a standard of proof less than beyond a reasonable doubt, the court would be in the position of expressing its own idea "'of what a reasonable jury would have done. And when [a court] does that, the wrong entity judge[s] the defendant guilty.'" (55 Cal.4th 342, 368, quoting *Sullivan, supra*, 508 U.S. at p. 281, internal citation omitted.)

Thus, however overwhelming a court may view the strength of the evidence of the defendant's guilt, that is not an appropriate factor to support a conclusion that omission of a reasonable doubt instruction was harmless under *Chapman*. Using *Aranda* as a guide, this Court in applying the *Chapman* standard should evaluate the record as a whole but without relying on its view of the overwhelming weight of the evidence supporting the competence verdict.

Concerning the flawed *Dusky* instruction, Appellant's Argument, section I, in the AOB (AOB 75-140) explains that the trial court's version of CALJIC No. 4.10 given to the competence jury was flawed in two ways: (1) it incorporated a requirement that the defendant's incompetence stem from a mental disease or defect; and (2) it said that a competent defendant must have the ability to assist counsel but failed to include the words "in a rational manner" or any other form of the rationality requirement in the *Dusky* test. As to the first of these flaws, as stated in section A.I, *ante*, Appellant concedes that this Court's precedent is contrary to his argument at AOB 81-103 (see fn. 30 at 98) but requests that this Court revisit its

holdings and acknowledge that section 1367 and CALJIC No 4.10 are flawed statements of competence to stand trial under the *Dusky* standard.

The error violates constitutional due process because the correct statement of *Dusky* concerning mental disease or defect is not covered by any other instructions given by the trial court; thus *Chapman* applies and under *Aranda* the whole record review ignores the weight of the prosecution's evidence. Instructing the jury that incompetence required proof of a mental disorder was not harmless beyond a reasonable doubt, in the context of this case.

The issue was contested at trial. Defense counsel Khoury introduced evidence that Appellant suffered from a mental disease in 1983 and 1984, through the testimony of Dr. Javaid, who conducted psychological testing and diagnosed Appellant with major depression, chronic-severe, with mood congruent psychotic features and melancholia." (26ART 283, 290-292.) Similarly, Dr. Ebert testified that his psychological testing of Appellant in 1983 showed that his mental disease at that time "was so substantial ... that it was dramatically interfering with his ability to think rationally and logically." (28ART 529.) However, evidence of mental disease or defect (as opposed to the more general condition of mental impairment or irrationality) at the time of the competence trial, was lacking because of Appellant's inability to cooperate. Dr. Kalish testified that Appellant refused to cooperate in mental examinations Kalish attempted to conduct in spring of 1987. (27ART 348.) Another medical professional called by the defense, Dr. Norum, testified that he could not form an opinion based on a psychiatric diagnosis because of "the availability of only a minimal amount of [current] psychiatric evaluative data." (30ART 989.)

Dr. Vargas, a prosecution competence trial witness who had been appointed by the court and attempted to examine Appellant in June of 1987, gave an opinion that Appellant was malingering and was able to assist his attorneys and competent to stand trial. (29ART 864, 870, 875-876.) Vargas concurred that Appellant *had been* suffering from a mental illness in 1983, but suggested that recovery within a few months, even without treatment, would be typical. (29ART 884.) Thus, it cannot be said beyond a reasonable doubt that the "mental disease or defect" requirement imposed under CALJIC No. 4.10, and the lack of evidence in the record on that score, had no impact on the jury's verdict of competence.

The second flaw in the *Dusky* instruction was the omission of the term "rationality" concerning the defendant's ability to assist counsel. Respondent contends there was no prejudice from this error because (1) the trial court's pre-instructions to the jury apprised it of the rationality requirement, (2) testifying witnesses addressed Appellant's ability to assist his attorney in a rational manner, (3) counsel's closing arguments reminded the jury it must decide whether Appellant could assist counsel in a rational manner, and (4) under *Huggins* this Court may look to the later guilt trial to determine whether instructional error at the competency trial was prejudicial. (RB 82-87.) But under *People v. Aranda*, 55 Cal.4th 342, this Court's task in applying the *Chapman* standard should evaluate "the record as a whole," but should "not rely upon its view of the overwhelming weight of the evidence supporting the verdict," in order to "satisfy its constitutional obligation." (*Id.* at 350.)

Respondent's first argument, that the trial court's pre-instructions during jury selection covered the rationality requirement for the jury (RB 82, citing 25ART 23-24), fails for the same reasons that the argument failed

in *People v. Vann* (1974) 12 Cal.3d 220. The overall charge to the jury should be reviewed in context. (*Boyde v. California*, *supra*, 494 U.S. at p. 378.) As Appellant conceded in the AOB, Levitt indeed advised the jury before jury selection that a competent defendant must be able to assist counsel "in conducting his defense in a rational manner." (25ART 23.) However, as noted in the AOB at 247, no party addressed the rationality requirement during jury selection, and after Levitt read the flawed version of CALJIC No. 4.10 during pre-deliberation instructions after the jury heard the evidence, Levitt informed the jurors that they had received "all the rules of law" necessary to reach a verdict. (31ART 1187-1190.) This would have led the jury to believe that the pre-deliberation instructions were all the law they needed to decide the case and they should ignore prior statements of the law. (See *People v. Vann, supra*, 12 Cal.3d 220, 227 [that court read burden of proof instruction prior to jury selection did not cure error in failing to instruct on the prosecution's burden of proof in pre-deliberation instructions].) In *Aranda*, this Court concluded that correct instruction before jury selection did not preclude prejudice from the court's error in giving the reasonable doubt instruction before sending the jury out for deliberations. (*Aranda, supra*, 55 Cal.4th 342, 363-364, fn. 11, citing *Vann, supra*, 12 Cal.3d 220.) The same outcome entails here. That the rationality requirement was mentioned in the pre-selection instructions does little to dispel prejudice.

Respondent's second argument on prejudice from omitting the rationality requirement, that the medical testimony included a discussion of whether Appellant could assist counsel in a "rational manner" also is unavailing. (RB 82.) The RB cites to the testimony of Dr. Kalish at 27ART 380, Dr. Vargas at 29ART 840-841, and Dr. Norum at 30ART

1021. That these doctors testified that Appellant lacked the ability to assist counsel in a rational manner weighs in Appellant's favor in the prejudice analysis, not Respondent's. As this Court explained in *People v. Mil, supra*, 53 Cal.4th 400, the reviewing court must consider beyond reasonable doubt whether the jury verdict would have been the same without instructional error of omitting an element – which would not be the case, for example, where "'the defendant contested the omitted element and raised evidence sufficient to support a contrary finding.'" (*Id.* at 417, quoting *Neder, supra*, 527 U.S. at p. 19.)

This Court must ask whether the record contains evidence that could rationally have led the jury to a contrary finding regarding the omitted element – whether "any rational factfinder could have come to the *opposite* conclusion" to the verdict (*id.* at p. 418), to wit, that Appellant was *not* competent to stand trial. Testimony of Dr. Kalish and Dr. Norum that Appellant lacked the ability to assist counsel in a rational manner was sufficient to support a rational juror's finding that Appellant was incompetent, by a preponderance of the evidence. Defense counsel contested the element during the competence trial and raised sufficient evidence to support a contrary finding. This shows that the flawed instruction mattered in the case.

Respondent's third argument on prejudice is that both the prosecutor and defense counsel in closing argument "reminded the jury of Dr. Kalish's testimony regarding Waldon's ability to consult with counsel in a rational manner." (RB 82-83, citing 31ART 1136, 1186.) The cited text from the prosecutor's argument quotes a question by Khoury to Kalish, asking whether Appellant failed the parts of a psychological test "dealing with the ability to cooperate with counsel in a rational manner," and Kalish's

answer, "absolutely." (31ART 1136.) That the prosecutor quoted this question by Khoury is not the same thing as the prosecutor admitting that Khoury's version of the test was the correct one. The prosecutor was referring to Khoury's question to Kalish, "'Isn't it true that [Waldon] is unable to assist an attorney in conducting his defense in a rational manner?' And that's the law in California, and isn't that what this is all about." (31ART 1186.) However, immediately before that Khoury reminded the jury that "the judge is going to read you the jury instruction" (31ART 1186), indicating that the jury should focus on the judge's instruction above all. A jury is presumed to follow its instructions. (*Weeks v. Angelone* (2000) 528 U.S. 225, 234.)

Moreover, as pointed out in the AOB at pp. 215-216, the prosecutor's argument considered as a whole rang a different bell, stating several times that the third prong of the test for competence was the defendant's "ability to assist" his attorney, period – omitting the requirement of an ability to assist counsel "in a rational manner." (31ART 1142-1143 [a competent defendant is "capable of understanding the nature and purpose, et cetera, that [he does] comprehend [his] own status, et cetera, and ... [he is] able to assist [his] attorney"]; 31ART 1143 [the test involves three things: "Are you capable of understanding the nature and purpose of the proceedings? Do you comprehend your own status with reference to those proceedings? Are you able to assist an attorney?"]; 31ART 1143 [to prove incompetence the defendant must prove he is "incapable of understanding the nature and purpose of the proceedings," he "does not comprehend his own status and condition in reference to such proceedings," or "he is unable to assist an attorney."]; 31ART 1144-1145 ["[Y]ou would have to find that he could not assist his lawyer regardless of

who that lawyer was before you could find that No. 3 to be true."].)

The prosecutor argued that any "ability to assist counsel," however impaired, would suffice to meet the standard. He said: "The third [element is that he is unable to assist. It doesn't mean, again, that his ability to assist is impaired in some way, that it isn't as good as the next fellow's might be, nothing like that. He has got to be unable to assist. What it particularly does not say is, it does not say unwilling to assist. You don't see that in there anywhere. It's got to be unable to assist." (31ART 1144.) Courts have equated a defendant's ability to assist counsel "in a rational manner" with an ability to "cooperate" with counsel. (See *People v. Clark* (2011) 52 Cal.4th 856, 893 ["'the test, in a section 1368 proceeding, is competency to cooperate, not cooperation,'" quoting *People v. Superior Court (Campbell)* (1975) 51 Cal.App.3d 459, 464]; see also *Cooper v. Oklahoma, supra*, 517 U.S. 348, 354 [a competent defendant must be able to communicate *effectively* with counsel].) Yet the prosecutor argued that CALJIC No. 4.10 said nothing about "cooperation" and that a defendant's ability to assist counsel did *not* mean an ability to cooperate with counsel: "The question is: Is he able to assist an attorney. Cooperation is not part of that instruction." (31ART 1145.)

So, taken as a whole, the attorneys' argument lacked any consistency and clarity to inform the jury that the rationality requirement must be found, irrespective of whether the judge's instruction stated that it was essential. To the contrary, the argument of counsel, especially the prosecutor, made it more likely that the jury was confused and applied the wrong test in its competence finding.

Respondent's fourth argument is that this reviewing Court should look to Appellant's later behavior, for example, in the guilt trial, to

determine whether instructional error at the competency trial was prejudicial. (RB 86, citing *People v. Huggins, supra*, 38 Cal.4th 175, 193-194.) This approach is at odds with the rule in *Aranda* that constitutional review of a jury instruction error on the burden of proof should include a review of the "whole record" but *without* consideration of the strength of the prosecution's evidence, because what's at stake is the jury's verdict, not how the evidence balances out on judicial review. If whole record review under *Aranda* disregards consideration of the overwhelming weight of the evidence in the competence trial itself, it follows even more strongly that review of the *Dusky* instructional error under *Chapman* does not involve an evaluation of whether signs of competence or incompetence were shown leading up to and during his guilt and penalty trials.

At any rate, Appellant's later behavior does not prove competence to stand trial, but rather the opposite. In *Huggins*, this court said it was "plain" from the record that the defendant had the ability to consult with counsel with a reasonable degree of rational understanding. The defendant in that case *was* represented by counsel leading up to and during trial, and nothing in the decision suggested any problems or drama in that regard. This Court in *Huggins* said:

> When defendant testified on his own behalf at the guilt phase, he was lucid, articulate, and fully able to comprehend the proceedings and to reason in light of them. He ably provided a self-justifying account of himself through his testimony, which he tailored to minimize his culpability. It is plain from the record that defendant had the *ability to consult with his counsel with a reasonable degree of rational understanding*, and had a rational and factual understanding of the proceedings.

(*People v. Huggins, supra*, at pp. 193-194, emphasis added.)

This case is not like *Huggins* because here, after the competence verdict Appellant never did anything that would prove an "ability to consult with his counsel with a reasonable degree of rational understanding." To the contrary, he continued to fight appointed counsel tooth and nail, and after Russell and Khoury were removed and Appellant won permission to represent himself he continued to battle with advisory and standby counsel Sanchez and Chambers whenever they tried to take steps to develop a mental health defense. Appellant never listened to the advice of counsel "with a reasonable degree of rational understanding," and although he apparently did get along with Bloom (appointed as advisory counsel on Appellant's *Faretta* motion) and on occasion with Rosenfeld (advisory counsel during trial), any peaceful coexistence depended entirely on those attorneys doing exactly what Appellant told them to do and never broaching with him the advisability of presenting any guilt or penalty defense related to his mental condition. Throughout the proceedings, Appellant clung obsessively to the notion that it was against his religion to be represented by counsel, and he irrationally and tenaciously refused ever to consult with any attorney who told him anything other than what he wanted to hear.

Respondent contends: "A review of the record of the subsequent guilt and penalty proceedings demonstrates conclusively that Waldon understood the nature of the proceedings and was able to assist in his own defense." (RB 86.) While it is true that Appellant while pro se did file pretrial motions (copied from some previously filed by Russell) and hire investigators and para-legals to help prepare his defense, the judges who heard funding motions consistently sided with advisory counsel (who were trying to steer the defense in an opposite direction as Appellant) over Appellant. This shows that the judges who heard Appellant's funding

requests for the most part held Appellant's intended pro se defense to be rubbish and not worthy of serious development.

Appellant examined witnesses and testified at trial, presenting a conspiracy defense of sorts, but considered in context that did not demonstrate rationality. The trial judge barred Appellant from calling his desired expert witness and presenting the heart of his guilt defense (that the charges stemmed from a Cointelpro to punish him for Poliespo, Esperanto, and Native American activism) on the ground that it was delusional and insane. When Appellant testified, he stayed on the stand for two days while pausing for as long as 10 minutes between questions and answers, alienating and infuriating the jury while accomplishing nothing to further his defense. In sum, the record makes abundantly clear that Appellant *never* assisted counsel in a rational manner, and the defense he presented pro se was delusional, divorced from reality, and anything *but* rational. Thus, even if Appellant's later actions in the court are considered in assessing prejudice from instructional errors in the competency trial, as done in *Huggins*, they do not establish that the instructional errors were harmless beyond a reasonable doubt.

To assess the effect of the error this Court must consider the whole charge to the jury in context and assess whether there is a "reasonable likelihood" that the jury applied the challenged instruction in a way that violated the constitution. (*Estelle, supra*, 502 U.S. 62, 72; *Boyde, supra*, 502 U.S. 62, 72.) Here, given the deficiencies in the instruction as a whole, the overall effect of attorney argument, and the fact that the defense made a more-than-plausible evidentiary showing under the *Dusky* standard, there is at least a "reasonable likelihood" that the competence verdict was effected by the erroneous version of CALJIC No. 4.10 given to the jury and reversal

is required.

Similarly, the trial court's error of instructing the competence jury with BAJI No. 2.02 was not harmless. The trial court instructed the jury, over defense objection, that a party's evidence should be viewed with distrust if it was within the party's power to produce stronger and more satisfactory evidence but the party offered weaker and less satisfactory evidence instead. (31ART 1094, 5CT 922.) The prosecutor made sure that the jury understood that it should apply the instruction to Appellant's evidence. As explained in the AOB at 212-213, the prosecutor in argument compared the case to the fable of the "blind men and the elephant," in that none of the experts could get a complete impression of Appellant's mental state because Appellant had kept them "in the dark" about his mental capacity as related to competence by refusing to answer their questions. (*Id.* at 1101-1102.) The prosecutor further highlighted Appellant's refusal to answer questions on the stand, specifically drawing jurors' attention to the court's instruction based on BAJI No. 2.02, that "if weaker and less satisfactory evidence is offered by a party when it was within his power to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (*Id.* at 1102.)

The prosecutor argued:

> [The defendant] has offered the evidence of doctors Kalish and Norum operating in the dark because of his refusal and failure to cooperate with them rendering the opinions they were able to render, each admitting that they would have liked to have had that greater opportunity. And of course, ultimately, the defendant himself refused to talk to you or to tell you anything about his mental state and what he was thinking, what he was feeling, what he knew about what was going on here, anything else. So that instruction, I submit, is extremely applicable to that situation that the party, Mr.

> Waldon. [*sic*] That's why I distinguish we are not talking about a case between Mr. Khoury and Mr. Patrick. We are talking about a case between Bill Ray Waldon and the People of this State, the party, Mr. Waldon, had it within his power to talk to the psychiatrists, had it within his power to talk to you, refused to do so. So he's the one that bears the onus, that bears the burden of proving his incompetence and to enable the psychiatrists to present stronger evidence concerning that issue.

(31ART 1102-1103.)

Respondent argues that any error in giving the instruction was harmless because the instruction was voiced in the conditional tense and advised the jury to view a party's evidence with distrust "only if" it found it within the party's power to produce stronger and more satisfactory evidence. (RB 119.) This argument is circular nonsense, where the prosecutor's own argument invited the jury to so find, there was nothing to suggest that Appellant did not have the "power" to speak and answer questions, and the prosecutor urged the jury to draw the inference that Appellant's evidence should be distrusted because he remained silent.

Respondent further argues that prejudice is dispelled because the jury also was instructed with versions of CALJIC No. 1.00 (Respective Duties of Judge and Jury), CALJIC No. 31 (saying that all instructions were not necessarily applicable), CALJIC No. 2.20 (regarding to how to evaluate a witness's credibility), CALJIC No. 2.30 (regarding how to evaluate an expert's testimony), CALJIC No. 2.10 (regarding statements made to a physician), CALJIC No. 2.22 (how to weigh conflicting testimony), and CALJIC No. 2.11 (stating that neither side was required to produce all available evidence). (RB 119-120, citing 31ART 1187-1188, 1091-1092, 1092-1094, 1094-1095; 5CT 911, 917, 919, 921, 923, 924, 926.) However,

the version of BAJI No. 2.02 by its own terms trumps all of these instructions and urges the jury to punish the withholder of evidence by distrusting the evidence he does introduce.

Respondent also argues that Appellant was not prejudiced by the giving of CALJIC No. 2.21. (RB 127.) Respondent says the instruction was not "directed specifically at Waldon and his witnesses," that it did not require the jury to reject any testimony, and that the jury was told that all instructions were not necessarily applicable. (*Ibid.*) But the prosecution's case centered on opinion testimony that Appellant was malingering and manipulating doctors, which he had done while in the Navy to get a discharge and was "trying to get away with" doing again in the competence proceeding. (31ART 1110.) The prosecutor stopped short of calling Kalish a liar per se, but just barely, as he argued that Kalish was biased and cited 15 sources of error in Kalish's opinion. (31ART 1111-1112.) In the circumstances, jurors easily would assume an instruction that a witness "willfully false in one material part of the witness' testimony is to be distrusted in others" and that it could "reject the whole testimony of a witness who has testified falsely to a material point" should be applied to the testimony of Dr. Kalish.

Considered together under the *Chapman* standard, the three erroneous instructions related to the burden of proof in the competence trial cannot be said beyond a reasonable doubt to have had no effect on the jury's verdict. The errors were prejudicial even when evaluated through a whole record review and reversal is required.

6. Failure to Give Accurate Instructions on *Marsden*, *Faretta*, and *Frierson* Sua Sponte Was Not Harmless under the Miscarriage of Justice and *Watson* Standards of Review

As noted in section III.b.1, *ante*, the AOB at 252 claimed error based on the trial court's failure to give instructions on the law under *Marsden*, *Faretta*, and *Frierson* on its own initiative. The RB altogether neglects to address this argument.

A trial court's breach of its duty to give an instruction sua sponte is an error evaluated under state standards, subject to reversal if an examination of the entire record establishes a reasonable probability that the error affected the outcome of the trial. (*People v. Breverman*, *supra*, 19 Cal.4th 142, 165, citing Cal. Const., art. VI, § 13; *Watson*, *supra*, 46 Cal.2d 818, 836; *People v. St. Martin*, *supra*, 1 Cal.3d 524, 532.) A defendant is entitled to a jury trial on all of the issues presented by the evidence, and the denial of such right is in itself a miscarriage of justice under article VI, section 13 of the California Constitution. (*People v. St. Martin*, *supra*, at p. 523.) If there is "substantial, direct testimony" supporting a finding under the withheld instruction, the reviewing court cannot assume that the jury would have rejected such finding. (*Ibid.*)

There is more than a reasonable likelihood that the jury misunderstood the law, given that Deputy District Attorney Ebert as an expert provided inaccurate and incomplete accounts of *Marsden*, *Faretta*, and *Frierson* and their holdings. In first ruling that Ebert's testimony would be allowed, Judge Levitt assured Khoury that the prosecutor's witness would not simply tell the jury "what the law is," and would not tell the jury that "a mentally ill defendant can run his case." (30ART 1027.) Levitt promised that he would "make sure" the jury was not "confused." (*Ibid.*)

However, when Khoury sought to ensure that the jury heard a correct version of the law, by cross-examining Ebert about the decisions that a "prima facie incompetent" defendant was allowed to control, seeking to draw out an admission that rights under *Frierson* would be suspended during a competence proceeding, Levitt sustained the prosecution's objections and barred an answer. (30ART at 1034-1036.) Later, in argument, Khoury tried to make the jury aware that a defendant's control over decisions under *Frierson* was inapplicable, by reading from *People v. Samuel, supra*, 29 Cal.3d 489, but Levitt sustained the prosecutor's objection that this was "improper argument." (31ART 1171.) Khoury tried again, by reading from *People v. Deere* (1991) 41 Cal.3d 353, but again Levitt sustained an objection and admonished the jury: "I will inform the jurors that I instruct the jury as to the law, not the attorney. And this isn't proper, not part of the case and is not based on evidence." (31ART 1172.)

The prosecutor's argument stressed the importance of Deputy District Attorney Ebert's testimony, arguing that it proved Dr. Kalish was wrong to treat Appellant's desire to control the case as a symptom of paranoia. (31ART 1124.)

There was substantial direct testimony from Dr. Kalish that Appellant's rejection of his attorney and his desire to represent himself sprang from paranoia and disordered thinking that would hinder the attorney-client relationship and impair his capacity to assist counsel. (27ART 363-365, 382.) The prosecutor impeached this testimony by questioning Kalish about a defendant's rights under *Faretta* to represent himself. (27ART 405-407.) Moreover, Appellant's statement on the stand that he could not answer questions because he was not receiving effective assistance of counsel (29ART 830) placed in dispute whether the standard

for substituting counsel was met, and whether Appellant made a voluntary choice not to assist counsel or instead was unable to assist counsel in a rational manner. Thus, there was substantial direct testimony that would have supported findings that Appellant's rejection of counsel and obsession with controlling the case were signs of incompetence to stand trial, rather than a voluntary exercise of free will, had correct statements of the law under *Marsden*, *Frierson*, and *Faretta* been given. (*People v. St. Martin*, *supra*, at p. 523.)

In argument, the prosecutor drew attention to the unheard and unresolved *Marsden* motion (31ART 1129) and argued that incompetence had not been shown because no other attorneys besides Russell and Khoury had been tried (31ART 1144-1145) and the evidence showed, at most, that Appellant was "not willing to assist the attorneys that he has now." (31ART 1150.) The prosecutor argued that Appellant's failure to cooperate during mental examinations and his silence when called to the stand earned distrust for the defense and proved malingering and manipulation (31ART 1100-1103, 1110), and the defense could not counter that argument because there were no instructions on how the law vests complete decision-making control in the hands of appointed counsel once a trial court declares a doubt of competence to stand trial.

Thus, there was a reasonable probability that the jury would have made different inferences about Appellant's behavior and attitude toward counsel as related to his mental condition, if it had received complete and accurate instruction on the issues of representation, self-representation, and control of the defense that were framed by the evidence presented by the parties. Reversal is required under the miscarriage of justice and *Watson* standards of review.

7. The Erroneous Refusal to Give a Version of CALJIC No. 4.01 Was Not Harmless

The trial court's refusal to give any version of CALJIC No. 4.01 apprising the jury of the consequences of a verdict of incompetence, to allay implicit fears that a dangerous man would be released into society, was not harmless.

The RB at 124 points out that this Court held in *People v. Marks, supra*, 31 Cal.4th 197, 222, that the instruction is "not constitutionally based" and reversal would not be warranted unless a different result would have been "reasonably probable" under the *Watson* standard. The Court in *Marks* cited *People v. Young* for the rule that *Watson* error applies because the holding in *People v. Moore* (1985) 166 Cal.App.3d 540, 555-556, that a trial court should give an instruction is not constitutionally based. (*Ibid.*, citing *People v. Young* (1987) 189 Cal.App.3d 891, 916.) *Young* itself relies on *People v. Montero.* (*Young, supra*, 189 Cal.App.3d at p. 916, citing *People v. Montero* (1986) 185 Cal.App.3d 415, 429-430.) The cited pages of *People v. Montero* do not involve an instruction under *Moore* and the case is inapposite. An examination of *Moore* reflects that the case it deemed to be seminal on the issue of a CALJIC No. 4.01-type instruction to sanity phase juries indeed did not base its analysis on constitutional principles. (*Moore, supra*, 166 Cal.App.3d at p. 551, citing *Lyles v. United States* (D.C. Cir. 1957 254 F.2d 725 as the seminal case.)

However, the AOB also argues that the trial court's refusal to give the requested instruction abridged Appellant's due process right, under the Fourteenth Amendment, to inform the jury that he would not be released upon a finding that he was incompetent to stand trial. (AOB 256, citing *Simmons v. South Carolina* (1994) 512 U.S. 154, *Shafer v. South Carolina*

(2001) 532 U.S. 31, and *Kelly v. South Carolina* (2002) 534 U.S. 246.) The AOB noted that this precedent establishes that a trial court's refusal to give a parole-ineligibility instruction to a capital jury when future dangerousness is an issue violates due process. (AOB 256) *Simmons* held a refusal to give a parole-ineligibility instruction violated due process for the same reasons that an instruction directing the jury not to consider the defendant's likely conduct in prison would not have satisfied due process in *Skipper*. (*Simmons, supra*, 512 U.S. at p. 171, citing *Skipper v. South Carolina* (1986) 476 U.S. 1.)

Appellant contends that the due process right of criminal defendants not to be tried while incompetent, which is fundamental in nature and warrants a high level of societal protection as noted in *Cooper v. Oklahoma*, is of such importance that the risk of a jury finding a defendant competent based on a refused CALJIC No. 4.01 instruction is of constitutional importance. Here, just as in *Skipper* and *Simmons*, a jury's fears of the defendant's future dangerousness and its lack of understanding of how the competence trial fits into the entire criminal framework pose a significant risk that withholding the instruction will impact the verdict. Thus, this Court should review the error under the *Chapman* standard and reverse unless it concludes beyond a reasonable doubt that the error was harmless. That it cannot do, and therefore Judge Levitt's refusal to give a version of the CALJIC No. 4.01 instruction as requested by the defense is another ground for reversal of the competence trial verdict.

c. Other Errors in the Competence Trial Were Not Harmless

Other errors in Appellant's competence trial raised in the AOB include Judge Levitt's telling Appellant in front of the jury that he was a competent witness required to answer questions (AOB 225-230), the court's

refusal to continue the competence proceeding until defense counsel Russell could be available (AOB 263-272), errors concerning prosecutorial argument misrepresenting the proximity of the declaration of a doubt regarding competence to the trial date (AOB 284-290), and various evidentiary errors. (AOB 272-284.) These errors were not harmless and they provide additional grounds for reversal.

1. Judge Levitt's Statement That Appellant Was "Competent"

In the AOB at 225-230 Appellant recounts how Judge Levitt said to Appellant when he was on the stand, "Mr. Waldon, you are a competent witness here ..." and then told the competence jury "Mr. Waldon apparently chooses not to testify." (AOB 227, citing 29ART 831.) Appellant showed that the judge's comments were highly prejudicial under precedents including *Starr v. United States* (1894) 153 U.S. 614, 626, *Bollenbach v. United States, supra,* 326 U.S. 607, 612, and *Quercia v. United States* (1933) 289 U.S. 466, 472, and were not within the scope of Article VI, section 10 of California Constitutional provision allowing a judge to comment on the evidence. (AOB at 223-225, citing *People v. Melton* (1988) 44 Cal.3d 713, 735, *People v. Cook* (1983) 33 Cal.3d 400, 408, and *People v. Proctor* (1992) 4 Cal.4th 499, 542.) "The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made. [Citation.]" (*Melton, supra*, 44 Cal.3d 713, 735.)

The AOB proves that the judge's comment on the ultimate issue in the case sent the jury the message that the judge believed and perhaps had even found the ultimate issue, that Appellant was competent to stand trial, and either directly or indirectly controlled the verdict, warranting reversal

without a showing of prejudice. (AOB 229-230.) Further, the error was prejudicial under the *Chapman* standard especially when its effect is considered in combination with the trial court's decision, over defense objection, to instruct the jury with BAJI No. 2.02. (AOB 239-240.)

Respondent contends Appellant has forfeited this claim because defense counsel did not object when the comments were made at trial, nor seek an admonition. (RB 110, 112.) However, the level of frustration exhibited by Judge Levitt toward both Khoury and Appellant by that point in time demonstrates that objection would have been futile, as there is little chance the judge would have sustained it or given an admonition. (*People v. Sturm* (2006) 36 Cal.4th 1218, 1238 [failure to object excused on appeal where objecting would have been futile].) Respondent argues that "nothing about the challenged remarks was incurably prejudicial, much less rendered the trial fundamentally unfair." (RB 110, citing *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648.) To the contrary, given the context in which Judge Levitt vented his exasperation and showed what he thought of Appellant, an admonition would have done nothing to cure the harm. After all, what could Levitt have said to unring the bell? By allowing the prosecutor to call Appellant to the stand the judge showed he did believe Appellant to be a competent witness – any contrary assertion was belied by the judge's conduct – and that he held Appellant responsible for "choosing" not to answer questions.

In *Abbaszadeh*, the reviewing court did not apply the waiver rule for three reasons: "(1) an objection would have been futile; (2) the People are at least equally at fault in allowing the error; and (3) we retain discretion to excuse the lack of an objection and elect to exercise that discretion in defendant's favor because of the shocking nature of the error which

rendered the trial unfair." (*Abbaszadeh, supra,* 106 Cal.App.4th at p. 648.) Those three reasons also apply in this case, where the prosecutor was equally at fault in allowing the error (because he knew or had reason to know that Appellant would not answer questions on the stand because of his frustrations with the unheard *Marsden* motion), and where the shocking impropriety of what the judge said to the defendant in front of the jury rendered the competence trial unfair.

This case is like *People v. Mahoney* (1927) 201 Cal. 618, wherein the trial judge's expressed partiality for the prosecutor's position, and his remarks showing that he believed the defendant guilty, were reversible error notwithstanding the lack of objection at trial. As this Court said in *Mahoney*: "[T]here may be instances, and this is one of them, where such effort would be entirely fruitless; no retraction sufficient to undo the harm; and the effort made might result in further error. Further, it is evident from the attitude of the trial judge, as shown by the record, that any assignment of misconduct would have been disregarded. Counsel for the Appellant, by making an assignment, would have brought upon himself further attack." (*Id.* at 621-627; see also *People v. Byrd* (1948) 88 Cal.App.2d 188, 191 ["Our courts have many times reversed convictions in criminal cases because of intimations by the trial judge during the taking of testimony that the defendant or his witnesses was not believed by the judge."].)

Respondent argues Judge Levitt's comments did not violate due process or show bias because they were not "significant and adverse to the defendant to a substantial degree." (RB 112-113, citing *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 740.) But the comments were significant and adverse to Appellant's competence showing, to the ultimate degree. Respondent argues that the judge's statements to the defendant, even if

implying criticism, were "brief, and did not create a pattern of disparagement of the defense or favoritism toward the prosecution." (RB 115, citing *People v. Bell* (2007) 40 Cal.4th 582, 605, and comparing *People v. Sturm*, *supra*, 37 Cal.4th at pp. 1240-1241.) However, this is not a case where judicial misconduct involves a pattern of disparagement toward the defense, but rather a case where the judge stated his view on the ultimate issue, on a factual matter – the defendant's competence to stand trial after a doubt has been declared – that is difficult to grapple with for juries, attorneys, and jurists.

Respondent contends Judge Levitt's comments related to the competence of a witness, which is an entirely separate matter under the law than a defendant's competence to stand trial. (RB 114-115 "[T]he trial court's remark was not a comment on his belief that Waldon was competent to stand trial, but was an expression of its finding that Waldon was competent to testify.".) For attorneys and judicial officers, of course, the distinction is well known, but there is no reason to think that the laypersons on the jury would have known the difference between a "competent witness" and a "competent defendant" called as a witness.

Later, the judge gave the jurors this instruction, which was insufficient to cure the harm caused by his biased comments:

> I have not intended by anything I have said or done, or by any questions that I may have asked, or by any rulings that I made, to intimate or suggest what you should find to be the facts on any questions submitted to you, or that I believe or disbelieve any witness.

(31ART 1089, 5CT 914.) Whether the judge "believed" or "disbelieved" Appellant as a witness was irrelevant, because Appellant said nothing on the stand that had any evidentiary content. Whether the judge *intended* to

intimate or suggest what the jury should find to be the facts on the question of competence is not the point; whether he intended to or not, Levitt unequivocally stated that Appellant was a competent witness who chose not to answer questions (viz., cooperate). Jurors were likely to be swayed by that statement, given the judge's authority and the level of experience the jurors would have assumed him to have in criminal trials.

Judge Levitt's comments to the jury had the effect of raising the burden of proof on Appellant to establish his incompetence to stand trial, and thus were reversible per se under *Cooper v. Oklahoma, supra*, 517 U.S. 348, or at the very least subject to review under *Chapman* for reasons explained in *People v. Johnwell, supra*, 121 Cal.App.4th 1267. The prosecutor's position in the competency trial was that Appellant was malingering and trying to get away with something by feigning mental problems (argument, 31ART 1100-1103, 1110), and Judge Levitt's intemperate remarks stating his views closely related to the ultimate issue would have been understood by the jury to mean that the judge thought the prosecution's position to be well taken. The error was not harmless beyond a reasonable doubt and reversal is required.

2. Refusal to Grant a Continuance for Russell

The AOB at 263-272 proves error in Judge Levitt's refusal to continue the competence proceedings until Appellant's lead counsel, Geraldine Russell, was available to represent him there.

Russell appeared before Judge Levitt on August 17, 1987, and explained that she could not then participate in the competence trial because she was appointed counsel in another death penalty case, one that would not conclude until early September. (25ART 1-2.) The prosecutor did not object to the continuance, but explained that he would not be available in

September but would be so in October. (4CT 829-831, 25ART 1-2.) Levitt said "I think it is inordinately improper to continue the case to the latter part of October," and insisted that the competence trial proceed with Khoury representing Appellant, notwithstanding that Khoury, as Russell pointed out, was not on the list of counsel qualified for capital cases. (25ART 2-3.) Judge Levitt said "[t]here is always prejudice to the system of justice when a case is continued," and seemed to believe the defense was estopped on the issue because Khoury, in a June 17, 1987 declaration supporting a motion to disqualify Levitt, had said that he was likely to have "primary responsibility" for the upcoming competence trial. (*Ibid.*)

The AOB argued that Levitt abused his discretion in refusing a continuance and also cited cases supporting that the ruling implicated Appellant's constitutional right to a fair adversarial proceeding and to present a defense. (AOB 266-267, citing *United States v. Uptain* (5th Cir. 1976) 531 F.2d 1281, 1291, *United States v. Clinger* (4th Cir. 1982) 681 F.2d 221, 223, *United States v. Rodgers* (7th Cir. 1985) 755 F.2d 533, 540, fn. 4, and *Powell v. Alabama, supra*, 287 U.S. 45, 59.) Defense counsel had offered good cause for the continuance (AOB 268, citing *People v. Wilson* (1965) 235 Cal.App.2d 266) and there would have been no disruption to the judicial process because the requested delay was relatively short and it would not have involved an interruption of a jury trial already begun. (AOB 268-269, contrasting *People v. Samayoa* (1997) 15 Cal.4th 795, 840.) There was no "reasonable basis" for the judge's capricious refusal to delay the trial, and thus an abuse of discretion was proven. (AOB 269, citing *People v. Jacobs* (2007) 156 Cal.App.4th 728, 737 and *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287.)

Respondent argues: "'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge ....'" (RB 130-131, quoting *People v. D'Arcy* (2010) 48 Cal.4th 257, 288.) Respondent further contends an important factor to be considered is whether a continuance would have been "useful." (RB 131, citing *People v. Mungia* (2008) 44 Cal.4th 1111, 1118.) Respondent argues there was no abuse of discretion because Khoury was available to represent Appellant during the competence proceedings. (RB 131-132, citing *People v. Durrant* (1897) 119 Cal. 201, 206.)

However, Judge Levitt did abuse his discretion in refusing a continuance based on the availability of Khoury because Khoury was not qualified to serve as lead counsel in capital cases in that court. Although Khoury had been representing Appellant for eight months when the competency trial took place, Russell had been representing him far longer and as shown during the evidentiary hearing on Appellant's competence to represent himself in the spring of 1987, it was Russell who was most familiar with and best understood Appellant's mental condition, and the evidence of it developed through the examination conducted and report prepared by Dr. Mark Kalish.

Respondent argues Appellant has not shown prejudice from denial of the continuance for Russell to try the section 1368 proceeding because only two errors by Khoury were iterated in the AOB. (RB 132; compare AOB 271 describing Khoury's error in permitting the jury to be instructed with a flawed definition of competence, and his struggles with the technical requirements for having key exhibits admitted into evidence.) Another such

error was Khoury's failure to object or seek an admonition when the judge commented that Appellant was a competent witness who was "choosing" not to answer questions. More importantly, Russell's absence from the competence trial after Levitt refused a continuance prejudiced Appellant *in and of itself*, because Appellant's dissatisfaction with Russell and his request to replace her were a significant factual predicate for Dr. Kalish's opinion (27ART 428-438), and the unheard and unresolved *Marsden* motions took center stage in the competence trial. Because Russell was absent, the jury had no opportunity to form an opinion whether she was providing effective assistance, or whether Appellant was unable to cooperate with Russell or whether Appellant was choosing not to cooperate. This is explained in the AOB at 271 and the RB offers nothing to counter it.

3. Prosecutorial Misconduct in Arguing That the Competence Issue Sprang up on the Eve of Trial

As proved in the AOB at 284-290, the prosecutor misrepresented in closing argument that issues concerning Appellant's competence to stand trial did not come up until May 22, 1987, only on the eve of trial, ten days before the trial date. Defense counsel Khoury objected to this argument and asked that the prosecutor's statement be stricken or that Khoury be allowed to argue the truth, that in fact the trial date was not imminent. (AOB 286-287.) The trial court erroneously overruled Khoury's objections and denied the motion to strike. (AOB 287.) The AOB explains that the prosecutor's argument misrepresented the facts and misled the jury, which was misconduct that was prejudicial under any standard of review. (AOB 288-290.)

Respondent counters that the prosecutor did not commit misconduct because his comments were neither misleading or prejudicial, and insists

that the prosecutor did not misstate the evidence. (RB 148-150.) Respondent does not argue forfeiture or waiver with respect to the claimed prosecutorial misconduct in misrepresenting to the jury that trial was imminent.

Respondent's brief focuses only on the bare facts submitted by the parties in the competence trial by stipulation. The parties stipulated at trial that there was no mention of competence to stand trial in any minute orders until May 22, 1987. It also was stipulated that on October 22, 1986, the date for Appellant's criminal trial was set for June 1, 1987. (30ART 1042-1044.) These facts are noted at RB 149.

Respondent says nothing about the other facts, *not* introduced to the jury in any stipulation, as relevant to the prosecutor's representations. As explained in the AOB, all counsel and judicial officers very well knew during the spring of 1987 that the June 1 trial date was not realistic. (AOB 285-286.) Defense counsel filed pretrial motions on April 1, and the deadline for the prosecution to reply to them was May 15, 1987. (1CT 223-2CT 369; 1CT 123.) The prosecutor filed a request for a continuance to oppose pretrial motions on May 1, 1987, and also asked to continue the trial readiness date and determine a new trial date. (2CT 513-514.) Moreover, defense counsel advised the court at a hearing on May 8, 1987, that although the trial date at that time was set for June 1, "[i]t was never contemplated that we would actually go then, it was a convenience to track the case. If I don't have a stay granted next week I will be starting a four to six month capital trial on May 18," and that if a new attorney were appointed to replace Russell because of her unavailability, that lawyer would need at least six months to prepare for trial. (13ART 13.) Although a trial readiness conference was on calendar for May 22, the court took it

off calendar. (1CT 78; 3CT 591.)

In closing argument at the competence trial, the prosecutor argued that the jury should distrust the defense case on competence because Kalish did not express a doubt about Appellant's competence until days before the trial was to begin. He said: "I think it's particularly significant, too, in considering that that doubt was ultimately expressed and these proceedings commenced to determine his competency just ten days before the date which had been established for trial of the criminal case, way back on October the 20th of 1986. We go clear till May the 22nd and then ten days before that trial date this supposed doubt about his competency comes up." (31ART 1133-1134.)

Considered in context, it was a misrepresentation for the prosecutor to argue to the competence jury that the declaration of a doubt occurred on the eve of trial. Khoury brought this to Judge Levitt's attention as he objected, challenging the prosecutor's statement in argument that the trial was imminent when the competence issue came up. (31ART 1151.) Khoury pointed out that the court's minutes would show the trial was not imminent because the pretrial motions had not been heard and there was no possibility that the trial would commence on the June 1, 1987, date, and moved either to strike the prosecutor's statement or allow Khoury to argue to the jury that in reality there was no possibility that the trial would have started on June 1. (31ART 1151-1153.) The prosecutor argued that Appellant in moving to represent himself had requested that all motions be withdrawn, and it was unclear that there would be motions. This too was misleading, because Judge Zumwalt had stated at a hearing on April 17, 1987, that Appellant's request to withdraw defense motions would not be filed. (13ART 18.)

Judge Levitt overruled Khoury's objections, stating "All right, I think the record is correct. Mr. Patrick indicated that there was a trial date [imm]inent and that's what there was so I'm not going to strike it. We will proceed from here." (31ART 1154.)

Respondent contends in the AOB that Levitt denied the motion to strike but "did not address" Khoury's alternative request to be allowed to argue that the trial date was not realistic. This argument belies the record – it is clear form Levitt's ruling in context that when Levitt said the "record" as stated by the prosecutor was "correct," and that argument would "proceed from here," he was overruling Khoury's objection altogether and would not allow defense argument stating anything beyond what was in the stipulations in the record.

"Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents ...." (*People v. Harrison* (2005) 35 Cal.4th 208, 242.) "A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such unfairness as to make the resulting conviction a denial of due process. Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial .... When a claim of misconduct is based on the prosecutor's comments before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Bryant* (2014) 60 Cal.4th 335, 427, quoting *People v. Gonzales* (2013) 54 Cal.4th 1234, 1275, internal citations and quotations omitted.)

The prosecutor at the competence hearing knowingly omitted the material facts concerning the trial date, misrepresenting the truth in what can only be construed as an effort to mislead the jury. There can be no claim the misrepresentation was inadvertent or out of ignorance – the same individual, Deputy District Attorney Patrick, represented the People in the proceedings before Judge Zumwalt in the spring of 1987 and during the competence trial in the fall of the same year. (See 14ART 1 [proceedings before Judge Zumwalt in spring of 1987, with Deputy District Attorney Patrick for the prosecution], 31ART 1151 [closing argument at the competence trial, discussion of closing argument made by Deputy District Attorney Patrick for the prosecution].)

By misleading the jury in closing argument that the trial date was imminent when a doubt regarding Appellant's competence was declared, the prosecutor in this case used deceptive and reprehensible methods and committed misconduct. His actions infected the trial with such unfairness that the resulting competence determination was a denial of due process, which is federal constitutional error and should be reviewed under the *Chapman* standard. Even if considered only as state law error, there is a reasonable likelihood under *Watson* that the jury construed the prosecutor's remarks "in an objectionable fashion." This is so because the prosecution's case in the competency trial, as shown by the testimony by Dr. Vargas and Dr. Strauss and closing argument, was that Appellant had been malingering when hospitalized for mental problems while in the Navy, and that he was again malingering in the criminal proceedings and faking mental problems to "get away with" something. (29ART 870-876; 30ART 950-953; 31ART 1110.)

4. Evidentiary Errors

The AOB also describes several evidentiary errors in the competence trial, including error by Judge Levitt in allowing the jury to learn of the charges, special circumstance allegations, and potential penalty that Appellant was facing (AOB 272-274); allowing the prosecutor to refer to Appellant as a "security risk" in the jail after referring to Appellant as an attempted jail escapee in cross-examination of Dr. Kalish (AOB 275-280); and in limiting Khoury's attempted cross-examination of Deputy District Attorney Ebert (AOB 280-282) and limiting Khoury's examination of defense expert witnesses. (AOB 282-284.) Respondent counters these claims at RB 133-148.

The prosecutor sought leave to describe the seriousness of the pending charges against Appellant (capital murder) in questioning Dr. Kalish, on the theory that Kalish's opinion on Appellant's competence was skewed by a bias against criminal defendants representing themselves in cases involving the death penalty. (26ART 77-79.) Khoury objected based on relevance, because Appellant's capacity to represent himself was not at issue, and argued under Evidence Code section 352 that the evidence's likely prejudicial effect on the jury substantially outweighed its probative value. (27ART 389-392.) Judge Levitt overruled the objection and allowed the prosecutor to ask Kalish whether he was aware that Appellant "was charged with a number of crimes, including murder and faced the possibility of the death penalty ..." (27ART 409.) Dr. Kalish testified that he knew Appellant was so charged. (*Ibid.*)

As explained in the AOB, the prosecutor's theory of relevance – to show bias – was a red herring because at the time of the competence trial it was good law and good practice to consider the complexity of the case in

addressing a defendant's competence to represent himself, under *People v. Burnett* (1987) 199 Cal.App.3d 1314, 1325. (AOB 273.) Only in 1993 did the high court's decision in *Godinez v. Moran* (1993) 509 U.S. 389 call into doubt the line of reasoning set forth in *Burnett*. Not only was evidence of the charges against Appellant therefore irrelevant to show any bias by Kalish, but also the trial court erred under Evidence Code section 352 by admitting the evidence because its prejudicial effect (scaring the jury about the possibility that a dangerous capital murderer would go unconvicted and unpunished if it found Appellant incompetent) substantially outweighed its probative value (which was none).

The trial court also erred in its handling of the prosecutor's reference to an attempted jail escape by Appellant in questioning Dr. Kalish (27 RT 449), and its insufficient admonition after striking the question, followed by allowing the prosecutor to ask Kalish whether he knew Appellant was a "security risk" in the jail. (AOB 279.) Judge Levitt should have granted defense counsel's motion for a mistrial after the inflammatory reference to the attempted escape was made. (AOB 278, citing *People v. Talle* (1952) 111 Cal.App.2d 650, 678, *People v. Crew* (2003) 31 Cal.4th 822, 839, and *People v. Hines* (1997) 15 Cal.4th 8997, 1038.) Respondent argues that this case is like *People v. Kipp* (2001) 26 Cal.4th 1100, 1126, wherein an appellate claim of error based on the introduction of evidence of an escape during trial was rejected because the escape attempt did not involve violence or likely interfere with the jurors' dispassionate evidence of guilt. (RB 140.) This case is different from *Kipp*, however, because this jury was not considering "dispassionate evidence of guilt," but rather the murkier issue of whether Appellant was incompetent even though he might pose a danger to society if unconvicted and unpunished, against the prosecution's

theory that Appellant was malingering and attempting to manipulate the judicial process.

Contrary to Respondent's assertion at RB 139, Levitt's admonition to the jury to disregard reference to the escape was not enough to solve the harm that had been caused. (AOB 279, citing *People v. Brooks* (1979) 88 Cal.App.3d 180, 185-187, *People v. Ford* (1948) 89 Cal.App.2d 467, 470, and *People v. Roof* (1963) 216 Cal.App.2d 222, 225.) Respondent's argument that any claim of prosecutorial misconduct is forfeited (RB 139) is inapposite because Appellant claims not prosecutorial misconduct based on this incident, but rather an abuse of discretion by Judge Levitt.

The next evidentiary error stems from Judge Levitt's sustaining of the prosecutor's objections and blocking Khoury from cross-examining Deputy District Attorney Ebert after Ebert testified inaccurately and incompletely about the law concerning representation, self-representation, and control of the case under *Marsden*, *Faretta*, and *Frierson*. (AOB 280-282.) The significance of Ebert's testimony and the circumstances of Khoury's efforts at cross-examination are set forth in section II.b, *ante*. The restriction of cross-examination violated Appellant's rights to a fair trial and due process and right to present a defense, as well as his right not to be tried while incompetent. (AOB 281-282.) This error was prejudicial because of the importance of the issues and Ebert's testimony to the prosecution's case on competence, and because Khoury's efforts to set things aright in closing argument were foreclosed. (31ART 1171-1172.)

Respondent argues that the trial court's ruling was appropriate because the intended cross-examination "did not pertain to matters in dispute" and was "irrelevant," because the questions involved the decision-making authority of a "mentally incompetent defendant," and were "purely

speculative until and unless Waldon had been found incompetent." (RB 143-144.) Respondent's position on this is absurd – clearly and without a doubt Khoury's questions to Ebert asked how and whether a defendant controlled decisions in the case when the defendant was "prima facie incompetent" (30ART 1033), which is a term used to describe a defendant as to whose competence *a doubt by the trial court has been declared.* If the defendant had been adjudged incompetent, as Respondent hypothecates, criminal proceedings are permanently abeyed and the preparation of a defense by appointed counsel becomes a nullity. There is no question of who controls decision-making authority any longer after an *incompetence* verdict.

The trial court further erred in its evidentiary rulings by limiting Khoury's attempted examination of his psychiatric witnesses, Dr. Javaid and Dr. Bruce Ebert. Dr. Javaid was not allowed to state his opinion about whether in 1983 (at the time of Javaid's examination) appellant would not have been able to assist his attorney had he been facing criminal charges (26ART 276-277), was not permitted to testify whether Appellant was suffering from the same mental illness at the time of trial that he had in 1983 and 1984 based on his review of Dr. Kalish's report (26ART 276-277), and was not allowed to testify about whether Javaid had observed the same symptoms in 1983-1984 that Kalish observed in 1987. (26ART 278.) Judge Levitt barred examination on these areas, on grounds of hearsay and irrelevance. (26ART 276-278.) This was error because the evidence sought to be introduced was highly relevant, especially where the *Dusky* instruction imposed a requirement that a mental disorder be established and Appellant's Navy doctors were the ones who had diagnosed mental illness.

Also on relevance grounds, the trial court did not permit Appellant to elicit from Dr. Bruce Ebert (the Air Force psychologist who did psychological testing of Appellant and wrote a report) his diagnosis of Appellant in 1983. The trial court's reason for the ruling was that Ebert had not put a diagnosis of Appellant into the report he prepared in 1983,[8] only what Ebert put in his report at the time of the evaluation was relevant, and what Ebert independently diagnosed was irrelevant. (28ART 535-536.) The trial judge also denied Khoury's request to elicit evidence of what individuals with test results like Appellant would have been diagnosed with. (*Id.* at 537-539.) Finally, Dr. Ebert was not permitted to state whether or not Appellant would have been mentally competent to stand trial in 1983. (*Id.* at 541.) Dr. Ebert's testimony on these questions was not irrelevant and there was no justifiable reason to limit its relevance to what Ebert had written into his report at the time of the evaluation. Judge Levitt's rulings were in error.

Only relevant evidence is admissible. (Evid. Code, § 350.) An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including a ruling concerning the relevance of evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) However, if the exclusion of evidence denies a defendant his

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[8] Dr. Ebert's report was part of Court Exhibit No. 1, a 149 page document consisting of the record of Appellant's psychiatric treatment in the Navy which was marked as an exhibit but not admitted into evidence. (26ART 262.) Page 88 of that exhibit is the report of Dr. Ebert. That report does not contain a diagnosis of Appellant. However, it does state that individuals with similar test results as Appellant's often are "diagnosed as schizo-affective, manic-depressed or major depressive episode." Appellant will request that the exhibit be transferred to this Court at the appropriate time.

right to present a defense, federal due process is implicated. (*Chambers v. Mississippi* (1972) 410 U.S. 284, 302-303.)

The trial court erred in holding that the information Appellant sought was irrelevant and/or improper. The evidence of other professional opinions about Appellant's inability to assist counsel were relevant to bolster the testimony that Appellant was not able to assist counsel, within the meaning of the definition of competence to stand trial. The opinions of doctors who saw Appellant in 1983 and 1984 showed that Appellant's problems were not counterfeited for his competence trial, but were long-standing. They were also relevant to show that Appellant suffered from a mental illness that had not gotten better. The trial court erred in its assertion that Ebert's opinion was not relevant because he did not offer it in 1983. Ebert's opinion about Appellant's diagnosis also was relevant because it showed the duration of Appellant's problems.

The restriction on examination denied Appellant his rights to a fair trial and due process, including the right to present his defense, under the Fifth and Fourteenth Amendments. In addition, it violated Appellant's due process right not to be tried while incompetent and to an adequate state procedure which protected his right not to be tried while incompetent. (*Pate*, *supra*, 383 U.S. 375, 385-386.) The error was prejudicial under any prejudice standard because it is reasonably probable that the outcome would have been different had Khoury been permitted to examine the doctors on the numerous relevant areas that the trial court erroneously prohibited. The prosecution sought to undermine Kalish's testimony by asserting that Kalish had not had extensive contact with Appellant. The inability of Appellant's counsel to support Kalish's testimony with expert evidence of Appellant's long-standing problems influenced the deliberations toward a verdict of

competence. Accordingly, reversal is required.

Respondent argues that the evidence was irrelevant because Dr. Javaid and Dr. Ebert had treated Appellant in 1983-1984, three or more years before issues of Appellant's competence to stand trial arose in 1987. (RB 146-147.) However, three to four years is not so long, considering the degree of illness that Dr. Javaid and Dr. Ebert observed and described, Appellant's lengthy hospitalization and eventual Navy discharge related to that illness, and that the doctors opined that the illness would not have gotten better unless treated. Appellant was an adult during both of the relevant periods, and thus no developmental changes would have suggested that his condition in 1983-1984 was unrelated to his condition in 1987. Moreover, the evidence was uncontested at the competence trial that Appellant never cooperated in any sustained way with treatment for his mental symptoms and conditions.

All of these evidentiary errors were prejudicial to Appellant, whether considered under the *Chapman* or the *Watson* standard. It cannot be said beyond a reasonable doubt that they did not affect the competence verdict, and there is a reasonable probability that the outcome would have been different without the errors.

d. The Appropriate Remedy for the Errors in the Competence Trial Is Reversal of the Competence, Guilt, and Penalty Verdicts Rather than a Conditional Remand with Instructions for the Trial Court to Consider Holding a Retrospective Competence Hearing

Respondent argues that if there were errors as Appellant asserts and they were not harmless, the appropriate remedy is a remand for a retrospective competence hearing. (RB 87-88, citing *People v. Ary* (2011) 51 Cal.4th 510, 520; *People v. Lightsey, supra*, 54 Cal.4th at pp. 691-692,

702, 706-707; *People v. Robinson* (2007) 141 Cal.App.4th 606, 618.)

The AOB shows that although *Lightsey, supra*, 54 Cal.4th at pp. 691-692 and *People v. Ary, supra*, 51 Cal.4th at p. 520, do provide authority for a limited remand in some cases, this is not such a case. (AOB 130-139.) Respondent counters that a retrospective competence hearing would be the best remedy, and since it "might be feasible" this court should remand for such a hearing notwithstanding the passage of time. (RB 87-88.) It is the prosecution who must establish that a retrospective competence hearing is feasible (*People v. Ary, supra*, 118 Cal.App.4th 1016, 1029), and in this case the Respondent's showing on that in the RB is nil.

Retrospective competency determinations are disfavored. In all of the leading United States Supreme Court precedents on the due process and constitutional protections related to the competency of criminal defendants to stand trial wherein reversible error was found, the entire judgement was vacated – in no instance was a retrospective competency determination ordered.

In *Pate v. Robinson, supra*, 383 U.S. 375, the United States Supreme Court cautioned against retrospective assessments of a defendant's competence to stand trial. The Court explained:

> Having determined that Robinson's constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial, we direct that the writ of habeas corpus must issue and Robinson be discharged, unless the State gives him a new trial within a reasonable time .... It has been pressed upon us that it would be sufficient for the state court to hold a limited hearing as to Robinson's mental competence at the time he was tried in 1959 .... But we have previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial. *Dusky v. United States*[, *supra*, 362 U.S. 402]. The jury would not be

> able to observe the subject of their inquiry, and expert witnesses would have to testify solely from information contained in the printed record. That Robinson's hearing would be held six years after the fact aggravates these difficulties.

(383 U.S. at p. 387.)

Similarly, in *Drope v. Missouri, supra*, 420 U.S. 162, 183, the United States Supreme Court held it would be inadequate to remand the case for a nunc pro tunc determination of whether the defendant had been competent to stand trial six years earlier. Instead, it reversed the judgment and authorized the state to retry the petitioner, so long as he would be competent at the time of the retrial. In *Cooper v. Oklahoma, supra*, 517 U.S. 348, 369, the Court again reversed the entire judgment after finding a due process violation with respect to a competence trial, rather than directing lower courts to conduct a retrospective competency hearing.

Indeed, as noted in *Lightsey*, the federal Ninth Circuit Court of Appeal has held that retroactive competence hearings may be permissible in habeas proceedings, but are *not* an adequate remedy for courts proceeding on direct appeal. (*Lightsey, supra*, 54 Cal.4th at p. 1101, fn. 16 ["We noted, however, the Ninth Circuit evidently accepts the permissibility of conducting retrospective competency hearings for *Pate* error only in habeas corpus and other collateral proceedings, while it applies a rule of automatic full reversal in direct criminal appeals. [Citations.]"].)

It is "a rare case in which a meaningful retrospective competence determination will be possible." (*People v. Ary, supra*, 118 Cal.App.4th at p. 1028.) The factors relevant to determining the feasibility of a postjudgment hearing on a defendant's mental competence when tried are: "(1) the passage of time, (2) the availability of contemporaneous medical

evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with [the] defendant before and during trial." (*Lightsey, supra*, 51 Cal.4th at p. 520, fn. 3.)

Here, an extremely long time has passed since Appellant's competence trial. Regarding the present availability of individuals, trial witnesses, court personnel, and experts who were "in a position to interact with [the] defendant before and during trial," it is unlikely that many such people will be available nearly three decades after the fact, and if they are, the memories of many are sure to have faded. Contemporaneous medical evidence might be available, but as shown by the competence trial in 1987 much of that evidence was from Appellant's mental illness in 1983-1984 that led to his Naval discharge, and the medical evidence in the section 1368 proceeding was in conflict and did not provide a clear picture on the issue of Appellant's competence. As to the fourth factor, statements by Appellant in the trial record, as shown in the AOB Argument section XIV, from the beginning of jury selection through the penalty phase and even during post-trial proceedings, showed his sustained and continuing inability to assist counsel or present a defense in a rational manner. (AOB 554-627.) Respondent does nothing to analyze any of the material related to these four factors in the RB, but Appellant explicates them further below.

The competence trial in this case took place in August and September of 1987, nearly 28 years ago as of the time of the filing of this brief. The guilt and penalty trials took place four years later, from July - December of 1991, nearly 24 years before the filing of this brief. More months or years will pass before this court issues a decision on the appeal.

This Court would be hard-pressed to find a case where a retrospective competence hearing was found to be feasible and constitutionally adequate, after a length of delay approaching anything close to that in this case. (*Cf. Lightsey*, 54 Cal.4th at 684 [delay of 18 years between the time of the challenged competence proceeding and date of reversal on appeal, 54 Cal.4th at 684]; *Pate*, [competence hearing in 1959, United States Supreme Court reversal in 1966]; *Drope* [reversal in 1975, on issue concerning the petitioner's competency in 1969]; *People v. Kaplan* (2007) 149 Cal.App.4th 372, 388-389 [reversal in 2007, on issue concerning the Appellant's competence in 1999 and 2003]; *People v. Murdoch* (2011) 194 Cal.App.4th 230, 239 [reversal in 2011, concerning a competency determination in 2009].)

The most recent medical evidence regarding Appellant's mental state is from 1988, when Dr. Kalish testified for the second time before Judge Zumwalt. However, as argued by the prosecutor during Appellant's competence trial, that evidence was not completely probative because Appellant did not cooperate with the psychological examination when Kalish met with him in 1987. The other medically trained witnesses who testified at the competence proceedings also had not been able to conduct full examinations due to Appellant's refusal to answer their questions. Thus, the most fully developed evidence in the record regarding Appellant's mental state, based on full examination and observation over a course of treatment, is from Doctors Javaid and Ebert, Naval professionals who had examined, tested, and treated Appellant in 1983, before Appellant was medically discharged from service in 1984.

Judge Edwards took steps to obtain medical opinion regarding Appellant's competence to represent himself in 1990, but the Court of

Appeal reversed that ruling in an order that chilled any further efforts by judges in the trial courts to probe the issue. Judge Gill stated repeatedly during trial in 1991 that Appellant was behaving irrationally, but he took no steps to obtain the opinion of medically trained professionals on the subject. "Clearly 'the difficulties of retrospective determination in *Dusky* are compounded (when there has been) no mental examination.'" (*United States v. Taylor* (4th Cir. 1971) 437 F.2d 371, quoting *Holloway v. United States* (1964) 119 U.S.App.D.C. 396, 343 F.2d 265, 267. Here, there was no examination for capacity to participate in the trial that resulted in Appellant's conviction and sentence, in 1991, and most of the examinations conducted in 1987 were not completely probative because Appellant did not answer questions. Thus there is not much in the way of sufficient, contemporaneously-made medical records upon which a nunc pro tunc determination could be based. Furthermore, there have been tremendous changes in the disciplines of psychology and psychiatry since 1983 – at that time professionals rested their expertise on the Diagnostic and Statistical Manual of Mental Disorders (DSM) III (published in 1980), but new editions of the DSM, reflecting new understanding of the discipline, were published in 1987 (DSM-III-R), 1994 (DSM-IV), and 2013 (DSM-V).

As stated in *Lightsey*, the determinative issue is "*whether a fair and reliable retrospective competency proceeding can be conducted.*" (*Lightsey, supra*, 54 Cal.4th at p. 710, emphasis added.) The Court reasoned: "[I]f placing defendant in a position comparable to the one he would have been in had the violation not occurred is possible, and a finding is made that he did not bear his burden to prove he was incompetent to stand trial, *we would then have no reason to question the fundamental fairness and reliability of the remainder of the judgment against him.*" (*Id.*

at p. 707, emphasis added.) Here, in contrast, there is every reason to question the fundamental fairness and reliability of the guilt and sentencing judgment against Appellant, because they rested on an irrational defense pursued by a defendant representing himself and stripped of the Sixth Amendment protections of effective representation. The facts of and circumstances of this case make it especially unfeasible to determine whether Appellant was competent when tried by way of a "retrospective" hearing. A backward-looking hearing will not provide Appellant "a *fair opportunity* to prove incompetence," but rather this is a situation where "merely ... some evidence exists by which the trier of fact might reach a decision on the subject." (*Lightsey*, 54 Cal.4th 668, 710 [emphasis in original].)

This case is unlike *Lightsey* in many ways. First, the lapse of time in this case is extreme – 28 years as of the time this Reply Brief is filed, whereas that in *Lightsey*, although also lengthy, was 18 years.

Second, the defendant in *Lightsey* received two full competence trials, during the first of which he was represented by counsel (Mr. Brown), whose performance was found constitutionally adequate in a full *Marsden* hearing leading to denial of substitution. Here, Appellant received only one competence trial, during which he was represented by counsel unqualified to represent a capital client without the assistance of lead counsel, and who further was stymied by the court's erroneous rulings. During the competence trial Appellant was constructively denied counsel because of the unheard *Marsden* motion and the significance of issues concerning representation, self-representation, and control of the case. On the subsequent competence writ, Appellant was unrepresented from the time that Russell was removed in January of 1988. Appellant was unrepresented

when *Faretta* status was granted in November of 1989, and throughout the chain of events that led up to the Court of Appeal's dismissal of the competence writ in 1990. As dictated in *Lightsey*, it is structural error for an Appellant to be unrepresented during competence proceedings – and in this case the competence proceedings were not final until 1990, and Appellant was constructively unrepresented for much of that time and literally unrepresented for the remainder.

Third, in *Lightsey* the opinions expressed by the trial court consistently reflected a view that the defendant was competent. In this case, there was no consistency of judicial observation to begin with (where there were 23 different judges assigned in the course of the case, see section F, *post*), and the record shows a disparity of views among judicial officers concerning Appellant's competence to stand trial and to represent himself. In *Lightsey*, the trial court consistently stated its view that the defendant was competent, although it granted two defense counsel motions for competence proceedings. Here, in contrast, Judge Zumwalt declared a doubt regarding Appellant's competency to stand trial.

In *Lightsey*, after the verdicts of competency the trial court stated that it was "fully convinced" of the defendant's mental capacity, and that the court did not have "any doubt" as to the defendant's competency to stand trial. (*Lightsey, supra*, 54Cal.4th at pp. 689-690 ["The trial court again expressed its view that defendant was voluntarily choosing not to cooperate with counsel and merely had a bad 'attitude.' The court declared, 'There is no doubt in this Court's mind as to the competence of [defendant], none whatsoever.'"].)

Here, in contrast, although Judge Zumwalt found in the spring of 1988 that Appellant was voluntarily choosing not to cooperate with Russell,

the Court of Appeal rejected that finding and held that this was not a case where the question of counsel's effective assistance was determined by the uncooperativeness of the defendant. Judge Boyle granted Appellant's *Faretta* status but only after complying with Appellant's demands not to review the record; ten months later, Judge Edwards voiced concerns that Appellant's mental state was deficient and appointed new psychiatrists to examine him. The Court of Appeal reversed that order and effectively preempted any trial court judge from thereafter calling Appellant's competence into question, but thereafter Judge Gill stated repeatedly that Appellant was pursuing an "irrational" defense. (AOB 533-627.)

Fourth, in *Lightsey* this Court reversed the competence verdict because the Appellant was unrepresented therein, but the case involved no other flaws in the competence trial indicating that the competence verdict was unsound. Here, in contrast, the competency trial was riddled through with defect as explained in the AOB (75-290, 466-473) and herein. The competency verdict was called into doubt when this Court granted review and ordered the issuance of an alternative writ (62CT 13989), and yet the Court of Appeal dismissed the alternative writ as moot and never heard or resolved the issue. (62CT 13783.) There is no similar trial and appellate history in *Lightsey* to undermine the competence verdict in any way.

Fifth, the soundness of the guilt and penalty trial themselves in this case is subject to scrutiny because Appellant represented himself in both of those proceedings. In *Lightsey*, in contrast, the defendant was represented by counsel in the guilt and penalty trials and his due process and fair trial rights were protected thereby. There was the potential that a retrospective competence proceeding could efficiently resolve the question at hand without disturbing the judgments that could be assumed to have been fairly

won. The situation is very different here, where the defendant's self-representation in the guilt trial on a Cointelpro theory, and in the penalty trial where nothing about mental state as possible mitigation was presented, make it far less likely that the trials comported with fairness, reliability, and due process standards under the federal constitution.

Sixth, this appeal and the claims it presents involve questions concerning Appellant's competence during several extended time periods. Was Appellant competent in the fall of 1987 during the competence trial? Was he competent during proceedings before Judge Boyle that led to the grant of *Faretta* status in November of 1989, and the dismissal by the Court of Appeal of the competence writ as moot in 1990, over Appellant's own objection? Was he competent in the fall of 1990 when the Court of Appeal granted his pro se writ and reversed Judge Edwards' order for further mental capacity examinations? Was he competent in early 1991 during proceedings concerning advisory counsel, funding strategy, and control of the defense? Was he competent during the six-month guilt and penalty trials? This case is unlike *Lightsey*, where the defendant was unrepresented during the competence trial but had the assistance of two lawyers thereafter, during the period in which the defense was prepared and the case was tried. Doubts concerning Appellant's competence to represent himself (as argued in section XX of the AOB, 804-824), as well as his competence to stand trial undermine the feasibility, fairness, and reliability of any limited remand. Because the competence question is relevant to so many of the issues raised in this appeal, the circumstances of this case make it eminently unlikely that a retrospective competence hearing could be feasible, reliable, and fair. In the *Lightsey* decision, in contrast, there is nothing suggesting that the competence question was integral to more than one significant issue

in the appeal.

For all of these reasons, is would be inappropriate for this Court to grant a conditional remand for consideration of holding a retrospective hearing to determine whether Appellant was competent when tried. Rather, the fundamental and egregious flaws in the competence proceedings followed by Appellant's self-representation leading up to, during, and after trial and the events during the trial itself render this a case where the entire judgment is cast into grave doubt, requiring reversal of the competence, guilt, and penalty verdicts.

* * * * *

SECTION B

ALLOWING APPELLANT TO REPRESENT HIMSELF

Argument sections VII-IX of the AOB address the grant of *Faretta* status, which led to Appellant's self-representation throughout pretrial proceedings, the guilt and penalty trials, and post-trial proceedings. Argument section VII shows the trial court violated Appellant's federal constitutional rights to due process, counsel, and a fair trial by revisiting the *Faretta* motion Judge Zumwalt denied in March of 1988, and by doing so without appointing new counsel to replace Russell and Khoury, who were removed. (AOB 291-371.) Respondent addresses these AOB sections at RB 151-174.[9] Argument section VIII shows Appellant did not make an unequivocal request for self-representation status that would include foregoing the assistance of counsel, and did not enter a knowing, intelligent, and voluntary waiver of his right to counsel. (AOB 372-403.) Respondent counters this at RB 175-188. Argument section IX proves Judge Boyle erred in taking up the *Faretta* motion without reviewing the entire file, while Appellant's competence to stand trial remained unresolved, and by ignoring the vast record showing Appellant's mental condition was in question, as relevant to his waiving counsel and representing himself. (AOB 404-445.) Respondent's rebuttal is found at RB 189-197.

Appellant's Reply will address the errors related to Judge Boyle's granting Appellant leave to represent himself in the following sequence:

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[9] This section also shows that there is no legal authority for a trial court to grant *Faretta* status to Appellant as "lead attorney" with the full assistance of appointed "co-counsel" or "second chair" counsel. (Argument section VII.C, AOB 364-368.) In this Reply, Appellant discusses this point as part of the analysis of Argument section VIII of the AOB, in section B.III, *post*. Respondent speaks to this issue at RB 173-175.

B.I, Boyle's grant of *Faretta* status was error because it was a critical proceeding in the criminal trial during which Appellant was unrepresented; B.II, if Appellant's motion to Judge Boyle was a straightforward request for self-representation, Judge Zumwalt already resolved that matter and the standards were not met for reconsideration of that ruling; B.III, if the motion before Judge Boyle was something new – a request for hybrid status with Appellant serving as lead counsel with the full assistance of second-chair counsel under the rubric of *Keenan v. Superior Court* (1982) 31 Cal.3d 424 as applicable to a capital case – then Boyle erred in granting it because he lacked legal authority to do so; B.IV, given the confusion over what it was that Appellant actually sought from the court, his request for self-representation was not unequivocal and he did not enter a knowing, intelligent, and voluntary waiver of his right to counsel; B.V, Boyle erred by failing to review the file and address the mental status issues it revealed, as part of his responsibilities before allowing defendant leave to represent himself.

I. Boyle's Grant of *Faretta* Status to Appellant Was Error Because the Proceedings Leading up to and Culminating in the November 3, 1989, Hearing Were a Critical Stage of Proceedings During Which Appellant's Right to Counsel Under the Sixth Amendment was Abridged

Appellant proves in the AOB at 368-371 that the hearings before Judges Revak and Boyle leading up to the grant of *Faretta* status, and the November 3, 1989, *Faretta* hearing were a critical stage of the criminal proceedings, and the trial court violated Appellant's right to counsel under the Sixth Amendment of the United States Constitution by failing to replace Russell or Khoury with another attorney serving as general counsel for all purposes during that time frame.

As Respondent concurs, a criminal defendant is entitled to the assistance of counsel at all critical stages of the proceedings. (U.S. Const., Sixth Amend.; Cal. Const., art. I, § 15; Pen. Code, §§ 686, 859 & 987; *Gideon v. Wainwright, supra*, 372 U.S. at pp. 344-345.) A denial of the right to effective assistance of counsel at a critical stage of the criminal trial requires per se reversal of a defendant's conviction. (*United States v. Cronic, supra*, 466 U.S. at pp. 658-659.)

A review of the record clearly shows that when Boyle granted Appellant leave to represent himself on November 3, 1989, Appellant was lacking in Sixth Amendment representation of appointed counsel in both the trial court and in pending proceedings on review of the competence trial verdict. After the September 1987 verdict that Appellant was competent to stand trial, on January 19, 1988, Russell as counsel for Appellant filed a petition for mandate and request for stay in the Court of Appeal, Case No. D007429. (56CT 11918-11996.) The Court of Appeal denied the petition on February 24 (62CT 1206), but on March 15, Russell filed a Petition for Review and a Request for Stay of Proceedings in this Court, Case No. S004854, from the denial of the petition for writ of mandate in Court of Appeal Case No. D007429. (55CT 11675-11699.) On May 19, this Court granted review and ordered the Court of Appeal 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 requiring the Superior Court to "grant the relief prayed for or to show cause why such relief should not be granted." (7CT 1399.) The prosecution filed an answer on July 8 (56CT 11998-12083) and defense counsel filed a reply (55CT 11802-11894), but no proceeding was ordered on calendar.

Meanwhile, Appellant's requests for self-representation and to relieve counsel, pending since spring of 1987, moved forward before Judge Zumwalt at a hearing commenced on February 25, 1988. (36ART 2-6, 14.) On March 8, 1988, Judge Zumwalt stated that proceedings on the "*Marsden*/motion to dismiss attorney" had been completed and her ruling was pending, with Appellant objecting that he had withdrawn his request for a *Marsden* hearing. (43ART 250-252.) Zumwalt then conducted a *Faretta* hearing (41ART 68-171; 43ART 306-380; 44ART 386-420; 45ART 424-510.), and on March 16, Judge Zumwalt entered a written Memorandum of Decision on both the motion to dismiss counsel and for self representation, denying both. (8CT 1572-1577.)

On March 25, 1988, Russell moved to be relieved on the ground that Appellant had a mental disorder that prevented him from cooperating with counsel, which made it impossible for her to prepare for trial. (8CT 1583.) Judge Zumwalt denied the motion on March 30. (48ART 530-534; 8CT 1602-1604.) Russell filed a petition for writ of mandate seeking review of the decision, Court of Appeal Case No. D007850. (72CT 15509-15540.) The prosecution also filed a petition for writ of mandate, Court of Appeal Case No. D007873, seeking review of Judge Zumwalt's decision denying Appellant's *Marsden* and *Faretta* motions. (45CT 9867-9912.) Appellant, pro se, also filed a petition for review on May 9. (62CT 13991-13992, referring to pro se petition (which is missing from the record).) On May 26, the Court of Appeal issued an order to show cause in Case Nos. D007850 and D007873. (9CT 1773.)

On August 12, 1988, the Court of Appeal heard argument in consolidated proceedings in Case Nos. D007850 and D007873, while keeping the competence writ off calendar (Case No. D007429) over

Russell's objections and insistence that it should be resolved first. (72CT 15673, 15683, 13792-13800.) On August 19, 1988, Russell filed a supplemental letter brief in Case No. D007429, urging that the competence writ was required to be resolved before the issue of Appellant's self-representation was reached. (62CT 13816.)

On September 12, 1988, the Court of Appeal denied relief with respect to Zumwalt's *Marsden* and *Faretta* rulings (Case No. D007873), and granted relief in Case No. D007850, ordering that Russell be removed as counsel and replaced, in both the trial court and on the pending competence writ. (10CT 1020-1024, 10CT 1926-1931.) On December 23, the Court of Appeal issued its remittitur in Case Nos. D007850 and D007873. (45CT 9914.)

On January 17, 1989, Judge Exharos removed Russell as counsel and transferred the case to the presiding judge for appointment of new counsel. (60ART 14-15.) The case instead went to Judge McConnell, who continued the question of appointing counsel three days hence for consideration by Judge Wagner. (61ART 1-3.) On January 20, Judge Wagner continued the matter three days so that John Cotsirilos, a candidate for appointment as counsel, could be present and accept appointment. (62ART 3-4.) On January 27, the parties appeared back before Judge Wagner and Mr. Cotsirilos, who was present, declared a conflict and was not appointed. (62ART 6-7.) The court stated it was "in a quandary," and that a further continuance would be required so it could find a lawyer to appoint to represent Appellant. (*Id.* at 7.) Attorney Alan Bloom also was present, and stated his appearance "perhaps as a special appearance for Mr. Waldon," and said that he had talked to Sanchez and Waldon about the situation. (*Ibid.*) Bloom urged the court to skip appointing counsel and

instead appoint Bloom himself for the "limited purpose" of helping Appellant seek self-representation. (62ART 8-9.) Judge Wagner cut off Bloom's further comments, heard the prosecutor's statement that he was against Bloom's suggestion, and denied the motion, stating the view that Appellant needed "an attorney appointed for all purposes." (62ART 10.) Judge Wagner offered to appoint Bloom in that capacity, but Bloom refused. (62ART 10.) The court put the matter over to January 31, for the appointment of counsel. (62ART 10-11.)

On January 31, the parties came before Judge Revak. (64ART 1.) Mr. Edwards, a prospective appointee as counsel, was present and declined the appointment. (*Id.* at 2.) Judge Revak put the case over to the next day to see if the conflicts panel could locate a qualified attorney available for appointment. (*Id.* at 3.) The case came back before Judge Revak on February 2, with the parties present along with attorneys Sanchez, Bloom, and Mark Wolf. (64ART 9.) At the urging of Bloom and Sanchez and over the objection of the prosecution, Judge Revak appointed Sanchez and Bloom to represent Appellant on the *Faretta* motion only, and ordered that Wolf would assume the status of general counsel potentially in the future, if *Faretta* status were denied. (64ART 9-11, 13, 15-19.) The judge rejected the argument that he should deal with the section 1368 question first, stating that he first would 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.)

The prosecutor had charged the criminal case as a consolidated proceeding bearing two case numbers, San Diego Superior Court Nos. CR82985 and CR82986. On June 5, Appellant (through Bloom) filed two separate documents, one marked No. CR82985 seeking two remedies, (1)

the appointment of an attorney to represent Appellant, who would obey him; and, if the first remedy were denied, (2) a grant of pro se status with the appointment of advisory counsel to assist Appellant. (11CT 2344-2359.) The second document, marked No. CR82986 (the capital case), also sought two remedies: (1) the appointment of two attorneys to represent Appellant, both of whom would be required to obey him; and, if that were denied (2) permission for Appellant to act as his own "lead counsel," together with the appointment of "second counsel" to work under Appellant's direction. (12CT 2492-2501.) This motion also included an "Acknowledge[ment] and Waiver" similar to a *Lopez* waiver in some respects but not others. (*Id.* at 2502-2506.)

On June 22, 1989, the parties appeared before Judge Perry Langford for hearing on Appellant's June 5 motions regarding representation. (See 78ART 5.) Charles Khoury also appeared, and reminded Judge Langford that this Court had granted review on the issues presented in the competence writ, and had 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," but the issue never had been resolved. (78ART 10.) Judge Langford opined that the removal of Russell as lead counsel would seem to implicitly terminate the appointment of Khoury as Russell's second counsel, and Khoury clarified that he was appearing as amicus to inform the court of problems arising from the history of the case. (78ART 9-11, 43-45.) Langford denied Appellant's motion to have one attorney appointed on the non-capital charges, and two attorneys appointed on the capital charges, which attorneys would be required to obey Appellant. (78ART 26-35.) Langford did not resolve the second part of Appellant's motions, viz., to be granted self-representation status with the appointment

of advisory counsel in the non-capital case, and granted "lead counsel" status with second counsel to work under him in the capital case.

On June 26, 1989, Judge Greer assigned the entire case to Judge Boyle. (79A-2RT 1.) Bloom explained to Boyle that he was assigned for the limited purpose of assisting Appellant with the *Faretta* motion. (79A-3RT 3.) Bloom said Judge Langford already had ruled on the first part of each motion, with the second part of each still pending. (*Ibid.*) Boyle asked Bloom if there were anything pending from the section 1368 proceedings, and Bloom said "[i]t is very remotely pending. It is not pending in this Court and may be pending in some sorts of writs." (79ART 5.) Boyle said "that bridge will be crossed after we decide the lawyer issue," directed Bloom to submit witness affidavits in support of the second part of Appellant's motions, and confirmed that the motions were on calendar for hearing on July 21. (*Id.* at 5, 7.)

At status hearings on July 14 and 21, 1989, Judge Boyle gave further thought to the roles and duties of Bloom and Sanchez in the context of considering whether they would receive discovery from the prosecutor and whether Russell could and should hand off the defense case file to them. (80ART 20-21, 81ART 25-37.) After ruminating on the issue and saying that Sanchez and Bloom were like "general counsel for a limited purpose," i.e., Appellant's motion to represent himself (81ART 29), Boyle ruled that Bloom could receive discovery from the prosecutor, but that he would not at that time order Russell to turn her case file over to Bloom, Sanchez, or Appellant. (81ART 36-37.) Bloom conceded that he would not need the case file in order to prepare the pro per issue within the scope of his limited assignment. (*Id.* at 37.)

In an appearance on August 18, Judge Boyle reiterated that before him were "limited proceedings where attorneys are here representing the defendant fully but for a limited purpose," that is to "help the Court" and the defendant determine whether the Appellant should be allowed to proceed without counsel. (82ART 50.)

Thus, there is no question whatsoever in the record that Russell and Khoury were both removed from any position as appointed counsel, and were barred from representing Appellant in either the competence writ, or the trial court through Judge Boyle's grant of *Faretta* status to Appellant on November 3, 1989.

Respondent argues at RB 163-168 that there was no deprivation of counsel with respect to the *Faretta* motion and hearing because Appellant was represented by Attorney Bloom as counsel. However, as the preceding chronology shows, Bloom was not appointed to take on the duties of defense counsel under the Sixth Amendment, foremost of which is to assure that the defendant receive due process and a fair and reliable guilt and penalty trial. Bloom never undertook to assist Appellant in his *defense* to the charges and special circumstance allegations – which is the paramount role of appointed counsel. (*Cronic, supra*, 466 U.S. 648, 654; *United States v. Ash, supra*, 413 U.S. 300, 309.) Rather, Bloom's objective was to do Appellant's bidding and to help him win the *Faretta* motion at all costs – whether or not Appellant's mental condition would impair him from entering a waiver of counsel that was knowing, intelligent, and voluntary.

By hearing the *Faretta* question before replacing counsel, Judge Boyle sacrificed Appellant's right to counsel by giving it *lesser* protection than his rights under *Faretta*. However, this Court made clear in *People v. Marshall* that the separate constitutional rights, of effective representation

by counsel and of self representation, are mutually exclusive and the right to counsel is afforded a higher level of protection. (*Marshall, supra*, 15 Cal.4th 1, 20.) "The right to counsel is self-executing ... [and it] persists unless the defendant affirmatively waives that right. (*Ibid.*, citing *Johnson v. Zerbst* (1938) 304 U.S. 458, 464-465.) Courts must indulge every reasonable inference against waiver of the right to counsel. (*Ibid.*, citing *Brewer v. Williams* (1977) 430 U.S. 387, 404.) The right to self-representation is not self-executing and has not been granted "the same kind of protection" by the high court. (*Marshall, supra*, 15 Cal.4th 1, 21.)

The right to counsel is paramount over the right to self-representation because the right to counsel "secures the protection of many other constitutional rights as well." (*Marshall, supra*, 15 Cal.4th 1, 23, citing *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 889 and other cases.) Yet, here the trial court subjugated appellant's right to counsel to his *Faretta* rights, by hearing and granting the latter motion without first appointing counsel to replace Russell and Khoury.

A critical stage for purposes of the right to counsel is one "in which the substantial rights of a defendant are at stake" (*People v. Crayton* (2002) 28 Cal.4th 346, 362, citing *Mempa v. Rhay* (1967) 389 U.S. 128, 134), and "the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial." (*United States v. Wade* (1967) 388 U.S. 218, 227.) The *Faretta* proceeding was a "critical stage" of the criminal case because it is one "in which the substantial rights of a defendant [were] at stake" (*People v. Crayton, supra*, 28 Cal.4th at p. 362) – viz., Appellant's right to counsel and his right to a fair trial. The "presence of [Appellant's] counsel" was necessary at the *Faretta* hearing in order to preserve his "basic right to a fair trial" (*United States v. Wade, supra,* 388 U.S. 218, 227), because an

appointed attorney would have ensured that Appellant's *Faretta* invocation was unequivocal and his waiver of counsel was knowing, intelligent, and voluntary. Respondent does not contest that this was a critical stage of proceedings under *Cronic*.

Instead, Respondent argues that the claim is forfeited on appeal because Appellant requested the trial court to proceed as it did and acquiesced in both the counsel appointed and process used to appoint him. (RB 168.) Respondent cites to *People v. Alexander* (2010) 49 Cal.4th 846, 871, for the rule that the trial court should consider the "defendant's preference for" and "trust and confidence in" an individual attorney in determining whether to appoint him. (RB 164.) Respondent argues there was no error because the trial court followed the procedure requested and approved by both Bloom and Appellant. (RB 168.)

The forfeiture argument fails for a very simple reason: "The right to representation by counsel persists until a defendant affirmatively waives it, and courts indulge every reasonable inference against such waiver." (*People v. Dunkle, supra*, 36 Cal.4th 861, 908.) Appellant never entered a knowing, intelligent, and voluntary waiver of his right to counsel during the critical proceedings comprised of the *Faretta* motion, proceedings, and hearing. The record is crystal clear that Appellant's waiver of his right to counsel took place *after* Judge Boyle said on November 3, 1989, that he would be granting the motion. Respondent cites *People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1408, *People v. Williams* (2008) 43 Cal.4th 584, 629, and *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49 (RB 168) in urging this Court to apply the forfeiture rule. (RB 168.) However, all three of these cases present straightforward issues of forfeiture by appellants who were represented by counsel who asked the trial court to do

as it did. They offer no precedent here.

Moreover, it violates the due process and fairness principles stated by this Court in *Samuel*, *supra*, 29 Cal.3d 489, and by the Supreme Court in *Pate, supra*, 383 U.S. 375, to allow a defendant as to whom a doubt of competence has been declared, and for whom no effective and meaningful process for determining competence has been carried out, to make his own decisions instead of having Sixth Amendment counsel act on his behalf. In this case, the efficacy of the competence trial to establish Appellant's competence was destroyed by the many defects related in section A, *ante*. Appellant's competence at that time was called even further into question by this Court's grant of review on the competence writ and the Court of Appeal's issuance of the alternative writ. The alternative writ remained unresolved when Judge Boyle granted *Faretta* status in November of 1989, and later was erroneously dismissed (as discussed in section C.I, *post*).

Respondent concedes that the deprivation of counsel to a defendant during critical proceedings in a criminal trial is structural error (RB 164), and that is what occurred in this case. Due to Judge Revak's determination to take up the *Faretta* motion before replacing counsel, the submission of moving papers on behalf of Appellant, and the November 3, 1989, *Faretta* hearing and entry of a waiver of counsel were all critical proceedings, and Appellant did not have counsel appointed for his defense during them. Therefore reversal of the competence, guilt, and penalty verdicts is required.

II. The Trial Court Erred in Reconsidering Appellant's *Faretta* Motion Because There was no Change in Circumstances

In Argument section VII.B, Appellant shows the trial court erred in reconsidering the *Faretta* motion because there was no material change in

circumstances following Judge Zumwalt's denial of the motion. (AOB 351-364.) Respondent counters that the removal of Russell as lead counsel constituted changed circumstances warranting the renewal and reconsideration of the *Faretta* motion, that reconsideration was proper in light of the Court of Appeal's orders disposing of various writ petitions, and that this claim is forfeited because Appellant insisted on a rehearing on his *Faretta* request and got what he wanted. (RB 157-163.)

Judge Zumwalt commenced a *Faretta* hearing on February 25, 1988, focusing on the question of whether Appellant was able to enter a knowing, intelligent, and voluntary waiver of counsel. (36ART 2-6, 14.) Dr. Kalish testified on the *Faretta* issue on March 1. (41ART 115-171.) Zumwalt then turned her focus to Appellant's motion for *Marsden* relief and/or to have Russell relieved as counsel, in hearings on March 2 and March 8, concluding on the latter date. (41ART 189-205, 42ART 207-241, 43ART 250-252.) *Faretta* proceedings then resumed, and Appellant questioned five of his friends/personal acquaintances as witnesses who testified that they knew Appellant through the Esperanto language movement and had found him to be competent in their dealings with him. (43ART 306-312, 314-380.)

The *Faretta* hearing continued on March 10, and attorney Russell called as a witness Dr. Koshkarian, who said he had been retained by defense counsel in the spring of 1987 and had met with Appellant. (44ART 386, 395.) Koshkarian testified that he was not convinced Appellant adequately could prepare a defense in the case if pro per, and that he believed Appellant was not capable of waiving his right to counsel "on the basis of an intelligent or knowing or eyes wide open or fully understanding the implications." (44ART 397-402.) Koshkarian opined that Appellant

possibly had the intellectual capacity to understand potential psychiatric defenses, but that he could not present them because his judgment on that subject was too impaired. (44ART 409-411.) Koshkarian did not think that Appellant could make a rational decision about the possibility of presenting psychiatric evidence in either the guilt or the penalty trials. (44ART 412.)

The hearing on the *Faretta* motion continued on March 15, with Russell calling as a witness Dr. Di Francesca, a psychologist who had interviewed Appellant and administered a battery of tests in 1987. (45ART 424.) Di Francesca opined that Appellant was not competent to waive his right to counsel with "eyes wide open, understanding the full ramification of what [he was] doing," nor was he competent to represent himself at trial because he was unable "to think clearly" on his case and, due to anxiety, was "unable to concentrate on anything that got even close to discussing the cases at hand." (45ART 430, 435-436.) Di Francesca said that when she had discussed with Appellant the issue of self-representation, he always seemed to express an intention of having "co-counsel," rather than going completely "pro per" in the case. (45ART 438.)

Judge Zumwalt concluded the sealed hearing and heard argument from counsel on the *Faretta* issue. (45ART 460-494.) The court discussed the contents of Appellant's written motion with him on the record, but did not put him under oath because it was not taking a "waiver" at that time. (*Id.* at 473.) Zumwalt asked, "do you understand by representing yourself, you would, in all likelihood, make your conviction and punishment possibility much greater than if you had a lawyer?" (*Id.* at 480.) Appellant retorted, "your Honor, I believe that's a matter of opinion. I understand that's the court's opinion." (*Ibid.*) As to whether Appellant could, after proceeding pro se, "complain on appeal" that he had lacked effective

representation, Appellant insisted that he could raise the complaint on appeal although it would be rejected. (*Id.* at 481.) On affirmation, Appellant stated that he understood the charges against him and the potential penalties. (*Id.* at 485-486.)

Judge Zumwalt took the testimony of Appellant's advisory counsel Sanchez as Appellant's witness. Sanchez stated that he was able to communicate with Appellant very well, that Appellant had taken much advice Sanchez had offered, and that in years of practice having worked with nine to ten pro per defendants, Appellant was the most "mentally competent" of them. (45ART 495-497.) Sanchez opined that Appellant was capable of waiving counsel and representing himself. (*Id.* at 497-498.) In spite of Russell's arguments that doing so would undermine any potential psychiatric defense because the documents later could be used by the prosecutor, Appellant insisted on submitting documents for Zumwalt's consideration, including his resume showing his educational and work history. (*Id.* at 506-509.)

Judge Zumwalt denied the *Faretta* motion, noting that she had considered some of the testimony from the competence trial. Zumwalt found Appellant was "incapable of voluntarily exercising an informed waiver of his right to counsel." (8CT 1574.) She further noted that 'his request to ... represent himself only on certain conditions shows he does not rationally perceive his situation." (8CT 1574-1575.) Zumwalt found that Appellant suffered a mental disorder, illness, or deficiency that had "adversely affected his powers of reason, judgment, and communication" and "impaired his free will to such a degree" that his decision to request to represent himself was "not voluntary." (*Ibid.*) Zumwalt found that Appellant did not "realize the probable risks and consequences of his

actions," and that his request to waive counsel was not "an exercise of his informed free will" and he could not "formulate and present his defense with an appropriate awareness of all ramifications." (*Ibid.*) She also found that the lay witnesses called by Appellant were "not competent to give an opinion of his ability to waive counsel," and their testimony was deserving of very little weight. (*Ibid.*)

Russell filed a petition for writ of mandate, Court of Appeal Case No. D007850, challenging Zumwalt's denial of Russell's motion to be relieved and also requesting review of the *Marsden* and *Faretta* rulings "in the spirit of *People v. Wende*." (72CT 15509-15520.) The prosecutor filed a petition for writ of mandate, Court of Appeal Case No. D007873, seeking reversal of Zumwalt's denial of the *Marsden* and *Faretta* motions. (45CT 9867.) Appellant, acting pro se, also filed a petition for writ of mandate challenging the denial of the *Faretta* motion.[10]

The Court of Appeal resolved these challenges in its September 12, 1988, order on consolidated proceedings in Court of Appeal Case Nos. D007850 and D007873. (10CT 1920-1933.) It denied relief in Case No. D007873, noting that neither the prosecutor nor Appellant had assigned any specific error in the trial court's denial of the *Marsden* and *Faretta* motions. (10CT 1920.) It declined to conduct an independent review of the record under *People v. Wende*. (*Ibid.*) The Court of Appeal granted relief in Case No. D007850, ordering Russell's removal as counsel in the trial court

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[10]There is no copy of this filing in the record, however the record does contain a May 10, 1988, letter from Russell to the Court of Appeal asking that Appellant's May 9 pro se writ petition, Court of Appeal Case No. D008026, be sealed because Appellant's mental illness prevented him from understanding how damaging its contents could be to his criminal case. (62CT 13991-13992.)

because there had been a breakdown in the attorney-client relationship. (10CT 1926.) It rejected Russell's request to remain as counsel on the pending competence writ and her argument that it should resolve the competence writ before ruling on the issue of her continuing representation. (10CT 1931-1932.)

The Court of Appeal's order concluded:

> The superior court is further directed to appoint substitute lead counsel forthwith. Substitute counsel shall have thirty 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 *Waldon v. Superior Court* No. D007429 pending before this court. In all other respects, the petitions are denied.

(10CT 1933.)

On December 12, Appellant, with the assistance of advisory counsel Sanchez, filed a petition for writ of habeas corpus in the Court of Appeal, Case No. D009282, challenging Judge Zumwalt's denial of Appellant's motion for self-representation while emphasizing that Appellant sought "self-representation with the full assistance of counsel" and Zumwalt had never ruled upon that request. (52CT 11025.246, 11025.250.) On January 6, 1989, the Court of Appeal issued the following order on that petition:

> The petition for writ of habeas corpus has been read and considered by Justices Work, Benke and Froehlich. It appears the issues raised in this petition which are not moot by reason of the finality of our consolidated decision in *Waldon v. Superior Court*, D007850, and *People v. Superior Court*, D007873, filed September 12, 1988, may be presented to the superior court by new counsel appointed pursuant to our decision. The petition is denied.

(51CT 11025.235.)

On January 12, Appellant, again with Sanchez, filed a petition for a writ of mandate in the Court of Appeal, Case No. D009343. Therein, Appellant made even more explicit his position that he had filed a motion, which was preliminary to the *Faretta* motion, upon which Judge Zumwalt never ruled. (42CT 9516.) Appellant explained that he wanted to waive his right to counsel under *Faretta,* if and only if Zumwalt denied him leave to proceed in pro per with the full assistance of counsel who would "obey" him. (*Id.* at 9519-9520.) Thus, he argued, Zumwalt had erred by addressing Appellant's "*Faretta* motion to waive counsel," without first ruling on the motion to proceed pro per with obedient appointed counsel. (*Ibid.*)

As noted in section B.1, *ante*, Judge Revak in the trial court ruled on February 2, 1989, at the urging of attorney Alan Bloom, that the question of Appellant's request to represent himself would be revisited, and that this would occur before the court appointed counsel to replace Russell.

On February 12, 1989, the Court of Appeal wrote the following letter to Mr. Sanchez, sending copies to Appellant, Judge Zumwalt, Judge Malkus, Judge Greer, the prosecutor, and Mr. Khoury:

> Dear Mr. Sanchez:
>
> As advisory counsel you filed the referenced petition [D009343] for Mr. Waldon challenging the trial court's denial of his request to represent himself. It has come to the court's attention Mr. Waldon now has a second motion to represent himself pending in the trial court.
>
> This is to inform you this court intends to hold Mr. Waldon's petition in abeyance pending disposition of the motion in the trial court.

(42CT 9512.)

On May 31, Judge Kennedy set a hearing on the motion to proceed pro per for June 22 and June 23, with the understanding that Bloom would file Appellant's moving papers by June 5. (77ART 7-8.)

On June 5, Appellant (through Bloom) filed two separate documents, one marked No. CR82985 seeking two remedies, (1) the appointment of an attorney to represent Appellant, who would obey him; and, if the first remedy were denied, (2) a grant of pro se status with the appointment of advisory counsel to assist him. (11CT 2344-2359.) The second document, marked No. CR82986 (the capital case), also sought two remedies: (1) the appointment of two attorneys to represent Appellant, both of whom would be required to obey him; and, if that were denied (2) permission for Appellant to act as his own "lead counsel," together with the appointment of "second counsel" to work under Appellant's direction. (12CT 2492-2501.)

On June 19, the prosecutor filed points and authorities in response to Appellant's motions, arguing in favor of Appellant's right to represent himself in defending both the capital and non-capital charges against him (which, the prosecutor noted, comprised a single case). (11CT 2367-2387.) The prosecutor asserted that the court should obtain a *Lopez* waiver if it decided to grant Appellant's motion for self-representation, and should revisit the question of self-representation if a death penalty trial later became necessary. (11CT 2367-2387, citing *People v. Teron* (1979) 23 Cal.3d 103, 111, 115, fn. 7 (*Teron*).)

On June 22, the parties appeared before Judge Langford on Appellant's motions; the judge observed that the case was in a "terrible tangle." (78ART 14.) Langford addressed the initial request in each of the two motions, seeking the appointment of attorneys who would take their

direction from Appellant and be required to obey him. (*Id.* at 26.) Langford denied this request on the ground that the Sixth Amendment does not entitle a criminal defendant to an attorney who would give the defendant the power to control decisions in the case (apart from exercising the fundamental rights reserved to defendants in their personal capacity under the case law, viz., the right to testify, to plead, to waive time, to confront accusers, and to have a defense supported by credible evidence presented if it his sole defense in the guilt phase of a capital trial.) (*Id.* at 26-35.) Turning to the second request in each of the written motions (viz., to permit Appellant to represent himself, assisted by advisory counsel in the non-capital case and "second counsel" in the capital case), Bloom informed Langford that he needed to call up to 30 witnesses to support Appellant's position. (*Id.* at 38-40.) Langford said he preferred to take those witnesses' evidence by affidavit rather than oral testimony (*id.* at 41-42), and put the motion over to July 21, with Bloom to submit papers by July 14. (*Id.* at 46.)

After several continuances, on October 25, 1989, Bloom submitted a number of declarations in support of Appellant's motion for self-representation. Most of them were lay declarations; some were witness responses to a "questionnaire." (38CT 8230-8277.) All of the witnesses knew Appellant in relation to his activities as an Esperantist in Los Angeles, Europe and/or Asia. (*Ibid.*) Most of them said Appellant was "mentally capable of knowingly, intelligently, and voluntarily waiving the right to be represented by an attorney" and/or had "the present ability to understand or learn the mechanics of preparing a trial defense." (*Ibid.*)[11] None indicated

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[11] See: 38CT 8231-8232 [Declaration of Roland J. Glossop]; 38CT 8233-8234 [Declaration of Joseph H. Gamble]; 38CT 8235 [Declaration of Jack K. Lesh]; 38CT 8250 [Affidavit of William R. Harmon]; 38CT 8251-

that the witness had discussed with Appellant any possible defenses to the pending charges. (*Ibid.*) Several of the witnesses stated a view that the court was questioning Appellant's mental competence to represent himself *because* he was an Esperantist and/or a Native American. (*Id.* at 8260, 8263, 8270, 8275.)

Declarations also were submitted from psychiatrist Dr. Ernst Giraldi and psychologist Dr. Ricardo Weinstein. Giraldi opined that Appellant was "competent to waive his right to counsel with his eyes wide open and represent himself." (38CT 8237, 8243.) Weinstein opined that there was "no impediment in [Appellant's] psychological capacities to prevent him from representing himself." (*Id.* at 8244, 8249.) Both Giraldi and Weinstein said their conclusions were based solely on what Appellant told them, including Appellant's denial of being depressed, or of experiencing hallucinations or mental problems. (*Id.* at 8243, 8248 .) Dr. Giraldi did not review any documents and Appellant had refused to let him ask about anything that happened more than one year prior. (*Id.* at 8243.) Dr. Weinstein had made the evaluation "while limit[ing] the focus of the information that [Appellant] would make available," and "the information obtained was mainly on what ha[d] happened to [Appellant] in the past year." (*Id.* at 8248.) Weinstein declared that Appellant had refused to say why he was incarcerated. (*Id.* at 8248.) Both Dr. Giraldi and Dr. Weinstein referred to Appellant as "Stephen Midas," the name under which Appellant

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8253 [Declaration of Bernice Garrett]; 38CT 8254-8255 [Declaration of Douglas Robert Witscher]; 38CT 8256-8257 [Declaration of Bernice G. Acers]; 38CT 8258-8261 [Declaration of Derek Roff]; 38CT 8262-8263 [Questionnaire Response of Joel Brozovsky]; 38CT 8264-8267 [Affidavit of Kathy Carter-White]; 38CT 8268-8272 [Questionnaire Response of Max Brande]; 38CT 8276-8377 [Questionnaire Response of Beatrice Garrett].

had been arrested. (*Id.* at 8243, 8248.)

The power of one judge to vacate an order made by another judge is limited. (*Greene v. State Farm Fire & Casualty Co.* (1990) 224 Cal.App.3d 1583, 1588; *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 713.) The rule applies in a variety of settings, in both criminal and civil cases. (See *People v. Madrigal* (1995) 37 Cal.App.4th 791, 795-797 [ruling of second judge imposing a prison sentence after probation violation hearing is unlawful when first judge had earlier reinstated probation]; *Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 630-631 [second judge without power to vacate default judgment entered by first judge].) Although a trial court generally has the authority to correct its own prejudgment errors, the general rule does not apply when it comes to the reconsideration of an interim ruling by a different judge. (*In re Alberto* (2002) 102 Cal.App.4th 421, 426 427; see *People v. Konow* (2004) 32 Cal.4th 995, 1021 [affirming *Alberto* principle, but distinguishing case before it].) A contrary rule would "place the second judge in the role of a one-judge appellate court." (*In re Alberto*, *supra*, 102 Cal.App.4th 421, 427; *People v. Garcia* (2006) 147 Cal.App.4th 913, 917; *In re Kasaundra D.* (2004) 121 Cal.App.4th 533, 542.) "Once a designated trial court hears a matter, it should continue to hear it, including retrials, until final judgment is rendered .... [I]in the vast majority of cases ... a designated trial court should continue to hear the matter until final judgment is rendered." (*People v. Sons* (2008) 164 Cal.App.4th 90, 100, fn. 7.)

This case did not fall into any of the exceptions to the rule that a second judge should not reconsider another judge's ruling. (See *People v. Goodwillie, supra*, 147 Cal.App.4th 695, 713 [exceptions lie when an appellate court reverses and remands on the issue, and when the original ruling is shown to be the product of inadvertence, mistake, or fraud]; *In re*

Alberto, supra, 102 Cal.App.4th at p. 430.) In fact, Judge Zumwalt held an evidentiary hearing before denying Appellant's *Faretta* request, and thus the rule against reconsideration by a different judge was even more strongly in effect. (*People v. Clark* (1992) 3 Cal.4th 41, 119 [a defendant is not entitled to two separate evidentiary hearings before two superior court judges on an issue]; Code of Civ. Proc., § 1008, subd. (A) [a motion for reconsideration may be brought only if the party moving for reconsideration can offer "new or different facts, circumstances, or law" which it could not, with reasonable diligence, have discovered and produced at the time of the prior motion].)

During the February 2, 1989, hearing when Judge Revak ruled that the court should address Appellant's desire to represent himself, no mention was made of Judge Zumwalt's March 1988 ruling, by either the judge or anyone else. (66ART 9-13.) No facts justifying a rehearing were described by either Appellant or Bloom. Judge Langford on June 22 followed the path laid out by Revak without considering whether doing so was warranted. (78ART 12-13.) Appellant's written requests addressed in part by Judge Langford and in part by Judge Boyd (12CT 2492-2501) did not set forth any basis for reconsidering Judge Zumwalt's ruling that Appellant could not represent himself.

Thus, while the decision by one judge to reconsider a ruling of another judge in the same court is reviewed for an abuse of discretion, in this case no discretion was exercised to begin with. The court decided to revisit the ruling without ever having read it or discussed it, or considered the rules related to one judge's reconsideration of the ruling of his own colleague. A trial court's failure to exercise discretion is itself an abuse of discretion." (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504.) "'To

exercise the power of judicial discretion all the material facts ... must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision.'" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, quoting *People v. Surplice* (1962) 203 Cal.App.2d 784, 791.) If one reasons that Judge Revak implicitly exercised his discretion on the issue, then that discretion was abused. The exercise of judicial discretion means an "exercise of discriminating judgment within the bounds of reason" (*Surplice, supra*, 203 Cal.App.2d 784, 791), and that did not occur in this case.

The "hearing" ultimately conducted by Judge Boyle was similar to that conducted by Judge Zumwalt, although it rested on evidence that Appellant did not present to Judge Zumwalt. Boyle considered numerous declarations from lay people who declared they knew Appellant and believed him to be competent to represent himself (38CT 8230-8277); Zumwalt also considered this type of evidence but from fewer lay witnesses, who testified in person. (43ART 314-320, 326, 333-335, 372-377, 378-380.) Judge Zumwalt gave those lay opinions on Appellant's competence to waive counsel little weight in her decision, because she believed that the opinions of the psychiatrists who testified (Drs. Kalish, Koshkarian, and Di Francesca) regarding a defendant's competence to stand trial were more probative. (73CT 15741.) Although Judge Boyle also considered evidence from mental health professionals (Dr. Giraldi and Dr. Weinstein), neither of them had reviewed any records from Appellant, nor did they know anything about Appellant's psychiatric difficulties or the criminal charges he was facing. (38CT 8243, 8248-8249.) These doctors knew less about Appellant than Dr. Vargas and Dr. Strauss, the opinions of whom Zumwalt considered but found unpersuasive because they had not

given Appellant mental examinations. (30ART 922-977; 29ART 834-891, referring to the testimony of Vargas and Strauss in the competence trial.)

Although a trial court can revisit its own interim decision to avoid an unjust outcome (*In re Alberto, supra*, 102 Cal.App.4th at pp. 426-427), there is nothing to suggest that is what Judge Boyle did in this case. Clearly Boyle's ruling was not based on a finding that Judge Zumwalt's ruling was unjust – Boyle himself said that he knew nothing about the previous proceedings in the case. (80ART 15-16.) The hearing conducted by Zumwalt was seven days in length and included testimony from three psychiatrists and from witnesses Appellant called through Sanchez as advisory counsel. It also took into account the testimony from the six-day competence trial, including testimony from mental health experts presented by both the prosecution and the defense. (73CT 15740.) Judge Boyle, in contrast, explicitly refrained from reviewing anything in the record other than what Appellant, Bloom, and Sanchez submitted. The only reason Appellant renewed his motion after Judge Zumwalt's ruling was that he was dissatisfied with the outcome, which is the kind of classic forum shopping that the rule limiting one judge from overturning the decision of another judge is designed to prevent. (See e.g., *People v. Woodard* (1982) 131 Cal.App.3d 107, 111.)

If Appellant *had* established that the motion warranted reconsideration in the trial court, it should have been reconsidered by Judge Zumwalt, not by another judge. (*Alvarez v. Superior Court* (2004) 117 Cal.App.4th 1107, 1111 [general rule is that reconsideration should be taken up by the same judge who ruled originally, unless that judge is not available].)

Respondent raises three reasons against this Court finding error in Judge Revak's order to reconsider Appellant's *Faretta* motion: (1) that Appellant moved Revak to do so and therefore appeal on this issue is barred by the doctrine of "invited error"; (2) that the removal of attorney Russell amounted to changed circumstances warranting renewal and reconsideration of the *Faretta* motion; and (3) that the Court of Appeal's orders on various writ petitions "made clear" that Appellant could present such a renewed motion to the trial court. (RB 157-160.)

Regarding invited error, the first point to mention is that while Judge Boyle indeed *did* revisit the question of whether Appellant could represent himself and ruled that he could, that is not, in fact, what Appellant's motion asked for in the capital case. The motion specifically asked the court to appoint Appellant in the capacity of "lead counsel," together with appointing second chair counsel to serve under Appellant. Appellant was clear in his writs, etc., that he wanted the trial court to consider an arrangement that Zumwalt never had ruled upon. In reality, Boyle wound up granting a motion that Appellant never made – because he granted *Faretta* status but *did not* appoint second chair counsel to work under Appellant as "lead counsel." Thus, what Appellant "invited" Boyle to do is not what he actually did.

More importantly, the invited error rule pertains to acquiescence by defendants who were protected by the shield of appointed counsel. Here, counsel was never appointed to replace Russell and Appellant proceeded as an unrepresented defendant whose mental capacity was and remained in question. The invited error rule is about fairness, and there is nothing fair about applying it against Appellant in this case. As stated in *Teron, supra*, 23 Cal.3d 103, *People v. Lopez* (1977) 71 Cal.App.3d 568 (*Lopez*), and

Curry v. Superior Court (1977) 75 Cal.App.3d 221 (*Curry*), discussed further *post*, when a trial court is on notice that a defendant might lack the mental capacity to enter a knowing, intelligent, and voluntary waiver of counsel, it must take steps to protect the defendant and be sure that the issue is developed. Given that there was never a sound and reliable determination of Appellant's competence, and that this Court granted review of the competence writ and the Court of Appeal issued the alternative writ (still pending when Judge Revak ordered that the trial court would revisit Appellant's *Faretta* motion) applying the invited error doctrine would not be fair to Appellant. Respondent neglects to address any of these pertinent circumstances.

Moreover, the concepts of forfeiture and invited error are closely related to that of waiver. (*Freytag v. Commissioner* (1991) 501 U.S. 868, 894, fn. 2 (conc. opn. Scalia, J. [noting that waiver and forfeiture have so often been used interchangeably that it "may be too late for precision"].) Concerning waiver of the right to counsel, it is a constitutional right of fundamental importance and "courts indulge every reasonable presumption against waiver of fundamental constitutional rights." (*Johnson v. Zerbst, supra*, 304 U.S. 458, 463.) Waiver of the right to counsel must be knowing, voluntary, and intelligent and as argued in Argument section VIII of the AOB and below, Appellant's waiver of counsel did not measure up to that test in this case.

The invited error doctrine rests on the principle that appointed counsel is authorized and obliged to make a "conscious and deliberate tactical choice" for the defendant. (*People v. Harris* (2008) 43 Cal.4th 1269, 1293, citing *People v. Weaver* (2001) 26 Cal.4th 876, 970.) With respect to Bloom, the rule would not fit because he was not making tactical

choices in the role of appointed counsel for Appellant's *defense*. (*United States v. Cronic, supra*, 466 U.S. 648, 654, emphasis added; *United States v. Ash* (1973) 413 U.S. 300, 309; *Avery v. Alabama* (1939) 308 U.S. 444, 446 [mere formal appointment does not satisfy the constitutional guarantee of assistance of counsel].) Rather, he served as the passive mouthpiece of a mentally compromised defendant dead-set on never relinquishing control to an attorney. Bloom simply never had the status of Sixth Amendment counsel authorized and empowered to "invite error."

The RB asserts that the removal of Russell as counsel was a "changed circumstance" that would warrant revisiting Judge Zumwalt's ruling, but it doesn't explain why. (RB 160.) To the contrary, Russell's removal would have warranted the trial court *abstaining* from reconsidering the *Faretta* issue, not the other way round – since Russell was not replaced, the hearing before Judge Boyle presumptively would have been less reliable, not more reliable, than the one before Zumwalt, when Appellant had representation for all purposes (Russell) and also advisory counsel (Sanchez). The Court of Appeal's orders uniformly directed that future motions of any kind would be brought by counsel appointed to replace Russell – something that never transpired. Respondent provides no argument supporting why Russell's removal without being replaced would be a circumstance relevant to the outcome of the *Faretta* motion in a manner warranting reconsideration. A "changed circumstance," to warrant renewed hearing on a motion already decided, should be those "which have a significant bearing" on the question to be revisited. (*People v. Kowalski* (1971) 21 Cal.App.3d 67, 70, citing Code of Civil Procedure § 1008 [the necessary "changed circumstances" might "exist, for example, if there were a substantial change in the law between the time of the first and second

motions, which made inadmissible much of the testimony considered by the grand jury or magistrate].)

Regarding the intervening events and the orders issues by the Court of Appeal, Respondent argues thus:

> [T]he Court of Appeal, in its order denying Waldon's petition for writ of habeas corpus, had specified that any issues not rendered moot by its order directing Russell to be relieved as counsel could be presented to the trial court by new counsel. (51CT 11025.235.) It reiterated this position in its decision to hold his later petition in abeyance pending the outcome of Waldon's second hearing. (10CT 2085; 42CT 912.) Waldon's attorney specifically directed the trial court's attention to the Court of Appeal's January 6 order stating that the appellate court did not intend to preclude Waldon from proceeding on the pro per issue. (67ART 1-2.) Based on this chain of events, it was not error for the trial court to consider Waldon's renewed motion for self-representation. Under these circumstances, the trial court was not "reconsidering" Judge Zumwalt's order but was hearing a new *Faretta* motion based on new circumstances not present when the earlier motion was denied.

(RB 160.)

Respondent's Brief does *not* argue this case is within the exception outlined in *Goodwillie*, *supra*, 147 Cal.App.4th 695, 713, where reconsideration is permissible because it is presented on remand after an appellate reversal. Clearly, that is not what happened. Respondent subtly tries to expand on the significance of the intervening appellate history between Judge Zumwalt's denial of *Faretta* status and Boyle's grant of the same in November 1989 – but at bottom, statements by the Court of Appeal mean only that, if it was the same motion, it was moot by finality and if it was a different motion, what to do with it was up to the trial court and there was nothing ripe for consideration on review.

Regarding the January 6, 1989, order on Appellant's December 12, 1988, petition for habeas corpus, Court of Appeal Case No. D009282, it stated that "[i]t appears the issues raised in this petition which are not moot by the finality of our consolidated decision in *Waldon v. Superior Court*, D007850, and *People v. Superior Court*, D007873, filed September 12, 1988, may be presented to the superior court by new counsel appointed pursuant to our decision." In the first place, this language is equivocal and inspecific, stating that it "appears" that "issues raised in the petition" beyond the finality of the consolidated decision could be "presented," which is nothing like saying that Appellant's specific desire for *Faretta* status would be granted a rehearing if it *were* presented in the trial court.

In the second place, the gist of the Court of Appeal order in Case No. D009282 was that the issues raised in the petition concerning Appellant's desire for *Faretta* status *were* moot by the finality of the consolidated decision. The September 12, 1988, consolidated decision *denied relief* in Case No. D007873, which was the prosecutor's petition for writ of mandate seeking review of the denial of Appellant's *Faretta* motion (45CT 9867-74). Thus, issues concerning Zumwalt's denial of the *Faretta* motion *were* "moot by the finality" of the consolidated decision. (51CT 11025.235.) Appellant's own pro se petition challenging Zumwalt's denial of the *Faretta* motion, Court of Appeal Case No. D008026, had been stricken by the Court of Appeal and all related documents had been returned to the petitioner back on May 12, 1988. Nothing in that action by the Court of Appeal could be construed as an invitation or suggestion that the *Faretta* motion be reheard in the trial court. Russell's own petition for review of the *Faretta* motion "in the spirit of *People v. Wende*," contained in Court of Appeal Case No. D007850 (72CT 15509) was disposed of in the September

12, 1988, decision (10CT 1920-1924), when the Court of Appeal declined to conduct the requested "independent review of the record" under *Wende*.

To the extent that anything in the petition in Court of Appeal No. D009282 possibly could have been considered not to be "moot by the finality" of the consolidated decision in Court of Appeal Case Nos. D007873 and D007850, that would be Appellant's statement that he sought "self-representation with the full assistance of counsel" and Zumwalt had never ruled on that request. (52CT 11025.246, 11025.250.) But "self-representation with the full assistance of counsel" is not the motion that Judge Revak ordered to be heard; his provisional appointment of Wolf to serve as counsel in the future if the motion for *Faretta* status were heard and denied. (66ART 11-16.) Nor is it the motion that Judge Boyle ultimately granted on November 3, 1989. After reviewing all of the declarations submitted by Appellant in support of the motion – all of which opined that Appellant was competent to *waive* counsel and *represent himself* – Boyle granted Appellant pro se status. Boyle also appointed Sanchez and Wolf to "assist" Appellant, but he made clear that they would serve in the capacity of *advisory* counsel which is not the same as counsel representing a defendant within the meaning of the Sixth Amendment. (85ART 87-88.)

The language of Appellant's motion submitted to Judge Langford in June of 1989 did seek something new and different, i.e., self-representation with second-chair counsel appointed to take direction from Appellant, but that motion, as a new motion, implicitly was denied by Boyle. What Boyle did grant was plain vanilla pro se status with advisory counsel, which is precisely what Judge Zumwalt had denied. The difference is huge. If any of the counsel appointed by the trial court to "assist" Appellant after he was

given leave to represent himself (Sanchez, Wolf, Chambers, Rosenfeld) truly were serving in the capacity of Sixth Amendment counsel, then Appellant will be allowed by this Court to claim on habeas that his Sixth Amendment rights were violated in connection with that representation. If that is what happened, then Revak/Boyle did not abuse their discretion and no reversible error occurred. Otherwise, it was an improper reconsideration of Zumwalt's order and the abuse of discretion warrants reversal.

What of the other actions by the Court of Appeal between September 12, 1988, and November 3, 1989? Respondent cites the Court of Appeal's February 12, 1989, letter in response to the January 12, 1989, petition for writ of mandate assigned as Court of Appeal Case No. D009343. (42CT 9516-9520.) That petition also claimed that Zumwalt had left unheard and unresolved a different motion (besides one for *Faretta*) by Appellant, a motion to proceed in pro per *with* appointed obedient counsel. (42 CT 9519-9520.) The Court of Appeal's February 12, 1989, letter to Sanchez stated that petition No. D009343 would be held "in abeyance" pending resolution of a "second motion to represent himself pending in the trial court." It did not state any position on whether such "second motion" warranted reconsideration of Judge Zumwalt's denial of *Faretta* status. (42CT 9512, 10CT 2085.)

Respondent says that "Waldon's attorney specifically directed the trial court's attention to the Court of Appeal's January 6 order stating that the appellate court did not intend to preclude Waldon from proceeding on the pro per issue." (67ART 1-2.) This is a fair account of what Bloom (who was not "Waldon's attorney") *said* on the issue, but that does not make it true. The Court of Appeal's "January 6 order" simply did not state that "the appellate court did not intend to preclude Waldon from proceeding

on the pro per issue." It merely said that the issue, if not "moot by reason of the finality" of the consolidated decision, could be "presented" in the trial court by "new counsel appointed" to replace Russell. It did not say (1) that it was not "moot by reason of the finality" of the consolidated decision; (2) that it could be presented by anyone *other than* counsel appointed to replace Russell; or (3) that if it were presented it would pass both the hurdle of justifying reconsideration and the hurdle of being meritorious. Thus, the course of intervening events in the Court of Appeal do nothing to take the *Faretta* motion outside of the rule against one judge overturning another judge's decision.

III. If the Motion Before Boyle Was Something New – a Request for Hybrid Status with Appellant as Lead Counsel and Second-chair Counsel per *Keenan* Working under Him – the Prerequisites for Hybrid Representation Were Not Met under *People v. Hamilton* and Granting the Request Would Have Been an Unauthorized Expenditure of Funds under *People v. Moore*

The only way out of the conclusion that Judge Boyle impermissibly reconsidered and overturned Judge Zumwalt's denial of Appellant's motion for *Faretta* status would be if it were proven that the motion in fact were not one for *Faretta* status, but rather one granting leave for Appellant and an attorney to "share" the status of counsel of record. The motion, construed as such, was denied by Judge Boyle and his action was not an abuse of discretion.

There is only one line of precedent that would permit the latter arrangement, that stated in *People v. Hamilton* (1989) 48 Cal.3d 1142. In the AOB at 364-368, Appellant proves that what happened in his trial is *not* the type of "hybrid" arrangement authorized by this Court in that case. Under *Hamilton*, the trial court could have appointed counsel to represent Appellant and then granted Appellant limited co-counsel status under the

"tactical control" of the appointed attorney, if and only if the appointed attorney requested that arrangement. (*People v. Hamilton, supra*, 48 Cal.3d at p. 1163, 1164, fn. 14.) But that is not what happened in this case. Judge Boyle appointed Sanchez and Wolf in some amorphous capacity, but they never took tactical control and never requested to have Appellant appointed as co-counsel. *Hamilton* provides that a trial court's limited discretion to appoint a defendant as co-counsel to an appointed attorney must be (1) upon a substantial showing that it would be in the interest of justice and efficiency in the particular case, and (2) at the request of the appointed attorney. (*Id.* at 1163.) There was no such substantial showing in this case, and no appointed counsel with standing to make that request.

Appellant's moving papers made clear that what Appellant sought was to be appointed as "lead counsel" with "second chair" counsel to serve under him, appointed as *Keenan* counsel. Judge Boyle entered Appellant's waiver of counsel during the first part of the November 3, 1989, hearing, without having first ascertained what it was that Appellant actually wanted the court to do with respect to assistance from counsel. (84ART 64.) Only after taking Appellant's waiver did Judge Boyle proceed to discuss "the question of assistance." (84ART 65.) Attorney Bloom, Appellant's advisory counsel for purposes of the self-representation motion only, explained that Appellant wanted the appointment of second chair counsel under *Keenan v. Superior Court, supra*, 31 Cal.3d 424, and that second chair counsel would be authorized to sign briefs and make appearances for the defense. (84ART 65-68.) Boyle said that what Bloom called second chair counsel was what Boyle called advisory counsel. (84ART 68-69.)

Appointing second chair counsel under *Keenan* for a pro se defendant is outside the scope of Judge Boyle's authority as conferred by

the Legislature. (*People v. Moore* (2011) 51 Cal.4th 1104, 1122-1123.) *Keenan v. Superior Court, supra*, 31 Cal.3d 424, held that the statute for appointment of counsel authorized the appointment of a second attorney in a capital case. (*Moore, supra*, at p. 1122.) After *Keenan* was decided and before Appellant's trial in 1991 and his *Faretta* hearing in 1989, the Legislature revised the statutes relating to the appointment of counsel for indigent defendants and added language in section 987(d) to state that a trial court in a capital case could "appoint an additional attorney as a cocounsel upon a written request *of the first attorney appointed.*" (*Moore, supra*, at p. 1122, quoting § 987(d), emphasis added in *Moore*.) A defendant proceeding in propria persona simply is not "the first attorney appointed" within the meaning of the statute. (*Ibid*, citing *Scott v. Superior Court* (1989) 212 Cal.App.3d 505, 511.) Granting co-counsel status to the defendant can be done only at the request of an attorney first appointed to represent the defendant.

Judge Boyle, acting in November of 1989, specifically cited *Scott v. Superior Court, supra*, which was decided in July of 1989 as having upheld the trial court's refusal to appoint *Keenan* counsel to a self-represented capital defendant, but refused to follow it, saying "that doesn't mean that's what ought to be done in a given case." (84ART 77-78.) Judge Boyle made no mention of this Court's holding in *Hamilton*, decided in June of 1989, stating that the trial court's discretion to authorize a "hybrid" arrangement was "sharply limited" and required a substantial showing that the arrangement would be in the interests of justice and was requested by an appointed attorney. (48 Cal.3d at p. 1162.) Thus, at the time Judge Boyle acted, granting Appellant's request would have been improper under this Court's holding in *Hamilton*, and the law now is clear that even if the

requisites of *Hamilton* had been met, appointment of second chair counsel to a self-representing defendant would have been an expenditure of funds unauthorized by the Legislature, and would have required as a prerequisite the appointment of an attorney who then requested that the defendant be granted co-counsel status. Under *Moore*, section 987(d) simply does not authorize a trial court to grant the request as framed by the Appellant in the trial court.

What the trial court did instead is take the more conventional step that is authorized under *McKaskle v. Wiggins, supra*, 465 U.S. 168, 176-178, granting Appellant *Faretta* status with primary control over and responsibility for his defense, while appointing advisory counsel to "assist in an advisory capacity if and when the accused requests help, or to serve in a standby role, available to represent the accused in the event that termination of the defendant's self-representation is necessary." Respondent argues that it was within the trial court's discretion to appoint "counsel to assist Waldon whether it referred to counsel as advisory counsel, co-counsel, or second chair counsel." (RB 168.) Respondent appears to take the position that although Judge Boyle used the terms "second chair counsel" and "co-counsel" at times interchangeably with the term advisory counsel, what he really did is grant Appellant *Faretta* status with advisory counsel, which was no abuse of discretion. (RB 173-175.)

Thus, Respondent concedes that Judge Boyle did not grant the motion presented by the Appellant. Instead, the court granted Appellant self-representation status with the assistance of advisory counsel – something that Appellant never requested, as concerning the capital charges. The following discussion will show that this disparity between what Appellant requested and what Judge Boyle actually granted was highly

material to the question of whether Appellant's *Faretta* request was unequivocal and whether he entered a knowing, intelligent, and voluntary waiver of counsel.

IV. Appellant Neither Unequivocally Invoked his Right to Self-Representation, nor Entered a Knowing, Intelligent, and Voluntary Waiver of His Right to Counsel

In the AOB at 372-403, Appellant proves that his invocation of his right to self-representation was not unequivocal, and his waiver of counsel in November of 1989 was not knowing, intelligent, and voluntary, thus causing a violation of his right to counsel that is reversible per se, and also not harmless under a *Chapman* analysis. Respondent counters this in the RB at 175-188.

A defendant's invocation of his right to self-representation under *Faretta* must be unequivocal, and his waiver of the right to counsel must be knowing, intelligent, and voluntary. (*People v. Stanley* (2006) 39 Cal.4th 913, 931-932; *People v. Noriega* (1997) 59 Cal.App.311, 319; *People v. Koontz* (2002) 27 Cal.4th 1041, 319; *People v. Bloom* (1989) 48 Cal.3d 1194, 1224.) A reviewing court must "indulge in every reasonable presumption" and indulge "every reasonable inference" *against* waiver of the right to counsel. (*People v. Marshall, supra*, 15 Cal.4th 1, 21; *Brewer v. Williams, supra*, 430 U.S. 387, 391; *People v. Stanley, supra*, 39 Cal.4th at p. 931-933.) In order to ensure that a defendant's waiver of counsel is knowing, intelligent, and voluntary, the trial court must make advisements of and inquiries on the risks and dangers of self-representation. (*People v. Koontz, supra*, 27 Cal.4th 1041, 1070-1071, endorsing the form of advisements provided in *People v. Lopez, supra*, 71 Cal.App.3d 568.) Although no specific form of warning is required (*People v. Pinholster* (1992) 1 Cal.4th 865, 928-929), the trial court should advise the defendant

that he has no right to either standby, advisory, or co-counsel in the event he decides to represent himself.

It is insufficient for the trial court simply to advise the defendant of the tautology that "by electing to represent himself he would be giving up the assistance of his appointed counsel." (*People v. Burgener* (2009) 46 Cal.4th 231, 243, citing *United States v. Crawford* (8th Cir. 2007) 487 F.3d 1101, 1106; *People v. Barnum* (2003) 29 Cal.4th 1210, 1221.) The court must advise the defendant of the dangers and disadvantages of self-representation, including (1) that the district attorney would be an experienced and prepared adversary; (2) that the defendant would receive no special consideration or assistance from the court and would be treated like any other attorney; (3) that he would have no right to standby or advisory counsel; and (4) that he would be barred from challenging on appeal the adequacy of his representation. (*Burgener, supra*, 46 Cal.4th 231, 243.)

In determining on appeal whether the defendant unequivocally invoked the right to self-representation, a reviewing court must "examine the entire record de novo." (*Ibid.*, citing *Marshall, supra*, 15 Cal.4th 1, 24–25, and *People v. Dent* (2003) 30 Cal.4th 213, 217–218.) A reviewing court also must make a de novo examination of the entire record in assessing whether a defendant's waiver of his right to counsel was intelligent, knowing and voluntary. (*Burgener, supra*, 46 Cal.4th 231, 241, citing *People v. Doolin* (2009) 45 Cal.4th 390, 453.)

a. Whether Appellant's Motion for Self-Representation was Unequivocal

In requiring that a criminal defendant's request for self-representation be unequivocal, it is much more than "the stability of

judgments that is at stake." (*Marshall, supra*, 15 Cal.4th 1, 22-23.) "The defendant's constitutional right to the effective assistance of counsel also is at stake – a right that secures the protection of many other constitutional rights as well." (*Ibid.*) Therefore, a trial court addressing a *Faretta* request must "evaluate *all of the defendant's words and conduct* to decide whether he or she *truly wishes to give up the right to counsel* and represent himself or herself and *unequivocally* has made that clear." (*Id.* at pp. 25-26, emphasis added.) Thus, in *Marshall*, this Court held that the defendant's statement to the trial court did not convey the "unmistakable desire to *forego counsel*," and thus the trial court properly denied his *Faretta* request. (*Ibid.*, emphasis added.) A defendant's preoccupation with the court appointing advisory and/or co-counsel can create doubt as to his "sincere interest in waiving his right to counsel." (*Id.* at p. 26.)

Several parts of the record fit together to make the whole picture showing that Appellant's *Faretta* invocation was not unequivocal. (AOB 376-380.) To set the context, it is important to consider that, from the beginning, Appellant was placing conditions on his request for self-representation status. Appellant's March 15, 1988, "Motion for Self-Representation and Waiver of Right to Representation by Counsel" submitted to Judge Zumwalt indicated that his request to waive counsel was *conditional* and he wanted the court to address it only if the court were to deny his primary request, which was to have the right to represent himself *together with* the "full assistance" of counsel who would be required to obey him. (8CT 1564-1570.) The filing consists of a pre-printed form with additions and interlineations by Appellant, and at the end of it Appellant wrote by hand:

> I am waiving my right to counsel, if and only if my request to proceed 'in propria persona' with full assistance of counsel (with the restriction that counsel be prohibited from doing or saying anything without my permission) (and be required to obey me) is denied by the court.

(8CT 1570.)

Appellant repeated this point during the March 15 hearing, saying:

> Your honor, I wish to waive my right to counsel if and only if my request to proceed in propria persona with full assistance of counsel with the restriction that counsel be prohibited from doing or saying anything without my permission and that counsel be required to obey me only if this request has been denied by the court.

(45ART 486.) Judge Zumwalt responded: "All right. In other words, you're not really applying to waive counsel. ¶ You want a restricted waiver, with certain conditions, is that correct sir?" (*Ibid.*) Appellant replied that he had two separate requests, and if the "number one" request were to be denied then he would apply to "waive counsel," which would be his "secondary request." (*Ibid.*)

The conditionality of the request was a factor in Judge Zumwalt's decision to deny it. Her March 16, 1988, order said:

> Defendant Waldon's motion to represent himself (Faretta motion) is denied. ¶ The court finds he is incapable of voluntarily exercising an informed waiver of his right to counsel, further, his request to the court to represent himself only on certain conditions shows he does not rationally perceive his situation.

(8CT 1574.) Appellant discusses the conditionality of Appellant's request to Judge Zumwalt in the AOB at 378, but Respondent's Brief does not address it.

Appellant's later attempts to appeal Judge Zumwalt's denial of *Faretta* status show more about his conception of what self-representation would look like. On December 12, 1988, Appellant filed a petition in the Court of Appeal, Case No. D009282, complaining therein that Judge Zumwalt never had ruled on his request for "self-representation with the full assistance of counsel." (52CT 11025.250.) A month later on January 12, 1989, Appellant petitioned the Court of Appeal again, making even more clear that he believed he had apprised Judge Zumwalt that he would waive counsel under *Faretta* only as a last resort, if and only if the trial court would *not* grant him leave to proceed in pro per with the full assistance of counsel who would "obey" him. (42CT 9519-9520.)

On June 5, 1989, Appellant submitted his moving papers that led to Judge Boyle's November 3, 1989, ruling. In one document, bearing Case No. CR82985 and captioned "non-capital case," Appellate requested the trial court to "assign counsel to defendant's case who will take direction from defendant; or if that motion denied, 2) allow defendant to act as own counsel and appoint advisory counsel to work under defendant's direction." (11CT 2344-2359.) In a separate document, bearing Case No. CR82986 and captioned "capital case," Appellant's request was entitled "Motion to: 1) Assign Two Counsel to Defendant's Case, Both of Whom Will Take Direction from Defendant or (if that Motion is Denied) 2) Allow Defendant to Act as His Own Lead Counsel and Appoint Second Counsel to Work Under Defendant's Direction." (12CT 2492-2501.)

The first part of Appellant's motion in his capital case is self-explanatory – he wanted the Court to appoint two attorneys to represent him, who would take direction from him and would obey him. This request is the same as what Appellant appears to have sought from Judge Zumwalt

(which he said was his initial request, and that he wanted *Faretta* status only if it were denied). Judge Langford denied the first part of Appellant's request.

The second part of Appellant's motion in the capital case introduced Appellant's new theory for obtaining the "full assistance" of "obedient" counsel, if the court would grant permission for him to act as his own "lead counsel," in the capital case, with "second counsel" appointed to work under his direction. (12CT 2493.) It is clear from the wording used that Appellant couched his request in the context of *Keenan* counsel in a capital case, reasoning that since capital defendants have a "lead" counsel and a *Keenan* counsel sitting second-chair, he could represent himself as "lead counsel," with an attorney sitting "second-chair" to him, appointed under *Keenan*. Appellant moved the court to "allow him to represent himself in the capacity as lead counsel and, since this is a capital case, appoint a second counsel to work under his direction." (12CT 2497.) While the motion referred to Appellant's constitutional right under *Faretta* to "proceed without counsel," what it actually asked for was the designation of Appellant as "lead attorney" to serve over the "second chair counsel" who, he contended, was required to be appointed in this complex capital case under *Keenan*. (*Id.* at 2498, 2500-2501.)

The motion defined the roles of "lead" and "second counsel" as follows: "Lead counsel assumes primary control for the handling of the case and second counsel provides assistance, at the direction of lead counsel, in a variety of areas, including legal motions, research, investigation in the penalty phase, or any other of a number of other divisions of duties. However, the key is that second counsel is appointed and takes his/her basic direction from lead counsel." (12CT 2501.) Thus,

rather than expressing a desire to *waive* the benefits of being represented by counsel, the motion insisted that once named as lead counsel Appellant wished to have what he asserted were "the same benefits as every other capital defendant in the county, i.e., to have a second chair counsel appointed on his case to follow his direction and assist him in the case." (*Id.* at 2501.)

A request to be named as "lead counsel" with second chair counsel providing assistance can hardly be said to comprise an unequivocal request for self-representation under *Faretta*. *Faretta* makes clear that the constitutional right to self-representation means giving up the Sixth Amendment right to representation by counsel, and that the two are mutually exclusive. (*Faretta, supra*, 422 U.S. 806, 833-835.) Simply stated, Appellant never made an unequivocal request for pro se status – which, by definition, means *waiving* the assistance of counsel under the Sixth Amendment – in defending the capital charges.

Respondent (RB 177) attempts to distinguish *People v. Stanley, supra*, 39 Cal.4th 913, 932, wherein this Court on appeal rejected a claim of error in denying a *Faretta* motion because the record showed the defendant did not fully understand or appreciate that the trial court would be under no further obligation to appoint counsel for him if his *Faretta* motion for self-representation were granted. In *Stanley*, the trial court repeatedly advised the defendant that if self-representation status were granted, the defendant would not have the "assistance of counsel," the "benefit of appointed counsel," or "any special assistance from the court" if he chose to represent himself. Thus, the invocation of *Faretta* was found on appeal to be equivocal. If the invocation of the right to counsel was equivocal in *Stanley*, that is even more strongly the case here, where Appellant submitted

his request on a written motion that *never* asked that he be without a lawyer in defending the capital charges, and made clear that what he sought was to be lead counsel with second chair counsel under *Keenan* to work under him.

Respondent also cites *People v. Marlow* (2004) 34 Cal.4th 131, 147, another appeal in which error was claimed based on the trial court's *denial* of *Faretta* status. (RB 177.) *Marlow*, like *Stanley*, favors Appellant's position rather than Respondent's. In *Marlow*, the defendant asked whether it was possible to go "pro per in my own defense and have someone appointed as co-counsel," and the trial court said it was not possible, and declined to convert the defendant's inquiry into a *Faretta* motion. (*Ibid.*) This Court on review endorsed the trial court's actions, stating that "the trial court correctly told defendant ... that a defendant does not have a right both to be represented by counsel and to participate in the presentation of his own case." (*Id.*, 34 Cal.4th at p. 147, fn. 6.)

The details of what Appellant asked for in his June 5, 1989, motions are set forth clearly in the AOB at 340 (quoting the title of the motion in the capital case, to "Allow Defendant to Act as His Own Lead Counsel and Appoint Second Counsel to Work Under Defendant's Direction" and citing 12CT 2492-2501) and at 377 (Appellant's "motion concerning representation in his capital case ... was not an unequivocal *Faretta* invocation because it made clear that Appellant sought not to go it alone as his own attorney, but rather to ... be "lead counsel" assisted by "second chair" counsel, appointed under *Keenan* and required to follow" Appellant's direction.)

Respondent's Brief glosses over the details and quotes only from the motion in the noncapital case:

> After Waldon's counsel was relieved, Waldon filed a motion asking the trial court 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 own counsel and appoint advisory counsel to work under defendant's direction." (11CT 2344-2354; 12 CT 2491-2501 [motion]; 11CT 2367-2373 [prosecution's response to motion].)

(RB 178.) Respondent says nothing about the wording of the motion in the capital case, nor even acknowledges that Appellant asked therein to be appointed as "lead counsel" with "second chair" counsel appointed to serve under him and follow his direction. Respondent contends that Waldon repeatedly made "articulate and unmistakable demands to represent himself over a period of more than two years" (RB 179), but offers no rebuttal concerning the specifics of what Appellant actually requested and whether they rendered the *Faretta* invocation conditional and equivocal.

Respondent argues that advisements given to Appellant by Judge Zumwalt in March of 1988, and his written waiver filed at that time, made clear that self-representation status might not include the appointment of co-counsel or advisory counsel. (RB 178; 45ART 483.) However, it is not the motion before Judge Zumwalt or her ruling on it that are here at issue. Appellant's motion to be appointed as lead counsel with second chair counsel in the capital case under *Keenan*, which led to Boyle's grant of *Faretta* status as challenged herein, was filed fifteen months later on June 5, 1989. What Judge Zumwalt said in addressing the prior, different motion that never sought the appointment of second chair counsel under *Keenan* does not make Appellant's later request to Judge Boyle any less equivocal.

Respondent next points to Judge Langford's ruling in June of 1989, arguing that Langford refused to appoint counsel, for all purposes, who would be directed to follow Appellant's decisions and directions. (RB 178,

citing 78ART 26-35.) That Langford denied the first part of the motion, and his reasoning in doing so, does not render the request in the second part of the motion unequivocal. Judge Langford's ruling has little relevance to the question at hand.

The question then is whether Judge Boyle said anything to Appellant prior to his waiver of counsel on November 3, 1989, that rendered Appellant's *Faretta* request unequivocal, notwithstanding what Appellant said he wanted in his moving papers. The answer to this is "no" – Boyle never turned to the discussion of whether second chair counsel would or would not be appointed until *after* he entered Appellant's waiver of counsel. Before granting pro se status, Judge Boyle said he had reviewed the 14 affidavits submitted by Appellant in support of the motion, and that it was within the court's discretion "whether or not to appoint standby or advisory counsel." Boyle defined the former as an attorney who could step in if Appellant changed his mind or had his pro se status revoked, and the latter as an attorney who could "get things done the defendant might otherwise not be able to do because he is in custody." (84ART 60.) Boyle did not, before entering Appellant's waiver, define co-counsel or second chair counsel, or mention whether he had discretion in whether to appoint them.

Judge Boyle advised Appellant that representing himself would not be an excuse to delay the trial, self-representation consistently was a detriment to the preparation of a defense, Appellant would be subject to the same rules as an attorney, the prosecution would be carried out by experienced lawyers, and Appellant would be required to cooperate with the court. (84ART 61-62.) Appellant said he understood those things. (*Ibid.*) Judge Boyle said he was inclined to "grant the pro per motion request,"

while "setting aside for the moment the issue of the assistance to be provided" by an attorney. (84ART 62.) Bloom said a waiver form had been submitted on June 22, and Boyle said he saw one in the file. (84ART 63.) At that, Boyle said Appellant had made "an intelligent and knowing request to represent himself" and would enter pro se status. (84ART 63-64.)

Only then did Boyle, at Bloom's behest, start to drill down into the question of whether second chair counsel would be appointed under *Keenan*. (84ART 66-80.) Appellant said nothing during this part of the hearing. Bloom argued that the court could appoint a standby attorney, appoint an advisory attorney (who would not have the right to sign documents or appear in court), or appoint second chair counsel (who could sign documents and appear in court) – and what Appellant requested was the third option. (84ART 67-68.) Regarding the identity of the counsel to be appointed, Bloom said Appellant requested Sanchez, if the court granted one second chair counsel, and Sanchez and Wolf, if the court granted two second chair counsel. (*Id.* at 74.)

In sum, Appellant's motion to be appointed as lead counsel with second chair counsel appointed under him pursuant to *Keenan*, which is something that is not permitted under the law, was not an unequivocal invocation of his rights under *Faretta*. Nothing transpired after the making of the motion, before pro status was granted, to make the request any less equivocal than it was in the written motion.

b. Whether Appellant's Waiver of Counsel was Knowing, Intelligent, and Voluntary

In proving that Appellant's waiver of counsel was not knowing, intelligent, and voluntary, the AOB first analyzes (AOB 380-386) the

reporter's transcript of the November 3, 1989, hearing, wherein Judge Boyle granted Appellant pro se status, alluded to the *Lopez* waiver in the file but never read it, and then discussed with Bloom at length the issue of representational "assistance" for Appellant. (84ART 59-70.) The AOB at 384-386 quotes from and discusses the latter half of the hearing before Judge Boyle, where the judge and attorney Bloom address the terms standby counsel, advisory counsel, and second chair counsel and Bloom reiterates that Appellant's sole desire is for second-chair counsel under *Keenan*, which Boyle ostensibly appears to grant. Respondent's brief says nothing about how Boyle's blurring of the terms standby, advisory, and second chair counsel impacted the entry of Appellant's *Lopez* waiver and whether Appellant's waiver of counsel was knowing, intelligent, and voluntary.

Respondent cites to a colloquy by Judge Langford on June 22, 1989, (RB 181, citing 78ART 23-25), arguing that the trial court made clear to Appellant the rule that he was not entitled to the assistance of lawyers who would work under his direction. (RB 181.) Langford's statements are addressed above in the discussion of whether Appellant's invocation of his *Faretta* rights was unequivocal – where Appellant points out that what transpired in June of 1989 before Judge Langford involved a different motion than the one granted by Boyle in November of 1989, and has little relevance to consideration of whether Appellant's later waiver met the constitutional requirements. That also is the case here.

As explained in the AOB at 386-391, this shows that Boyle did not satisfy the trial court's duties, set forth in *People v. Lopez, supra*, 71 Cal.App.3d 568 and related cases, necessary to ensure that Appellant was entering a knowing, intelligent, and voluntary waiver of his right to counsel. Judge Boyle did give Appellant some of the required admonitions,

including that "self-representation is consistently, if not always, a detriment to the defendant's preparation of his own defense," and that Appellant would "receive no special indulgence by the Court, [and would] be subject to the same rules and limitations as if [he] were an attorney." (84ART 61.) Boyle advised Appellant that he would be required to cooperate with the court, but failed to explain that doing otherwise would cause self-representation status to be terminated. (*Id.* at 62; *Koontz, supra*, 27 Cal.4th 1041, 1070-1071.)

The trial court should have advised Appellant that the prosecutor would be "represented by a trained professional who would give [Appellant] no quarter on account of his lack of skill and experience." (*Koontz, supra*, 27 Cal.4th 1041, 1070.) Boyle came close to that, but glossed over the skill disparity Appellant would face, saying that the prosecutor would be "more experienced" than Appellant in "practicing law" and that "experience sometimes means a lot," while staying silent on the point that the prosecution would seize every benefit of that advantage. (84ART 61-62.)

Trial courts should advise defendants that the limitations they face due to incarceration will not earn them special treatment as litigants. (*Lopez, supra*, 71 Cal.App.3d 568, 572-573.) Judge Boyle neglected to do that, and the oversight proved telling given Appellant's subsequent frustration over lacking access to his legal materials and other conveniences as a pro per inmate, and the trial court's refusal to order such access. (See, e.g., 84ART 52-53 [complaint that Appellant had no access to a copy machine]; 11RT 797-799 [denial of Appellant's request to be allowed more than nine boxes of legal material in his cell]; 11RT 667 [denial of Appellant's request to have extra copy of transcript]; 12RT 684 [denial of

Appellant's request to have court clothing dry cleaned]; 25CT 5633 [motion for 24-hour access to legal material denied]; 32RT 5174 [motion for extra time to study CALJIC denied]; 34RT 5923 [request to make phone call to out of state witness denied].)

Case law mandates that trial courts advise defendants, in taking a *Faretta* waiver, that they have no right to standby, advisory, or co-counsel if awarded pro se status. (*People v. Jones* (1991) 53 Cal.3d 1115, 1142; *People v. Noriega, supra*, 59 Cal.App.3d 311, 319-320.) Here, Judge Boyle touched on the court's "discretion" regarding appointing advisory and standby counsel (which Appellant's motion did not ask for, concerning the capital charges). But Boyle never told Appellant point blank that he had no right to appointed counsel in any supporting role, as a pro se defendant. Appellant's motion makes clear that he sought, and believed he was entitled, to serve as "lead counsel" giving direction over "second chair counsel" appointed to assist him. When Boyle later trod over nuances between the terms advisory, standby, and co-counsel (see 84ART 69-70 ["what I call advisory, you may call second chair ... so I think we are kind of talking about the same things, but we have been trapped by the labels put on these people by different courts"]), he sent the message that Appellant was being awarded what he asked for: the status of a pro per defendant serving as "lead counsel" over the direction of counsel appointed to serve under him as second chair. This is the exact opposite of advising Appellant that, at bottom, he was on his own and any assistance from counsel as the case moved forward would forever remain within the prerogative of the court. Further, these statements were made after Appellant's waiver of counsel was entered.

An effective waiver includes an advisement that while a represented defendant can claim on appeal that he received ineffective assistance of counsel, a pro se defendant granted *Faretta* status cannot complain of the inadequacy of his representation on appeal. (*Faretta*, *supra*, 422 U.S. 806, 834, fn. 46; *People v. Carson* (2005) 35 Cal.4th 1, 8, citing *Faretta*, *supra*, 422 U.S. 806, 834; *Lopez*, *supra*, 71 Cal.App.3d 568, 568.) Boyle neglected to advise appellant of that fact. Although this Court held in *People v. Bloom*, *supra*, that no specific set of admonitions is required as a matter of course (48 Cal.3d 1194, 1225), that case easily is distinguishable because the defendant therein sought pro se status so that he could advocate *for* a death sentence, while appellant herein wanted to represent himself to *lessen* his chance for conviction and a death sentence. (*Id.* at pp. 1216-1217.) Appellant does not argue that the constitution required Judge Boyle to caution him according to some pre-written formula; rather, he contends that his waiver was not subjectively knowing, intelligent, and voluntary and the words Boyle used, and omitted, support a conclusion that it was not.

Nor did Boyle, as recommended in *Lopez*, inquire into Appellant's familiarity with legal procedures. (*Lopez*, *supra*, 71 Cal.App.3d 568, 573.) On this score, the waiver and acknowledgment form submitted by Appellant in June of 1989 states, in paragraph 3: "I have been a full time criminal investigator, policeman, and legal counselor. In this capacity, I supervised, instructed, and/or advised the accused and witnesses at over a hundred judicial hearings." (12CT 2405.) Had Judge Boyle known anything about defendant and the case, the obvious implausibility of this statement would have been a red flag that Appellant might not be entering a knowing, intelligent, and voluntary waiver of counsel (assuming that Boyle read the form at all). It is clear from the record that Boyle did not read the document

(84ART 63-64); if he had done so, he would have seen much material prompting his duty to make additional inquiry.

Importantly, given the facts of this case, Boyle failed to heed the suggestion in *Lopez* to explore with Appellant his potential defenses. (*Lopez, supra*, 71 Cal.App.3d 568, 573 [exploration into possible defenses "will serve to point up to defendant just what he is getting himself into and establish beyond question that 'he knows what he is doing and his choice is made with eyes open,'" quoting *Faretta*].) Judges Levitt and Zumwalt similarly had neglected to address this topic, by conducting a *Frierson*-type inquiry (i.e., asking Appellant or counsel to describe the dispute or problems between them, see *People v. Frierson, supra*, 39 Cal.3d 803, 815-816, when addressing Appellant's complaints that he was receiving ineffective assistance from Russell).

Given what played out later in pretrial and trial proceedings, Judge Boyle's neglect in exploring Appellant's potential defenses during the waiver inquiry was a grave oversight. There were many signs in the court's file – which Boyle foreswore reading – that Appellant's mental capacity was likely to bear on possible defenses in the guilt and/or penalty trial. Boyle also might have learned of Appellant's intended defense that he was abducted by agents and framed through a Cointelpro plot to target him for Esperanto and Cherokee activism. (See, e.g., 54RT 10304 [Appellant explains to trial judge that he was subjected to FBI and CIA Cointelpro and that this is his entire defense]; 55-2RT 10795-10798 [Appellant informs trial judge that Cointelpro is his whole defense].) By failing to explore Appellant's potential defenses with him the trial court contributed to a waiver of counsel that was not knowing, intelligent, and voluntary. (*Koontz, supra*, 27 Cal.4th 1041, 1070-1071; *Burgener, supra*, 46 Cal.4th

231, 241 ["the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the *risks and complexities of the particular case*," emphasis added].)

In considering whether the waiver of counsel was knowing, intelligent, and voluntary, the AOB at 390-398 compares and contrasts two important pieces of written material: the preprinted *Lopez* waiver form Appellant submitted in connection with proceedings before Judge Zumwalt in March of 1988 (with handwritten alterations) (8CT 1564-1570), and the typewritten waiver form submitted in June of 1989. (12CT 2404-2408.)

The most telling differences between the two documents are these: The earlier form acknowledges the disadvantages of proceeding without *any* lawyer, while the later form addresses the impact of foregoing only a "lead attorney." The March 1988 form, under the heading "Advantages of Having a Lawyer," states: "I *understand* that if I had a lawyer to represent me," the lawyer would carry out various specific services on behalf of appellant. (8CT 1566.) Under the heading "Disadvantages of Self-Representation," it states: "I *understand* that without a lawyer I will have to do all those things which a lawyer would otherwise do for me," and "I also *understand* the judge will not help me to learn the rules, and it is not his job to teach me the law." (8CT 1568, emphasis added.)

The June 1989 form, in contrast, omits the headings "Advantages of Having a Lawyer" and "Disadvantages of Self-Representation" altogether. (12CT 2404-2408.) It never states any understanding that having a lawyer is an advantage to a defendant, and that Appellant is electing self-representation, which is a disadvantage to a defendant. In paragraph 6, it states: "I *have been advised and comprehend* that I have many legal rights including, but not limited to ... [the r]ight to the effective assistance of a

lawyer at all stages" and the right to an appointed lawyer if "I cannot afford a lawyer." (12CT 2405-2406, emphasis added.) Paragraph 7 states: "I *have been advised* that if I had a *lead attorney to represent me*," the lawyer would be "trained and experienced in legal proceedings" and would perform various specified legal services. (12CT 2406, emphasis added.) Paragraph 8 states: "I *understand* that if I am named lead counsel I will not have the benefit of *a lead counsel* to do all the forementioned [*sic*] things." (*Ibid.*, emphasis added [giving the suggestion that Appellant expects that "second chair" counsel *will* do the aforementioned things for him].)

Further, the March 1988 form is explicit about waiving the right to claim ineffective assistance of counsel on appeal, while the June 1989 form is not. The March 1988 form has this typical language: "I *understand* that if I am convicted I *will not be able to complain on any appeal that I did not effectively represent myself. However, if I am represented by a lawyer I may complain on appeal that I was ineffectively represented.*" (8CT 1569, emphasis added.) In contrast, the June 1989 form says: "I *have been advised* that if I am convicted any complaint on my appeal that I did not effectively represent myself will be denied if the appellate courts rule in accordance with the current law." (12CT 2407, emphasis added.) The form made no reference to giving up the right to claim ineffective representation *by counsel* on appeal (which suggests Appellant believed he would be able to claim ineffective assistance of second chair counsel on appeal).

The March 1988 form is explicit in its concluding waiver of counsel language. Under the heading "Waiver," the form (prior to alteration by Appellant) stated: "I *hereby waive and give up my constitutional right to representation by a lawyer.* [¶] I make this waiver freely and voluntarily. I have not been promised any benefit, *nor do I expect a benefit*, for making

this waiver. I have not been threatened, coerced, *or forced in any way* to make this waiver .... I have *read and understood*, and completed as necessary, all of the statements above." (8CT 1570, emphasis added.) In contrast, the June 1989 form reads: "I hereby waive and give up my constitutional right to have *a lead counsel* appointed on my behalf. [¶] I make this waiver freely and voluntarily. I have not been promised any benefit in exchange for this waiver, nor have I been threatened, or coerced to make this waiver." (12CT 2408, emphasis added.)

The content of the June 1989 form, considered together with the text of Appellant's motion and what transpired at the November 3, 1989, hearing, shows that Appellant's waiver of counsel was not made with subjective understanding that he was waiving the assistance of Sixth Amendment appointed counsel. As explained in *Burgener, supra*, 46 Cal.4th 231, it is the defendant's understanding, not the judge's understanding, that determines whether a waiver of counsel holds up on review as being knowing, intelligent and voluntary. (*Burgener, supra*, 46 Cal.4th 231, 241, citing *Koontz, supra*, 27 Cal.4th 1041, 1070 ["test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case"] and *United States v. Lopez-Osuna* (2000) 242 F.3d 1191, 1199 ["the focus should be on what the defendant understood, rather than on what the court said or understood"].)

In response to this argument in the AOB, the RB relies on the March 1988 hearing before Judge Zumwalt (45ART 474-488, 495-488) and alludes to the written *Lopez* waiver submitted in March of 1988 (RB 181, citing 8CT 1564-1570), a document that Judge Boyle never saw. Respondent quotes verbatim from the *Lopez* waiver submitted in June of

1989 (RB 181-184, quoting 12CT 2404-2408), but fails to discuss any of its salient points, for example, its reference to waiving "lead counsel" but never to "waiving representation by counsel" altogether. Most tellingly, Respondent never discusses the differences between the two documents.

The AOB proves that errors during the competence trial through the testimony of Deputy District Attorney Ebert likely fostered Appellant's ongoing confusion about what he could receive if granted *Faretta* status, as shown in his June 1989 motion. (AOB 395-397.) As outlined in sections A.II, A.III.b.a, and A.III.b.6, *ante*, the trial court, by permitting Deputy District Attorney Ebert to give an inaccurate statement of the "law" regarding the relative roles of a criminal defendant and his counsel, misled Appellant to believe that the law gave him the power to control an attorney representing him. (30ART 1031-1032.) Ebert, with the blessing of Judge Levitt and over the objection of defense counsel, testified that a "defendant himself or herself has the right to control fundamental decisions made in the presentation of that individual's case" and that the defendant "retains that control even in situations where the defendant is represented by counsel." (*Id.* at 1031-1032.) Ebert testified that the law guaranteed that "major decisions" such as whether to present any defenses related to the defendant's "mental" capacity were "left to the defendant," even where appointed counsel represented the defendant at trial. (*Id.* at 1033.) The prosecutor built on Ebert's misstatements during argument in the competence trial, stating that the law gave Appellant, rather than his appointed lawyer, decision-making control over the case (31ART 1122-1124), and arguing that Appellant's desire to control the case made sense given the "constitutional right" he retained "to make the fundamental decisions in [the] case even where he is represented by an attorney." (*Id.* at

1124.)

This testimony and argument during the competence proceeding fostered Appellant's confusion regarding how an appointed attorney provides effective assistance to a defendant in a criminal case. The situation as described by Ebert, with a fully-empowered defendant also gifted with a Sixth Amendment guarantee of effective assistance of counsel (and appeal rights thereon), sounds uncannily like the arrangement Appellant sought, and likely believed he won, in November of 1989 – full status as "lead attorney" for himself together with the benefits and protections of appointed counsel serving as his "second chair." Due in part to Ebert's inaccurate testimony, the record shows Appellant lacked subjective *understanding* of either what it meant to be represented by counsel, or what "self-representation" meant for a criminal defendant.

Respondent's Brief says nothing about this aspect of the case, as related to whether Appellant's waiver of counsel was knowing, intelligent, and voluntary.

As part of the inquiry on review, this Court should examine the parts of the record reflecting what happened after the grant of *Faretta* status. Appellant proves in the AOB at 398-401 that what happened after Judge Boyle granted Appellant pro per status further evidences that his purported waiver was an epic misunderstanding, rather than being knowingly, intelligently, and voluntarily made.

On November 8, 1989, Judge Boyle stated at a hearing in the case that he was inclined to appoint Mr. Sanchez and Mr. Wolf both as "second-chair, advisory counsel" (84ART 2603) to be paid at the rate of $60 per hour, relieved Bloom (84ART 2604), and put the matter over to December 8, 1989, at which time both Wolf and Sanchez would be "present as

advisory counsel." (84ART 2608.) On November 14, 1989, Boyle issued an order that appellant be afforded "pro per privileges" at the jail (12CT 2566); Appellant responded by submitting a proposed order (which Boyle denied) that those privileges would include placement in an "X" cell on the second floor of the jail, 24-hour access to a telephone and word processor, and sufficient lighting in his cell to permit reading and writing 24 hours per day. (*Id.* at 2611-2619.) In Appellant's December 4, 1989, request to the Court of Appeal for an extension to prepare a response to the competence writ, he complained about not having access to the court's files, his legal materials, and runners and paralegals; he also complained that advisory counsel Wolf had broken promises and was providing ineffective assistance of counsel. (*Id.* at 2628-2629.) The next day, attorney Sanchez moved for clarification of his role and asked to be designated as "Standby/Advisory" counsel which would enable Appellant to work on his own defense "in his own fashion" while Sanchez concurrently prepared a defense in a "competent" and "professional" manner with independent support services and funding. (*Id.* at 2630-2645.)

On December 6, 1989, Mr. Wolf moved to withdraw as "advisory attorney" in the case. (13CT 2648-2652.) That date, Sanchez appeared in court at a hearing before Judge Boyle as "counsel table advisory and second chair" for Appellant. (86ART 1.) During the hearing the trial court removed Wolf, and Appellant requested the court to appoint Bloom to replace Wolf. (*Id.* at 15.) Boyle appointed Bloom on a temporary basis to replace Wolf, for appearance at a status hearing set for January 18, 1990, and in so doing opined that one could "read every case in the state of California on the issue [and they would show that] nobody understands the roles of these different counsel as that concept is evolving ..." (*Id.* at 16.)

Appellant said he recognized the jurisdiction of neither the court nor the state. (*Id.* at 18.) Sanchez requested to be appointed as both advisory and standby counsel, so he would be authorized (and funded) independently to prepare a defense "in a professional manner" in parallel to Appellant's own preparation of a defense. (*Id.* at 18-22.) Boyle denied the request, stating that Sanchez's duty was to be prepared; he did not necessarily have to be ready to run and could have a reasonable delay to get up to speed. (*Ibid.*)

In a hearing before Judge Revak on December 18, 1989, Judge Revak addressed Mr. Sanchez as "second chair, co-second counsel," to which Sanchez replied that he was "advisory" or "advisory second chair" counsel, at which time Appellant objected to Sanchez speaking in court without Appellant's permission. (87ART 2-3.) Appellant complained that Sanchez had been appointed as advisory counsel but had been "ineffective." (87ART 3.) Discussion before Judge Revak showed great confusion about Appellant's status under section 987.9 with respect to obtaining and managing funds to cover expenses in defending the case, and at the conclusion of the hearing Sanchez said that no one in his office would work any further on the case. (*Id.* at 24-36.) On January 3, 1990, Appellant moved for a new advisory attorney to replace the temporarily-appointed Bloom (13CT 2721-2726), and on January 16 Appellant complained that he was "entirely without effective assistance of advisory counsel" and requested that Mark Chambers be appointed. (88ART 4-8.)

Time and again Appellant complained about the effectiveness of advisory counsel, and tried to prevent them from speaking with the court, the prosecutor, or each other without Appellant's permission, or from taking

action outside of his direction.[12]

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[12]See 96ART 12-13; 96ART 5-43 (May 2, 1990); 1RT 150-171 (July 9, 1990); 1RT 176-178 (July 20, 1990); 8RT 1471 (January 7, 1991, motion to bar advisories from filing anything without Appellant's permission and signature); 8RT 474-495 (February 1, 1991, motion to fire Chambers and for determination that Rosenfeld and investigator Atwell were ineffective); 9-1RT 531-536 (February 5, 1991 hearing on Appellant's request to fire Chambers and discussion of whether Appellant could claim ineffective assistance of advisory counsel); 9RT 542-560 (February 6, 1991, hearing on Appellant's complaints of ineffective assistance by Rosenfeld); 9RT 576-598 (February 15, 1991, hearing on complaints about Rosenfeld); 80CT 17110-17127 (February 19, 1991, petition in court of appeal seeking "control" over advisory counsel, complaining that Chambers planned to get appellant's pro per status revoked, and "firing" Chambers); 80CT 17248 (February 25, 1991 order denying petition for mandate and regarding Chambers as "stand-by" counsel]); 10RT 642-667 (March 18, 1991, hearing on Appellant's motions, wherein appellant said he had been unable to file motions because "Boyle's order relating to advisory counsel was not followed" and because Appellant had not had access to legal material in the jail); 80CT 17249 (March 19, 1991, petition for review of court of appeal decision, stating that Appellant's religion required he not recognize anyone who would interfere with his right to self-representation); 12RT 700-735 (March 28, 1991, hearing on motions, wherein Appellant claimed that a severance motion violated his religion because it was "essentially produced" by an attorney rather than himself because the trial court would not order access to Appellant's nine boxes of materials in jail, and said he would not use anything produced by Chambers, a "prosecution agent"); 12RT 817 (April 8, 1991, hearing on Appellant's access to boxes of materials, wherein Appellant stated that his religion in the World Humanitarian Church required self-representation, but might permit submission of work for Appellant by an attorney who recognized the self-representation tenet).

Appellant also labored under misconceptions regarding the role of judges in the trial court. Appellant obviously believed that the provision of second counsel was not a matter of the judge's discretion. To the extent that such counsel as Appellant was given by Boyle was advisory counsel, of course, the trial court had discretion to order or not order such counsel. (See *Bloom*, *supra*, 48 Cal.3d 1194, 1218 ["[A] self-represented defendant who wishes to obtain the assistance of an attorney in an advisory or other limited capacity, but without surrendering effective control over the presentation of the defense case, may do so only with the court's permission and upon a proper showing."]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1368 ["The court retains authority to exercise its judgment regarding the extent to which such advisory counsel may participate."].)

Rather, in Appellant's eyes, the judge had an obligation both to assure that he got the counsel Boyle ordered and, on top of that, a duty to enforce the role Appellant believed such counsel should play, i.e., that they must put on the case he wanted the way he wanted it without counsel's exercise of his or her own judgment. For instance, Appellant reminded Judge Gill of Judge Boyle's order that he have counsel, and asserted that it was Gill's obligation to uphold that order and that such counsel could not be taken away from him without "due process of law." (9RT 542.) So too, Appellant asserted that it was Judge Gill's obligation to enforce Boyle's order that his counsel acted only at his direction. As an example, Appellant asked Judge Gill to order advisory counsel Sanchez not to speak with other counsel without Appellant's permission. He asked Gill to order successor counsel Nancy Rosenberg to show Appellant her billings on the case before they were submitted. (*Id.* at 542-543.) He repeatedly asked that Gill prevent advisory counsel from speaking in court without his permission.

(See, e.g, 8RT 474; 9-3RT 621-622; 11RT 666; 12RT 817-818; 14RT 1252.) This illustrates Appellant believed that, in waiving counsel, his role as "his own attorney" would be backed up with supporting counsel – and with a quiescent judge who would insist on counsel obeying him – no matter what Appellant wished to do at his trial. This Appellant did not get: Gill explicitly refused to order Appellant's supporting counsel to give up their independent judgment.

The RB says nothing to rebut this showing in the AOB at 398-401 of how events as they unfolded after Judge Boyle's November 3, 1989, grant of self-representation status further prove that Appellant's waiver of counsel was not knowing, intelligent, and voluntary.

Finally, the AOB at 401-403 establishes that errors in connection with Judge Boyle's entering Appellant's waiver of counsel in November of 1989 require reversal, under either a structural error or a harmless error analysis. The error in failing to advise Appellant adequately about the consequences of waiving his Sixth Amendment right to counsel requires reversal of the verdict. In *Burgener, supra*, this Court declined to rule on this very issue, because Mr. Burgener was entitled to relief "even if the error were subject to harmless- error review under *Chapman* in some form." (46 Cal.4th at p. 245.) However, in the past this Court has recognized that the type of error committed by the trial court here will result in automatic reversal. (*People v. Crayton, supra*, 28 Cal.4th 346, 364; *People v. Hall* (1990) 218 Cal.App.3d 1102, 1108-1109.)

The United States Supreme Court has recognized that "some errors necessarily render a trial fundamentally unfair" and the denial of the right to counsel is one such error. (*Rose v. Clark, supra*, 478 U.S. 570, 577, citing *Gideon v. Wainwright, supra*, 372 U.S. 335; *Penson v. Ohio* (1988) 488

U.S. 75, 88; *Cronic, supra*, 466 U.S. 648, 659; *Chapman v. California, supra*, 386 U.S. 18, 23 [recognizing that the right to counsel is "so basic to a fair trial that [its] infraction can never be treated as harmless error"]; see also *Cordova v. Baca* (9th Cir. 2003) 346 F.3d 924; 930.)

Nor was the error harmless. Respondent argues (RB 188) that Appellant would have waived counsel even if Boyle had given the full and correct advisements Appellant now claims were wanting. One cannot say beyond a reasonable doubt that defendant would have waived the assistance of counsel no matter what the trial court said or did. When Judge Gill learned of Appellant's intended "Cointelpro" defense, he barred Appellant from putting it on. Had Boyle properly inquired on November 3, 1989, he would have learned of Appellant's intended defense and it may well have borne on the self-representation rulings. Appellant's main reason for going pro se was to be able to present the Cointelpro defense. The prosecution cannot show beyond a reasonable doubt that Appellant would have waived counsel even if he understood he would lack court-compelled assistance of second-chair or advisory counsel to present that defense. Hence reversal is required.

V. Judge Boyle Erred in Granting *Faretta* Status Due to Questions Concerning Appellant's Mental Capacity as Related to His Waiver of Counsel and His Competence to Represent Himself

In the AOB at 404-445 (Argument section IX), Appellant proves that Judge Boyle erred in granting him *Faretta* status due to questions concerning Appellant's mental capacity as related to waiver of counsel and his competency to represent himself, and also because his competence to stand trial had not been determined reliably. Section IX.A is introductory and requires no further discussion. Section IX.B describes Judge Boyle's error in ruling based only on the defendant's written submissions, while

ignoring the case file. Respondent counters at RB 189-192. Section IX.C explains Judge Boyle's error in granting self-representation without first ordering a psychiatric evaluation, and the RB addresses this at 192-193. Section IX.D proves Boyle's error in granting *Faretta* status without exercising his discretion to assess whether Appellant was competent to represent himself. The RB contests this at 83-97. Section IX.E explains how the inadequacy of the competence trial and the unresolved alternative writ on the competence petition served as a factor in Boyle's erroneous grant of *Faretta* status. The RB does not rebut this argument but rather simply refers back to Respondent's arguments (outlined in Section A, *infra*) that the competence trial was perfectly satisfactory. (RB 193, fn. 14.)

In reply, for clarity of analysis Appellant will group the points in Argument sections IX.B, IX.C, and IX.E of the AOB together in section B.V.a, *post*, and then turn to the points raised in Argument section IX.D of the AOB in section B.V.b.

a. Judge Boyle Erred by Granting *Faretta* Status Without Inquiring into Appellant's Mental Capacity as Related to Waiver of Counsel under California Law That Survives *Godinez*, Especially When He Agreed Not to Review the File and Kept Himself Ignorant to the Fact That an Alternative Writ Had Been Issued Regarding the Competence Verdict

As explained in the AOB at 374-375 and 407-409, the test from *People v. Lopez, supra*, 71 Cal.App.3d 568 outlines a trial court's duty to make advisements and inquiries of the risks and dangers of self-representation, in order to ensure a defendant's knowing, intelligent, and voluntary waiver of counsel. (*People v. Koontz, supra*, 27 Cal.4th 1041, 1070-1071.) The Court of Appeal in *Lopez* addressed this Court's words in *People v. Windham* that "'a trial court must permit a defendant to represent

himself *upon ascertaining that he has voluntarily and intelligently* elected to do so, irrespective of how unwise such a choice might appear to be,'" and stated a test that includes inquiring into the defendant's intellectual capacity. (71 Cal.App.3d at p. 571-573, quoting *People v. Windham* (1977) 19 Cal.3d 121, 127-128 emphasis in *Lopez*.) Specifically, "[i]f there is any question in the court's mind as to a defendant's mental capacity" then a "careful inquiry into that subject should be made – probably by way of a psychiatric examination." (*Id.* at p. 573.)

Cases decided soon after *Lopez* coined the duty to inquire as involving an assessment of the defendant's mental "competency" to waive counsel (*Curry, supra*, 75 Cal.App.3d 221; *People v. Zatko* (1978) 80 Cal.App.3d 534 (*Zatko*); *Teron, supra,* 23 Cal.3d 103), which is something separate from and higher than a mere competence to stand trial. (AOB 410-412.) The effect of the United States Supreme Court's holding in *Godinez* was to abolish the term "competency" to waive counsel, and yet preserve the concept that trial courts well can consider the defendant's mental capacity – and obtain a psychiatric evaluation if needed – as related to the issue of whether a waiver of counsel in fact is "knowing and voluntary." (AOB 414-416, discussing *Godinez, supra*, 509 U.S. 389; *Johnson v. Zerbst, supra,* 304 U.S. 458; and *Westbrook v. Arizona* (1966) 384 U.S. 150 (*Westbrook*).) Notwithstanding the holdings in *People v. Hightower* (1996) 41 Cal.App.4th 1008, 1115 (*Hightower*) ("competency to waive counsel" standard cannot, after *Godinez*, be higher than that of competence to stand trial) and *People v. Welch* (1999) 20 Cal.4th 701, 741-742 (reversing the determination that a defendant was competent to stand trial yet lacked the "mental capacity" to waive his right to counsel), the *Lopez* mental capacity inquiry survives as precedent, so long as it is understood to pertain to

whether the defendant actually *is* making a knowing and voluntary waiver, not whether the defendant is "capable" of making a knowing and voluntary waiver.

Thus, the AOB at 406-425 proves that precedent under California law that survives the United States Supreme Court's decision in *Godinez*, and federal due process principles under *Westbrook* and *Johnson v. Zerbst*, require trial courts to inquire into defendants' mental capacity, if the circumstances demand it, as related to their entry of a knowing, intelligent, and voluntary waiver of counsel during a *Faretta* hearing. The circumstances of this case triggered that inquiry. Judge Zumwalt carried out her duty to inquire, appointed Dr. Kalish to do a psychiatric examination, and ultimately concluded that Appellant's mental capacity was a barrier to his waiving counsel. Judge Boyle, in contrast, ignored the issue altogether, blindfolded himself to Judge Zumwalt's discoveries, entered Appellant's waiver of counsel, and granted self-representation status.

The RB says nothing to dispute this reading of precedent, and yet seems to assert that the verdict that Appellant was competent to stand trial is all that matters. (RB 192 "In this case, Waldon had already been found competent to stand trial.") *Godinez* makes clear that the defendant's competence to stand trial is a prerequisite to granting him *Faretta* status. In this case, Judge Boyle in granting *Faretta* status stated, without elaborating further, that appellant was "competent to make [the] request" to represent himself. (84ART 64.) The judge made no explicit or implicit determination of the more fundamental question, of whether Appellant was competent to stand trial to begin with, nor did he state that he was relying on the section 1368 verdict with respect to that issue. Moreover, the reliability and probative value of the competence verdict is itself called into

question for all of the reasons explained in the AOB and section A, *ante*, of this Reply, and at the time Boyle ruled the verdict's soundness had been impugned by this Court's grant of review and the Court of Appeal's issuance of the alternative writ and order to show cause. (AOB 319-320.) In addition, as the AOB proves, mental capacity as related to the entry of a knowing, intelligent, and voluntary waiver of counsel is separate from and different than competence to stand trial.

Respondent contends that "[n]othing in the record suggests Waldon was mentally incapable of understanding the nature of the charges against him or the nature of the rights he was asked to waive." (RB 192.) The issue, however, is not whether Appellant was "capable" of understanding but rather whether he did in fact subjectively understand the rights he was waiving and do so knowingly, intelligently, and voluntarily. (*Godinez*, *supra*, 509 U.S. 389, 400-401.) The Court in *Godinez* explained that the focus of a competence to stand trial inquiry is the defendant's mental capacity – whether he has the "*ability* to understand the proceedings" – while the purpose of the "knowing and voluntary" inquiry is "to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." (*Id.* at p. 401, fn. 12, citing *Drope v. Missouri, supra*, 420 U.S. 162, 171, for the competence inquiry and *Faretta, supra*, 422 U.S. 806, 835, *Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 279 (*Adams*), and *Boykin v. Alabama* (1969) 395 U.S. 238, 244 (*Boykin*), for the "knowing and voluntary" inquiry.)

Next, Respondent argues that Appellant's claims that his self-representation was required as a matter of religious belief (AOB 424-425[13]) mean nothing, because "[m]ore is required than just bizarre actions or statements by the defendant to raise a doubt of competency." (RB 193, quoting *People v. Marshall, supra*, 15 Cal.4th at p. 33.) But Appellant's insistence on self-representation as a matter of faith and salvation is but one piece of evidence on the issue of his mental capacity as related to whether his waiver of counsel was knowing, intelligent, and voluntary.

Judge Zumwalt's March 1988 ruling denying *Faretta* status was based on all of the relevant evidence of which she was aware, both formal and informal. The formal evidence included the testimony of court-appointed psychiatrist Dr. Kalish (40ART 65-188), Dr. Koshkarian (44 ART 386-420), and Dr. Di Francesca (45 ART 424-438); the declarations of Appellant's five witnesses; the testimony of advisory counsel Sanchez; the testimony of Russell and Khoury during the hearing on the motion to relieve counsel; evidence taken during the initial hearing on competence to waive counsel in the spring of 1987; and the evidence introduced at the competence trial. The informal evidence included Appellant's written submissions in the trial and appellate courts, and Judge Zumwalt's own

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[13] This portion of the AOB cites, e.g., 52CT 11025.320-11025.323 [Appellant says that Russell appearing without his permission violated his First Amendment religious freedom rights because his "religious beliefs require [him] to represent [him]self in propria persona."]; 14ART 34, 64 [Dr. Kalish testified Appellant told Kalish he had a religious belief that prevented him from cooperating with a psychiatrist in court proceedings]; 27A RT 351 [same]; 93ART 14 [Appellant insists his name be changed in legal proceedings, for religious reasons]; 2RT 256-258 [same]; 86ART 18 [Appellant insists the trial and appellate courts had no "jurisdiction" over him].

observations of Appellant and his statements and conduct in court and in ex parte hearings over many days of proceedings in 1987 and 1988. Such evidence is summarized in the AOB at 291-312. Based on all of this, Judge Zumwalt concluded that Appellant had "a mental disorder, illness or deficiency which impair[ed] his free will to such a degree that his decision to request to represent himself [was] not voluntary," and that he did "not realize the probable risks and consequences of his action." (8CT 1574.)

The record before Boyle was even stronger than that before Zumwalt in proving the need for a rigorous *Lopez* step-two inquiry, because it also included evidence of Appellant's obsessive attack on Judge Kennedy and numerous other officers of the court – even judges who ruled as appellant sought for them to rule. (See, e.g., 45ART 512-513 [accusing Russell of sexual relationship with her client John Maier and stating plan to bring criminal charges against Russell and Maier if granted pro se status]; 10CT 2097-2109 [accusing Kennedy of sexual involvement with Russell]; 52CT 11025.246-323 [accusing Russell of subjecting Appellant to involuntary servitude and domination in violation of the Thirteenth Amendment, asserting right to represent himself as a matter of "religious belief," accusing Russell of being a dominatrix in sexual relations with male and female judges, accusing Russell of attempting to kill Appellant and of being an "omnivaginal" prostitute and a "man trapped in a woman's body," inter alia]; 84ART 52-53 [seeking disqualification of Judge Boyle at the beginning of the November 3, 1989, hearing on the self-representation motion, after Boyle has acquiesced to all of Appellant's request (through Bloom) since Boyle's assignment to the case five months earlier].) Judge Kennedy wanted to order a psychiatric examination in advance of hearing Appellant's self-representation motion, but Bloom talked him out of it.

(70ART 9.) At the beginning of the November 3, 1989, hearing, Appellant made peremptory and cause challenges to Judge Boyle, causing Boyle to state that the case was becoming "insane in its practice and procedure." (84ART 53.) Yet, Boyle closed his eyes to reviewing the file and apparently never considered his duties under *Lopez* concerning Appellant's mental capacity as related to waiving counsel.

Godinez makes clear that the defendant's competence to stand trial is a prerequisite to granting him *Faretta* status. In this case, Judge Boyle in granting *Faretta* status stated, without elaborating further, that Appellant was "competent to make [the] request" to represent himself. (84ART 64.) The judge made no explicit or implicit determination of the more fundamental question, of whether Appellant was competent to stand trial to begin with, nor did he state that he was relying on the section 1368 verdict with respect to that issue. For all of the reasons explained above, the 1368 jury determination was egregiously flawed and it could not, under the circumstances, be taken as a reliable finding that Appellant was competent to stand trial. Judge Boyle violated due process and fundamental fairness by granting Appellant pro se status where his competence to stand trial remained in doubt and where his attorney had been relieved and no lawyer had been substituted to represent him. This is yet another basis to reverse the judgment and remand to the trial court for further proceedings on the *Faretta* motion.

Judge Boyle erred in granting pro se status without conducting the required inquiry into Appellant's mental capacity as related to whether his waiver of counsel was knowing, intelligent, and voluntary. Appellant proves this in the AOB and Respondent offers little to rebut that showing. Boyle's error violated Appellant's rights to due process and counsel under

the Fifth and Sixth Amendments of the federal constitution, as explained in sections B.IV and B.V, *ante*. The error is structural and reversal is required without any consideration of prejudice.

b. Judge Boyle Erred by Failing to Consider Whether Appellant Suffered Mental Defects Compromising his Competence to Represent Himself in the Trial

The AOB proves at 425-444 that the federal constitution and California law required Judge Boyle to consider Appellant's mental condition as related to his competence to represent himself at trial, as a prerequisite to granting the *Faretta* motion. Respondent addresses this argument at RB 93-97, and fails to overcome it.

Respondent contends Appellant's argument is solely one that Judge Boyle failed to exercise his discretion (RB 193), but that is not the case. The AOB argues both that Boyle had discretion and authority to deny *Faretta* status if he was incompetent to represent himself, and that Boyle had a *duty* to consider the question. (AOB 425-426, 442-444.) It explains that the Court of Appeal in its 1988 decision in *Burnett*, which Judge Zumwalt followed in withholding *Faretta* status, correctly interpreted federal constitutional law, as now is clear based on the United States Supreme Court's endorsement in *Indiana v. Edwards* (2008) 554 U.S. 164 and *Godinez, supra*, 509 U.S. 389, of the continued vitality of *Massey v. Moore* (1954) 348 U.S. 105, and *Adams, supra*, 317 U.S. 269 (in addition to *Westbrook, supra*, 384 U.S. 150, and *Johnson v. Zerbst, supra*, 304 U.S. 458). (AOB 443.) The RB fails to cite or discuss these older federal constitutional precedents, or their meaning in light of the analysis in *Edwards* and *Godinez*.

At the time the United States Supreme Court issued its decision in *Faretta*, California constitutional law was that defendants had no right to

self-representation. (*People v. Sharp* (1972) 7 Cal.3d 448, 459, 461, 463-464.) Once *Faretta* was published in 1975, state appellate courts and this Court addressed whether a defendant's competence to represent himself was a prerequisite to a trial court granting pro se status under the federal decision, and held that it was not. (*Curry, supra*, 75 Cal.App.3d 221, 226-227 [holding it was appropriate under *Westbrook* and *Johnson v. Zerbst* for the trial court to order a mental examination, but the results thereof were relevant only to the issue of whether the waiver of counsel was knowing and voluntary and not to whether the defendant was competent to represent himself]; *Zatko, supra*, 80 Cal.App.3d 534, citing *Curry* and reaching the same conclusion.) In *Teron*, where there were no facts known at the time of the *Faretta* hearing triggering the *Lopez* requirement to order a psychiatric exam, this Court upheld the grant of self-representation under *Faretta*, citing and quoting *Curry* for the rule that trial courts must consider the defendant's mental capacity to waive his right to counsel, but need not ask whether the defendant is "competent to serve as counsel in a criminal proceeding." (*Teron, supra*, 23 Cal.3d 103, 113-114.) The only federal constitutional precedent addressed in *Curry*, *Zatko*, and *Teron* was *Faretta* itself, a case that did not involve a defendant who was mentally compromised.

In *People v. Burnett*, the Court of Appeal in 1987 engaged a deeper inquiry into the question of self-representation for defendants whose mental capacity interfered with their ability to present a defense at trial. (*Burnett, supra*, 188 Cal.App.3d 1314, 1324-1325.) The court noted that in *Faretta* the high court itself relied on the precedents of *Adams, supra,* 317 U.S. 269, 279 ["[E]vidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case

effectively in court."] and *Johnson v. Zerbst, supra*, 304 U.S. 458, and that the precedent of *Massey v. Moore* stood for the same principles. (*Massey v. Moore, supra*, 348 U.S. 105, 108-109 ["No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court ...."].) *Burnett* and its rationale was followed by the Court of Appeal in *People v. Manago* (1990) 220 Cal.App.3d 982. Neither *Burnett* nor *Manago* addressed the *dicta* in *Teron*.

Making no mention of *Teron*, this Court in *Taylor* said that *Godinez* called into question the principles and ideas stated in *Burnett*. (*People* v. *Taylor* (2009) 47 Cal.4th 850, 877-888.) This Court noted that it had not addressed the issue between the time *Godinez* was decided and the time of the trial therein, and the Courts of Appeal in *Hightower*, *People v. Poplawski* (1994) 25 Cal.App.4th 881 (*Poplawski*) and *People v. Nauton* (1994) 29 Cal.App.4th 976 (*Nauton*) had held that California had not adopted a higher standard for self-representation than competence to stand trial. (47 Cal.4th at p. 876.) It also noted that it had characterized *Godinez* as holding that the ability to represent onself is irrelevant to a competent waiver of counsel in *People v. Bradford, supra*, 15 Cal.4th 1229, 1364, and specifically held *Burnett* not to be good law after *Godinez* in *People v. Welch, supra*, 20 Cal.4th 701, 734-735. But *Godinez* itself had not been decided when Appellant represented himself at his capital trial, and the holdings in *Poplawski*, *Nauton*, *Hightower, Bradford,* and *Welch* did not reach the trial court in Appellant's case.

Respondent treats this Court's decisions in *Taylor* as foreclosing Appellant's claims. (RB 195-197.) As Respondent points out, the Court in *Taylor* explained, ""We reject the claim of error because, at the time of

defendant's trial, state law provided the trial court with no test of mental competence to apply other than the *Dusky* standard of competence to stand trial ... under which defendant had already been found competent." (RB 196, quoting *Taylor, supra*, 47 Cal.4th at 879.) However, *Taylor* was decided in 2009 and involved a murder committed in September of 1994 and a trial in which the defendant invoked his *Faretta* rights in January and February of 1996. The court that tried Mr. Taylor's case was governed by a completely different body of law than that pertaining to Judge Boyle's decision to grant Appellant *Faretta* status in 1989. Respondent is simply wrong in stating: "Here, as in *Taylor*, at the time of Waldon's trial, California state law did not provide a standard of competence for self-representation different from the standard required to stand trial. As Waldon had been found competent to stand trial, he likewise met the competency standard to represent himself." (RB 196.)

Moreover, *Taylor* never considered that the Court in *Godinez* addressed only the question of "competence to waive counsel," distinguished *Massey* as involving an issue not before it (509 U.S. at p. 399, fn. 10), and cited the portion of *Faretta* that relied on *Adams v. United States ex rel. McCann, supra*, 317 U.S.269 (509 U.S. 389, 399-401 & fns. 11, 12.)

This Court in *Taylor* did address the high court's decision in *Indiana v. Edwards, supra*, 554 U.S. 164, and, as explained in the AOB at 439-441, technically was correct in stating that *Edwards* did not *create* a federal constitutional guarantee that mentally impaired defendants *must* be represented. However, *Taylor* never addressed the significance of *Massey* and *Adams*, or the fact that the Court in *Edwards* specifically stated that the question presented in *Godinez* was not the same one as that presented in

Massey. (*Edwards, supra*, 554 U.S. 164, 177.) As argued in the AOB at 439-440, *Edwards* held that even after *Faretta*, state law can insist on representation by counsel for a defendant who lacks the mental capacity to conduct his defense (viz., carry out the tasks set forth in *McKaskle*) without the assistance of counsel. *Edwards* never squarely addressed the question of whether due process principles under the federal constitution also required limiting self-representation to defendants mentally capable of performing the *McKaskle* tasks, but its statement that the *Massey* precedent survives *Godinez* suggests that to be the case. Thus, the implication from *Taylor* that the right does not exist because *Edwards* did not create it is not well-reasoned.

Respondent at RB 196-197 also relies on *People v. Johnson* (2012) 53 Cal.4th 519, 527-531, which states that its holding under *Indiana v. Edwards* that trial courts have discretion to deny self-representation based on the defendant's mental capacity as related to his ability to conduct a defense would have prospective effect only. (53 Cal.4th at p. 531.) But as explained in the AOB at 441, the suggestion in *Johnson* that trial courts pre *Edwards* could not similarly restrict *Faretta* rights is mistaken, as shown by the fact that the *Edwards* court itself was reviewing the trial court actions taken in 2005. Appellant continues to urge: "This Court must revisit its ruling in *Johnson* to the extent it suggests trial courts' constitutional authority to deny *Faretta* status, based on a defendant's inability to represent himself due to mental defects, was born with *Edwards*' 2008 publication. Similarly, this Court's statement in *Johnson* that California courts 'may deny self-representation *only* where *Edwards* permits it' [citation] has no explicit authority under federal constitutional law." (AOB 441.) Respondent presents nothing to counter this argument.

Moreover, as noted in the AOB at 444 fn. 87, an added complexity exists where the question is whether a mentally compromised defendant should be allowed to present his own defense in a *capital* case. The full argument in that regard is developed in the Argument section XX of the AOB and section E, *post*.

Finally, Respondent contends that this Court must defer to the trial court's discretion (*People v. Johnson, supra*, 53 Cal.4th at p. 531) and that the record is supported by substantial evidence that Appellant's mental condition did not prevent him from representing himself. (RB 197.) On the former issue, Appellant reminds this Court that the only judge to exercise any discretion on this issue was Judge Zumwalt, and she found based on an amply developed record that Appellant was *not* capable of representing himself. As for Judge Boyle, a trial court's refusal to exercise its discretion is itself an abuse of discretion. (*In re Marriage of Gray, supra*, 155 Cal.App.4th 504.)

On the latter point, Respondent says the evidence of Appellant's conduct leading up to and during trial prove his competence to represent himself; Appellant argues again that it proves the precise opposite. The benchmark is the ability to do the tasks set forth in *McCaskle v. Wiggins, supra*, 465 U.S. 168, 174: "organization of defense, making motions, arguing points of law, participating in *voir dire*, questioning witnesses, and addressing the court and jury." Of these, the trial court repeatedly referred to Appellant's failure to file motions timely despite Appellant being given resources and legal support, and said that the motions that Appellant finally filed were for all intents and purposes a near duplicate of those previously filed by Russell. The trial court also stated on the record Appellant's lack of preparedness, and commented on the extraordinary length of time

between questions when Appellant was examining a witness. The trial court also noted on more than one occasion that Appellant appeared to have no clue as to his negative effect on the jury. But most importantly, the record demonstrates that Appellant could not and did not carry out the most important task – organizing a defense based on anything other than fantasy and delusion. Judge Gill himself repeatedly ruled that the defense organized by Appellant was based on delusion and was so deficient that it could not be presented to the jury.

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SECTION C

COURT OF APPEAL RULINGS

Three sections of Argument in the AOB involve actions taken in the Court of Appeal. In section X (AOB 446-454), Appellant proves that the Court of Appeal erred in finding that Judge Boyle's grant of *Faretta* status to Appellant mooted the issues in the competence to stand trial writ. Respondent addresses this issue at RB 200-201. Section XI (AOB 455-474) proves that Appellant's self-representation in the competence writ proceedings violated his due process right to not be tried while incompetent and his right to the assistance of counsel under federal and state law. This Respondent counters at RB 198-199. Argument section XII (AOB 475-502) proves that the Court of Appeal's reversal of Judge Edwards' consideration of Appellant's mental state as related to his self-representation and waiver of counsel was erroneous and violated Appellant's rights to due process, a fair trial, and assistance of counsel. The response to this is found at RB 202-204. Appellant replies concerning the first two of these three arguments in section C.1 and concerning the third argument in section C.2, as follows.

I. The Court of Appeal Committed Egregious Error in its Disposition of the Competence to Stand Trial Writ, Because it Failed to Ensure Appellant Had Representation of Counsel in the Writ Proceedings and it Reached an Outcome That Subverted Legal Requirements Concerning Mentally Compromised Defendants

a. Appellant Should Have Had a Lawyer During Writ Proceedings on the Competence to Stand Trial Verdict

When a doubt has been declared concerning a defendant's mental competence to stand trial, due process and fair trial rights under state and federal constitutional law and state statutes, and related precedents, require

the assistance of appointed counsel for that defendant until the doubt has been resolved – even if the resolution of the doubt is a question pending before a Court of Appeal on writ proceedings, rather than a trial court. As shown in the AOB, this conclusion is drawn from the federal constitutional guarantee of adequate procedures for determining a defendant's competence to stand trial (see *Pate, supra*, 383 U.S. 375) and the right to assistance of counsel during competence proceedings recognized by this Court in *People v. Lightsey*. As authority for this contention in the AOB, Appellant cites numerous cases and statutes and also points out that this Court granted review in Case No. S004854 and the Court of Appeal on May 25, 1988, issued an alternative writ concerning the competence verdict, which remained pending until it was dismissed as moot in 1990. (AOB 464-466.)

The RB admits *Lightsey* held that a criminal defendant has an unwaivable right to representation during competence proceedings, yet argues there is "no basis for extending the holding" to require representation during writ proceedings challenging the competence to stand trial verdict. (RB 200.) Respondent emphasizes the distinction between an appeal (during which a defendant clearly has no right to represent himself, see *Martinez v. Court of Appeal of California, Fourth Appellate District* (2000) 528 U.S. 152, 163-164) and a pretrial writ petition, and avers that Appellant had a Sixth Amendment right to represent himself up until his conviction, and says there is no authority for the premise that Appellant should have had "separate counsel" in pretrial writ proceedings. (*Id.*) Respondent says Appellant "received everything he was entitled to," because counsel was appointed and represented him through the trial court competence proceedings and he waived counsel after the jury issued its

competence verdict.

While there is no current decisional rule requiring representation by counsel during writ proceedings challenging a competence verdict, this Court should adopt one, at least where, as here, this Court has granted review and directed the issuance of an alternative writ by the Court of Appeal. That occurrence indicated there was a prima facie case for invalidating the section 1368 verdict, triggering the Court of Appeal's jurisdictional duty to judge the petition on its substantive and procedural merits. (See Suppl. AOB 20.) The RB completely ignores the fact that the alternative writ had been issued and remained pending, when the Court of Appeal dismissed the competence writ while Appellant was unprotected by the assistance of counsel. Moreover, the competence verdict was flawed to the core, for reasons explained in AOB Argument sections I-VI. The federal constitutional right to due process guarantees an adequate procedure for determining a defendant's competence to stand trial once it has been called into question, and that provided in this case (the deficient competence trial coupled with the Court of Appeal's abdication of its duty to exercise oversight under the rules governing mandamus proceedings) did not meet constitutional muster.

b. <u>The Court of Appeal's Determination That Boyle's Grant of *Faretta* Status "Mooted" or Resolved the Alternative Writ Concerning the Competence Verdict Was Erroneous</u>

The AOB at 446-454 proves that the Court of Appeal erred in dismissing the alternative writ in Case No. D007429 as "moot" based on Judge Boyle's grant of *Faretta* status for numerous reasons: (1) the standard for determining that one is "competent to represent oneself" is not the same as that for determining competence to stand trial; (2) the Court of Appeal in

discharging the alternative writ said Boyle had "determined [Appellant] competent to represent himself, rendering these proceedings moot," but Boyle never made such finding; (3) the procedural requirements for a trial court's ruling on a *Faretta* motion do not satisfy the federal due process and statutory requirements for a determination of whether a defendant as to whom a doubt has been declared is competent to stand trial; (4) the term "competent" is defined differently in section 1368 (competence to stand trial) and under the law involving competence to waive counsel; and (5) taking a waiver of counsel does not necessarily involve any consideration of the defendant's mental capacity.

Respondent counters none of these points, but rather asserts only that Appellant has failed to preserve this challenge to the Court of Appeal's decision by seeking rehearing or review. (RB 198-199.) Respondent relies on *Barbee v. Appellate Department of Superior Court in and for Los Angeles County* (1930) 209 Cal. 435 [Supreme Court denied petition for alternative writ on ground that petitioner failed to seek rehearing in the court of appeal and petition for hearing in the Supreme Court if rehearing were denied] and rule 8.490 of the California Rules of Court [order dismissing a petition for a writ as moot after issuance of an alternative writ is final in the issuing court when filed and rules governing rehearing in the Court of Appeal and the Supreme Court apply]. However, the decision in *Barbee, supra*, was criticized in *Funeral Directors Assn. Of Los Angeles & Southern California v. Board of Funeral Directors and Embalmers of California* (1943) 22 C.2d 104, 106, as misconceiving the jurisdictional problem and prescribing an undesirable rule of practice, and under current rule 8.490(b)(2) of the California Rules of Court it is unnecessary to petition for rehearing as a predicate to this Court's jurisdiction on review.

(8 Witkin, *California Procedure 5th* (2015 supp.) Writs, § 221.)

Moreover, Appellant was unrepresented by counsel when the alternative writ was discharged and his mental capacity was at issue. Federal and state constitutional and statutory principals sounding in due process and the right to counsel preclude application of these rules of finality and claim preservation under the circumstances.

The Court of Appeal's discharge of the alternative writ was contrary to law for all of the reasons proved in the AOB. This Court should grant rehearing of Appellant's writ challenging the competence verdict in this Court if it deems that remedy appropriate. (Cal. Rules of Court, rule 8.536.)

II. The Court of Appeal Erred in its Resolution of Writ Proceedings Concerning Judge Edwards's Order Appointing Psychiatrists for Further Mental Assessment of Appellant

In the AOB at 475-502, Appellant establishes errors in the Court of Appeal's resolution of writ proceedings challenging Judge Edwards' steps to investigate Appellant's mental condition as related to self-representation status and appointment of Drs. Di Francesca and Koshkarian to do mental examinations, in August and September of 1990. Respondent avers that Appellant has forfeited the claim, it is not preserved because he did not seek rehearing or review of the Court of Appeal decision, and the Court of Appeal's decision was correct. (RB 198-199.)

Forfeit should not apply because the issue concerns Appellant's fundamental federal and state constitutional and statutory rights to counsel and due process, and this Court should exercise its discretion to address the claim notwithstanding Appellant's failure to take steps to preserve it. The argument that failure to seek rehearing or review of the Court of Appeal decision means it is not preserved fails for the same reasons explained above in section C.I.

Turning to the merits, the AOB shows that Judge Edwards acted appropriately in applying a heightened standard to assess whether Appellant's mental capacity affected his entry of a knowing, intelligent, and voluntary waiver of counsel under precedent including *Godinez*, *Westbrook*, *Johnson v. Zerbst*, *Teron*, *Lopez*, *Burgener*, *People v. Johnson*, and *Edwards*. These principles are explicated in section B.IV and B.V, *ante*, and are applicable to this situation as well. The Court of Appeal's conclusion that Appellant's conduct of his defense in the trial court between his November 3, 1989, receipt of self-representation status and Judge Edwards' ruling ten months later evidenced his mental capacity was completely groundless, for all the reasons stated in the AOB.

Respondent argues that Edwards abused his discretion in taking steps to revisit either the competence to stand trial verdict or the grant of *Faretta* status. This is not so, however, because the continual unfolding of events over the preceding 10 months, especially including Appellant's filings in the Court of Appeals requesting extensions to *prosecute* the writ challenging the verdict of competence, were changed circumstances justifying reconsideration of the issue at hand. (AOB 499-500, referencing Appellant's vociferous challenge of trial judges, including those who ruled in his favor, and attack on the qualifications of a judge appointed by the Judicial Council; his ardent requests for extensions of time to litigate the competence writ in the Court of Appeal; his assertions that the government and courts lacked any jurisdiction over him; his request for minutes from every criminal proceeding heard in the trial court over a two-week period in 1987; advisory attorney Sanchez's criticisms of Appellant's penchant for filing specious motions, and avoidance of preparing a defense; and his problems with advisory counsel Rosenfeld and complaints against her and

Sanchez.)

The Court of Appeal's reversal of Judge Edward's rulings was structural error because it caused further breach of Appellant's right to counsel in the guilt and penalty phases of the capital trial. (See e.g., *Cronic*, *supra*, 466 U.S. 648.) Should this Court consider whether the error was harmless, the conclusion that Appellant was prejudiced is unavoidable. The Court of Appeal's ruling cast a pall over subsequent proceedings before Judge Gill, who noticed and commented on the delusional nature of the defense pursued by Appellant, but sat on his hands in light of the appellate court's admonition that this was a "disagreeable" case in which Appellant had an "unconditional" right to represent himself, and it had been unduly prolonged.

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SECTION D

TRIAL AND PRETRIAL PROCEEDINGS

Argument sections XV, XVI, XVII, and XVIII of the AOB prove that after Appellant was granted self-representation status and the Court of Appeal dismissed the competence writ and abrogated Judge Edwards' 1990 efforts to inquire into Appellant's mental capacity, the events leading up to and during trial involved numerous errors and abridged Appellant's rights under federal constitutional law and state law. In section XV at AOB 628-679, Appellant shows Judge Gill's erroneous failure to suspend proceedings because of evidence concerning Appellant's competence to stand trial and his mental capacity as related to self-representation violated due process. Respondent counters at RB 207-214. Section XVI at AOB 680-730 proves that the trial court's actions concerning the role of advisory counsel interfered with Appellant's right to self-representation under the Sixth and Fourteenth Amendments of the federal constitution, and under state law. The RB retorts to this argument at 214-246. AOB Argument section XVII establishes that the trial court violated Appellant's right to present a defense under the Sixth Amendment of the federal constitution by excluding testimony of Appellant's intended expert witnesses in support of his Cointelpro defense. (AOB 731-757.) Respondent answers this at RB 246-255. In Argument section XVIII, the AOB proves that the atmosphere in the courtroom, and Judge Gill's failure to keep it in line, were inherently prejudicial and violated Appellant's federal constitutional rights to due process and a fair trial. (AOB 758-774.) The RB addresses this issue at RB 255-264.

I. Judge Gill's Failure to Declare a Doubt Regarding Appellant's Competence to Stand Trial Violated Appellant's Right to Due Process, Requiring Reversal of All the Verdicts

In Argument section XV, AOB 628-279, Appellant showed that his conviction and sentence must be reversed because Judge Gill failed to suspend proceedings in light of substantial evidence of Appellant's mental incompetence. The competence to stand trial standard for a represented defendant requires that the defendant rationally and factually understand the proceedings and have the capacity to rationally assist counsel in his or her defense. (*Dusky v. United States, supra*, 362 U.S. 402.) However, as Appellant established in the AOB, when a defendant is unrepresented at trial the standard is different: the defendant must be able to rationally and factually understand the proceedings and *to make a rational defense*. This was part B of Appellant's argument. (Arg. § XV.B. AOB 628-642.) Then, in section XV.C, Appellant showed that if there is substantial evidence the defendant cannot make a rational defense, trial proceedings must be suspended. (Arg. § XV.C, AOB 642-662.)

In section XV.D, Appellant delineated the evidence that he could not make a rational defense, which was substantial evidence that he was incompetent to stand trial. (Arg. XV.D., AOB 665-668.) In section XV.E, Appellant explained how evidence that his actions delayed the case is immaterial. (Arg. XV.E., AOB 662-665.) In section XV.F, Appellant showed that, should this Court not find that the competence standard for a self-represented defendant is different than that for a represented defendant, there was substantial evidence Appellant could not rationally assist counsel or rationally understand the proceedings, under the *Dusky* standard. (Arg. XV.F., AOB 665-668.) In section G, Appellant showed that a retrospective competence hearing is not feasible so that reversal, not remand, is required.

(Arg. XV.G., AOB 669-673.) In the final two parts of the argument, sections H and I, Appellant showed it was error for Judge Gill to fail to hold a hearing on Appellant's competence to represent himself, since there was evidence that Appellant did not have the capacity to knowingly and intelligently waive counsel. (Arg. XV.H and XV.I, AOB 673-679.)

Respondent does not address Appellant's argument that a different competence standard is required when a defendant is unrepresented at trial. Rather, Respondent assumes that the applicable standard for competence to stand trial in this case is that of *Dusky*, and asserts that a jury found Appellant competent to stand trial under that standard and there was no evidence of a substantial change in circumstances warranting that the competence verdict be revisited. (RB 207, citing *People v. Jones, supra*, 53 Cal.3d 1115, 1153.) Respondent's contention pertains only to Appellant's arguments in section XV.F of the AOB, and the RB takes no position regarding parts B, C, D, E, G, H, and I of Argument section XV. Therefore, Appellant limits his Reply to section XV.F as well.

As Respondent points out, this Court in *Jones* held that once a competence hearing has been held "the trial court need not conduct a second competenc[e] hearing unless it is presented with a substantial change in circumstances or new evidence casting serious doubt on the validity of a prior finding." (RB 207.) However, *Jones* does not apply for two reasons. First, its rationale does not fit where, as here, it is asserted that the unrepresented defendant lacked the ability to present a rational defense, because Appellant was *represented by counsel* during the initial competence trial and therefore the *Dusky* standard of being able to "rationally assist counsel" governed that proceeding. Appellant never received any competence hearing using the standard appropriate for a self-

represented defendant, and thus the question of whether the evidence supported a "second hearing" during proceedings before Judge Gill never arises – *Jones* simply is inapposite. Since Appellant never received a competence hearing using the standard appropriate for a self-represented defendant, his right to be competent when tried was not given protection by adequate procedures under the federal Constitution, and this structural error requires reversal of the guilt and penalty verdicts. (*Drope v. Missouri, supra*, 420 U.S. 162, 172 [due process guarantees procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial]; *Pate v. Robinson, supra*, 383 U.S. 375.)

Second, should this Court find Appellant's argument in AOB sections XV.B and XV.C unpersuasive, even if the *Dusky* standard (ability to rationally assist counsel) applies when a defendant is self-represented at trial, *Jones* does not determine Appellant's claim. *Jones'* requirement that there be substantial evidence of a change of circumstances or new evidence of incompetence casting doubt on the validity of the prior finding presumes that the prior competence hearing yielded a valid finding to begin with. In this case, it did not. The jury in the 1987 competence trial received proper instruction in the first part of the *Dusky* test (whether the defendant rationally and factually understands the proceedings and charges), but not on the second part (whether the defendant rationally can assist counsel in his defense). Rather, as shown in AOB Argument section I, and section I of this Reply, *ante*, Appellant's section 1368 jury was instructed that it should determine whether Appellant had the ability to assist "an attorney in conducting that person's defense," but the words "in a rational manner" were omitted altogether. (31ART 1095-1096.) The section 1368 jury considered and resolved the factual and legal issue framed for it by the

judge's flawed instructions, and thus the prior competence proceedings never determined or entered findings of whether Appellant met the *Dusky* standard for competence to stand trial. As a result, the circumstances before Gill never triggered an inquiry into whether there was "substantial evidence" of changed circumstances, since the initial competence determination did not produce valid findings of competence, under *Jones*. (Cf. *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 952-953 [competence determination based on incorrect standard must be treated as if no competence hearing was held at all].)

Finally, even assuming *Jones* does apply, reversal is required under the holding of that case. In the opening brief, Appellant showed that there was substantial evidence of his inability to cooperate rationally with counsel, and that this was substantial evidence of incompetence requiring that Judge Gill suspend the proceedings. (AOB 665-668.) This same evidence is also new evidence casting serious doubt on the *validity* of the prior finding. The jury's section 1368 finding in this case was based upon evidence and prosecution argument that Appellant's difficulties with counsel were limited to his inability to assist Russell and Khoury and that he could assist other counsel should he choose to do so. (See, e.g., 31ART 1150 [prosecution's argument that the evidence showed at most that Appellant was able but unwilling to assist his current attorneys, but it was not proven that he could not assist any attorney].) Subsequent developments after the competence verdict was entered did prove the latter contention, however. The record is replete with examples of Appellant's inability to assist *any* attorney rationally – which Judge Gill well knew given Appellant's difficulties with attorneys Sanchez, Chambers and Rosenfeld. (See AOB 643-645.) While Appellant did seem to get along

with attorney Bloom, appointed for the limited purpose of assisting with the *Faretta* motion in 1989, that was Bloom assisting Appellant for a narrow objective and not Appellant assisting Bloom in preparing and carrying out a defense. As such, the new evidence of Appellant's inability rationally to assist *any* counsel in his defense cast doubt on the jury's finding, and justified a new competence inquiry under *Jones*.

Moreover, *Jones* aside, under United States Supreme Court precedent, where the evidence before the trial court raises a "bona fide doubt" as to a defendant's capacity to stand trial, the judge on his own motion must conduct a competence hearing. (*Pate v. Robinson, supra*, 383 U.S. 375, 385; *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561, 568.) "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." (*Drope v. Missouri, supra*, 420 U.S. 162, 181.) The bona fide doubt standard applies, both when the issue is whether to hold an initial competence hearing and when it is whether to hold an additional competence hearing after one already has been held. (*Amaya-Ruiz v. Stewart* (9th Cir. 1997) 121 F.3d 486, 489; *Maxwell v. Roe*, *supra*, 606 F.3d at p. 568.) Here, there was evidence before Judge Gill of "circumstances suggesting a change that ... render[ed] the accused unable to meet the standards of competence to stand trial," which met the "bona fide doubt" standard applicable under the federal constitutional test. Thus Gill erred in failing to order a competence hearing.

Respondent's argument in the RB continues: "Waldon contends that his unwillingness to discuss options for his defense with advisory counsel and that his claims that advisory counsel, the prosecution, and even the trial

court were involved in a conspiracy against him constituted substantial evidence that he was incompetent to stand trial." (RB 208, citing AOB 643-650.) Respondent characterizes Appellant's behavior in this regard as a mere refusal to cooperate, not as evidence of a lack of understanding of the nature of the proceedings and charges or of an inability to "assist [counsel] in his ... defense." (*Ibid.*) Respondent cites *People v. Lewis* (2008) 43 Cal.4th 415, 426, for the proposition that where there is no substantial evidence that the defendant's behavior reflected an inability rather than an unwillingness to cooperate with counsel based upon the observations of the trial judge, there is no substantial evidence of incompetence. (RB 211-212.)

Respondent has misunderstood Appellant's argument. The AOB runs through the evidence that Appellant would not discuss options for a defense with appointed members of the defense team, and believed nearly everyone in the courtroom was in a conspiracy against him, not to prove that the second prong of the *Dusky* test, viz., that Appellant was "unable to assist [rationally] in his own defense." Rather, it was offered to establish that there was substantial evidence Appellant, as a pro se defendant, was unable to "make a rational defense" (the standard Appellant asserts in section XV.B must be applied) because he could not rationally understand, consider, and then choose a defense. (AOB 643.) He could not, with rationality, discuss and comprehend defense options with those appointed to present them to him, because of his obsessive belief of an over-arching conspiracy including those on the defense team. (AOB 643-650.)

Respondent's neglect of this difference is critical – Appellant does not contend that the conspiracy delusion in and of itself rendered him incompetent to stand trial, but that under the circumstances of this case it

actually interfered with his ability to make a rational defense. It is possible that a defendant suffering a delusion of being persecuted by the FBI and the CIA because he was a Cherokee-Esperanto activist who invented a new language and was the founder of a new religion could still cooperate with counsel. One can imagine scenarios where a defendant suffering from such delusions could discuss the decisions related to trial with counsel, and the attorney could, in spite of a mentally ill client, put on a viable defense while working around the defendant's delusional beliefs. (Cf. *People v. Lawley* (2004) 27 Cal.4th 102, [trial court characterizes defendant's disagreement with counsel over whether to choose a court trial, based on the defendant's delusion that women on a jury wearing pants were lesbians or transvestites, as a mere matter of trial strategy].)

However, it is next to impossible that a defendant who believed that the reason for his prosecution was persecution by all associated with the law could himself, acting pro se, put on a rational defense. Someone who believes in a delusion that the government is out to frame and destroy him and the court is part of that grand conspiracy – and who cannot alter those beliefs in response to contrary evidence – cannot rationally choose between alternate courses in putting on a defense. (See *People v. Murdoch, supra*, 194 Cal.App.4th 230, 239, fn. 3 ["For defendant, the existence of nonhumans in human bodies is, at times, his reality, but it is not a rational defense (absent a plea of not guilty by reason of insanity)."].) Here, because of his obvious mental problems, Appellant could not objectively view the evidence against him, decide which defense he preferred, and then put on that defense. His perception and choices were distorted completely by his delusion that he was the victim of a grand conspiracy. This point is particularly important in relation to Appellant's ability to select and present

a penalty phase defense. As someone who unshakeably believed that his delusional notions of conspiracy were true, Appellant could not rationally choose whether to present the delusional beliefs as evidence of a profound mental disability in mitigation, as a reason against imposing the death penalty.

People v. Marshall, supra, 15 Cal.4th 1, cited at RB 212, thus is distinguishable. In *Marshall*, this Court held that the defendant's delusions were not substantial evidence showing incompetence because "bizarre statements, standing alone, are not sufficient." (*Id.* at p. 33.) In this case, the record does not show only "bizarre statements." Here, Appellant's delusions were direct evidence of Appellant's incompetence to stand trial, because the record shows that they radically interfered with his ability to make a rational defense.

Respondent quotes *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1047: "An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper." (RB 208.) Respondent argues that "the record shows that Waldon refused to work with his advisory counsel and his ancillary staff in order to delay the proceedings and avoid moving forward." (*Ibid.*)

There is no question that Appellant's behavior with those assigned to assist him had the effect of delaying the case. The issue, however, is not whether Appellant's actions delayed the case, or even whether Appellant knew that acting uncooperatively with counsel would cause delays; Appellant knew that there would be delays. Rather, the pivotal question is whether Appellant's actions in failing to cooperate with advisory counsel were the product of a rational choice. Rationality is not about the outcome,

rather it is about the thought process. Decision-making relating to a trial requires the capacity not only to understand, but also to appreciate the significance of information with regard to decisions, the capacity to think logically about different courses of action and then choose between the different courses of action. (AOB 637.) The AOB details dozens of instances where Appellant said the court and counsel were conspiring against him, or where Appellant asserted that he would not cooperate with advisory counsel because these individuals were in league with the prosecution, who, together with counsel and the judge, wanted to see him convicted of murder and sentenced to death.

This belief of Appellant's that the prosecution was conspiring with his advisory counsel was, of course, completely unfounded – which everyone else in the courtroom recognized. Respondent assumes that Appellant was acting rationally in acting to delay the case, but the record belies that. The record shows he refused to cooperate out of perceived self-preservation, in order to thwart the goals of those conspiring against him. In attributing all of Appellant's behavior to a master plan to delay the proceedings, Respondent has adopted the attitude of Judge Gill, who in the latter part of the trial became very frustrated with Appellant's behavior that slowed the case down. (See AOB 663.) In light of the evidence before Judge Gill, the conclusion that Appellant's delay was only a bothersome trial tactic was unwarranted. Appellant's refusal to discuss a viable defense with advisory counsel, together with his stated reasons for refusing to do so (i.e., that his helpers were "agents of the prosecution") are enough evidence to raise a reasonable doubt about Appellant's incompetence triggering the trial judge's duty to halt proceedings to assess the facts. It is well-established that if there is substantial evidence of incompetence to stand

trial, then there must be a proceeding to assess competence, notwithstanding other evidence in the record. (*People v. Lawley, supra*, 27 Cal.4th at p. 131.) Judge Gill erred by failing to inquire in to Appellant's competence to stand trial, given the evidence before him, and that error demands reversal. (*Pate v. Robinson, supra*, 383 U.S. at p. 385.)

By focusing on the delay issue as a result of Appellant's irrational behavior, Respondent sets the evidentiary bar too high – presupposing that Judge's Gill's task was to determine the ultimate question of whether Appellant *was* incompetent to stand trial. This is not so. The task for a trial judge is to assess whether there is evidence which raises a reasonable doubt about the defendant's competence. As explained in *Moore v. United States* (9th Cir. 1972) 464 F.2d 663:

> Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. *The function of the trial court in applying Pate's substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency.* At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of the competency of the defendant to stand trial.

(*Id.* at p. 666, emphasis added.) California cases are in accord. "[O]nce such substantial evidence appears, a doubt as to the sanity of the accused exists, no matter how persuasive other evidence may be." (*People v. Sundberg* (1981) 124 Cal.App.3d 944, 955.) When the trial court becomes aware of substantial evidence which objectively generates a doubt, it must

declare a doubt and suspend proceedings even if the judge's personal observations suggest that the defendant is competent. (*People v. Pennington* (1967) 66 Cal.2d 508, 518.)

Again citing *People v. Lewis and Oliver, supra*, 39 Cal.4th 970, 1047, Respondent contends that a reviewing court should defer to the trial court's observations and assessments regarding whether a defendant has presented substantial evidence of incompetence. (RB 208.) There are two responses to this. First, as Appellant showed in Argument section XIX of the AOB, this case bounced from judge to judge while Appellant's competence to stand trial and competence to represent himself were in doubt, and therefore this is not an instance where this Court can defer to an individual trial judge and his/her face-to-face familiarity with Appellant when considering issues related to Appellant's mental state. (AOB 775-803.) One main fact relevant to assessment of Appellant's mental state involved his behavior with and toward advisory counsel, which Respondent characterizes as being carried out in a deliberate attempt to delay. Critical expert evidence in the record showed that delay or not, Appellant *could not* rationally discuss a defense with counsel – yet Judge Gill never knew of this evidence. Expert psychiatric testimony of Drs. Kalish and Norum at the competence trial, and expert testimony by Drs. Koskarian and Di Francesca in the *Faretta* and *Marsden* hearings before Judge Zumwalt, all concluded that Appellant could not rationally discuss a defense with counsel. Nor did Gill know anything of the evidence at the competence trial concerning Appellant's psychiatric breakdown while in the Navy.

This Court has noted that an appellate court is in "no position" to "appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer

temper," (*People v. Danielson* (1992) 3 Cal.4th 691, 727), but in this case that drawback applies to the position that Judge Gill was in, as well. Judge Gill could observe Appellant's behavior and its effect on the trial – i.e. that Appellant was presenting a defense with no basis in reality which the jury reacted to with incredulity and laughter. However, without knowledge of Appellant's mental health history and the benefit of available expert opinion regarding that history, Gill was not in a position to assess whether Appellant's absurd defense was the product of a rational choice. (Cf. *People v. Lawley, supra*, 27 Cal.4th 102, 132 [trial court assesses competence expert testimony in light of other facts].) In assessing whether there is a bona fide doubt of Appellant's competence to stand trial, a court must consider all of the evidence. (*Moore v. United States*, *supra*, 464 F.2d at p. 666.) Likely because of the admonition by the Court of Appeal concerning the "long and tortured history" of the case and the desire not to "prolong" these "disagreeable proceedings" (15CT 3190; 79CT 17008), Judge Gill ignored a large quantity of highly pertinent evidence. This Court cannot defer to his observations, and its review must consider the record en toto. Additionally, Judge Gill's ignorance of the prior proceedings, under a legal framework where competence is presumed (section 1369) denied Appellant his due process right to a meaningful competence hearing.

Second, the record as a whole does not support a conclusion that Judge Gill's personal observations and assessments left him without substantial concern about Appellant's competence to stand trial. Gill himself repeatedly acknowledged the irrationality of Appellant's defense, as pointed out in the opening brief. Respondent quotes several passages in the record where Judge Gill addressed concerns about Appellant's capacity and mental illness and noted that section 1368 proceedings might become

necessary (RB 209-211, citing 3-1RT 349-1-350-1, 12RT 877-878, 13RT 981, 66RT 13529-13530), as evidence that Judge Gill "understood [the court's] responsibilities to assess whether Waldon was competent to stand trial." (RT 212.) The quoted passages indeed help establish there was enough evidence of incompetence to give Judge Gill cause for concern. Judge Gill said in August of 1990 that future events might cause him to order section 1368 proceedings, and the other comments quoted by Respondent were made in April and October of 1991.

The evidence of Appellant's incompetence to stand trial did accumulate over many months, causing Gill to say in October of 1991 during the guilt trial that Appellant's theories on Cointelpro were "manifestation of a mental disorder" and that Appellant had "disabilities" that interfered with "rational thought." (66RT 13529-13530.) But Gill's comments are not dispositive – what's dispositive is the evidence, recounted in detail in the AOB, that caused Gill to make them. Moreover, there was "proof in the pudding" because however Gill equivocated about what Appellant's statements, conduct, and strategies showed concerning his mental state, in the end of the day Judge Gill did not permit Appellant to investigate, develop, and present his Cointelpro defense because he dismissed the defense as "delusional" and insane. Gill thus should have declared a doubt, stopped the charade that Appellant's trial had long since become, and inquired into Appellant's competence.

II. The Trial Court's Actions in Relation to Advisory Counsel Interfered with Appellant's *Faretta* Rights and Require Reversal of the Verdicts

In Argument section XVI, Appellant explores the other side of the coin, showing that if his mental state did *not* present a bar to his standing trial and representing himself (viz, if this Court is unpersuaded by AOB

Argument sections I-XV), then the trial court violated Appellant's exercise of his *Faretta* rights when it permitted advisory counsel to interfere with Appellant's control of the case and by thwarting Appellant's efforts to present his chosen defense. (AOB 669-730.) Simply stated, if Appellant *was* competent to present a rational defense, then the trial court was required to allow him to present it as he chose, within the scope of his right of self-representation. In particular, Appellant showed that the trial court's actions in relation to Mark Chambers, who served as advisory counsel (to assist the defendant) in name but as standby counsel (to assist the court by preparing a shadow defense in case *Faretta* status was revoked) in fact interfered with Appellant's right to assert strategic control over the defense. Respondent's assertion (RB 214-246) that Appellant has not shown that the trial court substantially interfered with Appellant's *Faretta* right is based on a misunderstanding of the facts and the law.

Respondent first argues that the trial court did not breach its duty to monitor and clarify the role of advisory counsel because "the trial court made every effort to respect Mr. Waldon's right to represent himself, while at the same time encouraging him to take advantage of the advice and assistance of advisory counsel." (RB 224.) Appellant in the AOB cited *People v. Stansbury* (1993) 4 Cal.4th 1017 (*Stansbury*), for the proposition that the trial court had an affirmative duty to monitor the relation between advisory counsel and Appellant to ensure that the role of advisory counsel stayed within constitutional bounds. (AOB 706.) Respondent does not dispute that *Stansbury* implies a monitoring role for the trial court; rather, Respondent asserts that there was no error under *Stansbury* because Appellant "personally and actively participated in his defense." (RB 227.) Respondent neglects the facts showing the applicability of *Stansbury*.

In connection with his citation of *Stansbury* in the AOB, Appellant showed the many times the trial judge was made aware of Appellant's complaints that advisory counsel was not doing what Appellant asked, and his complaints that advisory counsel Chambers was impeding Appellant's ability to present his defense – particularly in the area of funding. Appellant also showed that the trial court refused to do anything about these conflicts and instead (possibly out of frustration that Appellant would not present a defense the court considered reasonable and rational) allowed Chambers to ignore Appellant's demands for help in presenting his chosen defense. The trial court palmed the problem off on other judges – i.e., those handling section 987.9 matters – refusing and neglecting to inquire into the details of what was going on. (AOB 706-710.) This was in violation of *Stansbury*, which requires the trial judge to keep a sharp lookout for advisory counsel overstepping his bounds in violation of the defendant's right under *Faretta* to present his chosen defense.

In light of these facts, Respondent's statement that the trial court did not err by encouraging Appellant to take the advice of counsel (RB 227) is not responsive. Respondent has assumed away Appellant's argument. It is no argument to assume, as Respondent does, that there was nothing fundamentally amiss with the relationship between advisory counsel (particularly Chambers) and Appellant, and based on that conclude that all of the problems rose from Appellant's irascible attitude toward Chambers, not from Chambers' efforts to commandeer the defense. Advisory counsel Chambers' efforts in fact succeeded, as is shown by the 987.9 judges' funding of Chambers' requests over Appellant's. In the face of Appellant's irrational defense, the judges were tempted to ignore their responsibility to assure Appellant's exercise of his *Faretta* rights was honored, in favor of

their role of making sure that the trial process was not subverted. Having failed to halt the trial so that the implications of Appellant's chosen defense could be unpacked and examined, the trial court's duty was to assure that advisory counsel did not undermine defendant's presentation of his chosen, peculiar defense. Here, unlike in *Stansbury*, the trial court failed to assure that the "defendant [was] solely responsible for the defense," advisory counsel's "role was that of an assistant," and "all parties clearly understood and observed their respective rights and duties." (*Stansbury*, *supra*, at p. 1040.)

Citing *McKaskle v. Wiggins, supra*, 465 U.S. 168, 179, Respondent asserts that because Chambers did not interfere with Appellant's defense in front of the jury, there was no error. Respondent limits *McKaskle* to the proposition that a defendant's right to represent himself is violated solely when the jury observes advisory counsel, and not the defendant, present the case. (RB 227.) This is not a correct interpretation of the precedent. A defendant who represents himself has the right "to control the organization and content of [his] own defense." (*Id.* at p. 174.) The circumstances of what the jury observed in Mr. McKaskle's trial are but one illustration of how this rule can be breached.

Respondent also asserts that the trial court did all it could, by reminding Appellant he could take counsel's advice if he wanted to – with the understanding that it would not require advisory counsel to do things it thought were unethical. (RB 227-228.) Again Respondent has assumed away the issue. Respondent assumes that Appellant's unreasonableness caused all of his problems with advisory counsel – he was difficult to communicate with, he did not want to follow advice. This imagines away the reality: that the trial court abdicated its responsibility to assess whether

Appellant's complaints about Chambers usurping his rights were justified. Gill bounced the issue over to the section 987.9 judges, whose rulings permitted Chambers rather than Appellant to organize the defense.

Respondent asserts Appellant has identified no instance where the trial court resolved a conflict when the matter was "'one that would normally be left to the discretion of counsel.'" (RB 227, citing *People v. Stansbury*, *supra*, 4 Cal.4th at p. 1040.) This is immaterial, since what the trial court did was worse: by failing to police the roles of advisory counsel, irrespective of Appellant's repeated outcry that Chambers was undermining him, the court set up the chance for the section 987.9 judges to strip Appellant of his ability to present his chosen defense.

Respondent next asserts that the section 987.9 judges were innocent of any wrong doing because they correctly had judged that Appellant had not "shown that [his] requests [for funding] were reasonably necessary." (RB 228.) In a similar vein, Respondent asserts Appellant has not shown that the funding court "resolved any conflicts between [Appellant] and Chambers in Chamber's favor as to any matter of importance." (RB 240, citing *McKaskle v. Wiggins*, *supra*, 465 U.S. at p. 179.) Respondent argues that Chambers's role as standby counsel is immaterial because it did not deprive Appellant of his right to "actual control over the case he [chose] to present to the jury." (*Ibid.*) This argument neglects the many instances where the trial court refused to grant Appellant funding for items unless Chambers agreed that it was necessary – even when Appellant violently disagreed with Chambers's assessment of the situation. That Chambers acted as standby counsel to assist *the court* precluded his ability to carry out the role of advisory counsel, whose duty is to assist *the defendant* in his chosen defense. By approving funds for standby counsel to investigate and

develop a defense that Appellant did not want, and denying funds for Appellant to investigate and develop his chosen defense, the trial court interfered with Appellant's exercise of his right to self-representation under *Faretta.*

Respondent next asserts that Judge Gill did not abuse his discretion in failing to replace Nancy Rosenfeld as advisory counsel in the penalty phase, because Gill reasonably chose to avoid the delay of obtaining additional counsel based on the fact that Mark Chambers was prepared and available to assist Appellant. (RB 242-245.) Thus, having assumed away all of the facts in the AOB showing Chambers's interests were gravely at odds with Appellant's, Respondent draws the inevitable conclusion that there was no need to replace Rosenfeld due to Chambers's continued participation in the case.

Respondent admits that the denial of or substantial interference with a defendant's right to self-representation is "not amenable to 'harmless error' analysis." (*McKaskle v. Wiggins, supra*, 465 U.S. at p. 177, fn. 8 ["The right is either respected or denied; its deprivation cannot be harmless."] Respondent contends nevertheless that the trial court's "judgment calls" reconciling "the participation of standby counsel with a pro se defendant's objection to that participation" is entitled to deference on review. (RB 245-246.) But what happened in this case was not a "reconciling" of the tension between Chambers's involvement and Appellant's objection to it; rather it was a flat-out abrogation of Appellant's *Faretta* rights and a substantial interference with his self-representation in his defense. The trial court's errors in this regard cannot be harmless and reversal is required.

III. The Trial Court Erred by Excluding Expert Evidence of Cointelpros

In Argument section XVII of the AOB Appellant showed that the exclusion of his expert evidence on FBI Cointelpros violated his Sixth Amendment right to present a defense. (AOB 731-757.) Respondent asserts that Appellant's Cointelpro evidence was irrelevant and thus properly excluded. (RB 246-255.) Respondent ignores most of Appellant's argument and neglects numerous facts in the record.

Respondent characterizes Appellant's evidence as going only to a claim that a third party was responsible for the crimes, and then asserts that the evidence regarding the FBI Cointelpro program was "too tenuous and speculative to be admitted as third party evidence." (RB 253.) In support of this characterization, Respondent asserts that Appellant did not show a link between the Cointelpro program and himself, or a link between the FBI Cointelpro program and the crimes with which he was charged. (*Ibid.*) Respondent then asserts Appellant was "unable to show that he had ever been a target of any government counterintelligence activities, and there was nothing to support his claim that government agencies were responsible for manufacturing evidence against him, or even more incredibly, actually committing the charged crimes in order to frame him." (RB 254.)

This is not correct. First, Appellant did offer evidence that he was the target of federal government agents. Appellant and Birgitta Sequoyah testified about the activities of Mark Williams, an admitted federal agent, and about other men with the words "federal agent" on their jackets attacking Appellant because of his Cherokee and Poliespo "horseshit." (57RT 11476; see AOB 750.) There also was testimony about a link between Appellant and his political activities and the crimes with which

Appellant was charged. Appellant put on testimony that federal agent Mark Williams took Appellant's car hours before the crimes of December 20, 1985. (AOB 754.) This also is evidence supporting Appellant's assertion that Williams, and not himself, was responsible for the crimes.

Respondent cites *People v. Hamilton* (2009) 45 Cal.4th 863, 913, among other cases, for the proposition that evidence of third party culpability should be excluded, where the evidence does not connect the third party to the crime in any way. (RB 254-255, also citing *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1136-1137, *People v. Edelbacher* (1989) 47 Cal.3d 983, 1018.) Respondent misapplies *Hamilton.* First, Respondent has mis-described the proffered evidence as third party culpability evidence, because actually the evidence regarding Mark Williams was offered to support Appellant's innocence by showing how inculpatory evidence could have gotten into his car. Appellant told the trial court he was not offering the evidence of Mark Williams's involvement to show that the federal government had committed the crimes. (AOB 751.)

Moreover, even if the evidence was offered to support a third party defense, *Hamilton* is not on point because Appellant indeed did offer evidence to establish a connection between a third party – the federal agent Mark Williams – and the crimes. The evidence that Appellant was attacked for his political beliefs and that his car was stolen by a federal agent immediately before the crime was sufficient to serve as a predicate for introducing Swearingen's expert testimony, and a sufficient basis for a third party defense.

Respondent argues that the Swearingen evidence was not admissible because Appellant did not establish that the attacks on him were part of the FBI Cointelpro program that also was responsible for the attacks on the

Black Panthers. Respondent states: "In this case, Swearingen's testimony could not have connected the FBI's now-discredited counterintelligence program to the charged crimes in any manner." (RB 253-254.) Whether the Cointelpro program against Appellant was part of the same one carried out against the Black Panthers is irrelevant. Swearingen cited the Black Panther example to illustrate how FBI Cointelpros work, not to establish the Appellant himself was a target within the scope of the Black Panther related Cointelpro. As for whether a Cointelpro was carried out against Appellant, Swearingen said that the symptoms were present due to Appellant's leadership as a Native American activist and his organizing for that cause among Esperantists in Europe.

Judge Gill ignored the evidence that the government knew about Appellant and his activities, just as he ignored Swearingen's testimony that he had remained knowledgeable about current FBI activities and that Appellant's activism was the kind of thing the FBI was likely to target. (AOB 750.) Any holes in the foundation laid by Appellant to show that the attacks on him were part of a larger FBI scheme were caused by the trial court's numerous rulings that Appellant's evidence about his activities was inadmissible because irrelevant. (AOB 751.) Judge Gill thwarted Appellant's many attempts to introduce evidence of his leadership of a political movement that the FBI would perceive as dangerous. (AOB 749.) Having prevented Appellant from laying a foundation for the Swearingen evidence, Gill then ruled the Swearingen evidence was irrelevant because it lacked any supporting foundation. This violated Appellant's right to put on a defense – a point ignored entirely by Respondent.

The record shows that Judge Gill refused to let in the Swearingen evidence because he simply did not believe the testimony of Appellant and

his wife Birgitta Sequoyah. (AOB 755-756.) However, a trial judge should not assess the credibility of witnesses when determining the admissibility of evidence. Any credibility determination about Appellant and his supporting witnesses was a task for the jury, not Judge Gill. (AOB 755.) This is another portion of argument that Respondent neglects entirely.

Judge Gill often said that Appellant's assertions he was the victim of a government conspiracy were delusions. (AOB 756.) Judge Gill appears to have believed that the delusional character of the Cointelpro evidence was sufficient grounds to discount it as a basis for the admission of Swearingen's testimony. However, if Judge Gill thought that the evidence was delusional he should have put a halt to the trial because the delusions showed that Appellant was not capable of putting on a rational defense. Assuming that there was no error in failing to call a halt to the trial, then the judge at least had the obligation to treat Appellant's testimony like any other evidence – evidence subject to credibility assessment by the jury only, and which the judge had to assume was true in making his admissibility determination. Judge Gill breached this duty, and improperly excluded the evidence critical to Appellant's defense that he was framed and others were responsible for the charged crimes – which was the very core of Appellant's chosen defense.

Respondent asserts there was no error in failing to admit the Swearingen expert evidence, because there was no evidence connecting a third party to the crimes. (RB 255.) As Appellant has shown, there was plenty of evidence connecting the third party to the claimed Cointelpro. The RB, by its silence, suggests a belief, like Judge Gill's, that this evidence amounted to a delusion and thus was not worthy of consideration. Whether the defense theory rested on delusional fantasy was pertinent to the

question of whether Appellant was competent to stand trial, but not to the question of whether Appellant, if assumed competent to stand trial and granted *Faretta* status, had a right to present his chosen defense. The trial court violated Appellant's Sixth Amendment right to present a defense and reversal is required.

IV. The Atmosphere in the Courtroom and the Trial Court's Failure to Control it Violated Appellant's Right to a Fair Trial

In Argument section XVIII of the AOB, Appellant showed that the actions of the bailiff and others in the courtroom and the trial court's failure to control such actions violated Appellant's right to a fair trial, requiring reversal of the verdicts. (AOB 758-774.) Respondent asserts that Appellant did not show any of the practices impermissibly influenced the jury, so reversal is not required. (RB 255-264.) Respondent has misunderstood Appellant's argument.

First, Respondent asserts there was no error because Appellant was not prejudiced by the presence of bailiffs and because there was no showing that the jury saw Appellant while shackled. (RB 261.) This contention is irrelevant because Appellant never argued that the mere presence of the bailiffs or shackling was the source of any error.

Respondent next asserts that Appellant has misapplied *Turner v. Louisiana* (1965) 379 U.S. 466. (RB 262.) Respondent has misunderstood the fundamental constitutional principle underlying *Turner*. As Respondent would have it, *Turner* stands solely for the proposition that a defendant's right to due process is violated when the deputy sheriffs who served as bailiffs also testify. This is far too narrow a reading of *Turner*. *Turner* stands for the broad proposition that "[i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the

'evidence developed' against a defendant shall come from the witness stand in a public courtroom ..." (*Turner*, *supra*, 379 U.S. at p. 472.) By assuming that *Turner* is limited to cases where bailiffs testify, Respondent fails to come to grips with Appellant's core argument, i.e., that where there are multiple instances of bailiff misconduct, and a failure by the court to control such misconduct, Appellant's right to a fair trial is violated.

Respondent's attempt to distinguish *Parker v. Gladden* (1966) 385 U.S. 363 (RB 262-263) also is unpersuasive. Respondent asserts that the actions by the bailiff in *Parker* are "a far cry from the alleged acts in the instant case." (RB 263.) *Parker* involved incidents where the bailiff told the jury that he believed that the defendant was guilty and that any error would be corrected by a higher court. (*Id.* at pp. 363-364.) In this case, while the bailiff did not directly tell the jury that Appellant was guilty, he engaged in numerous acts which amounted to the same thing. The bailiff obviously thought that Appellant's defense was a joke and he clearly was guilty. The bailiff communicated that belief to the jury with acts of irritation and disdain – all of which were detailed in the AOB. (AOB 771-772.) The bailiff's acts in this case were even more pernicious than those in *Parker* because they were in front of a jury charged with the responsibility of determining whether Appellant deserved the death penalty. The things done by the bailiff in Appellant's case are easily on a par with those in *Parker*.

Respondent next asserts that Judge Gill's inquiry into the misconduct was conducted appropriately, and that he did not err in failing to hold a hearing to gather additional evidence on the issue. (RB 263.) Respondent again has addressed an argument Appellant did not make. Appellant does not assert that Judge Gill was at fault for failing to hold a hearing when

Appellant's advisory counsel (Nancy Rosenfeld) brought some of the actions of bailiff Glen Tremble to Gill's attention. Appellant's only claim in relation to Judge Gill's failure to hold a hearing is that any implicit factual findings the judge made in relation to this issue do not deserve deference because of his failure to investigate. (AOB 772.)

Respondent has missed the thrust of Appellant's claim. It is not about the trial court's actions in relation to Nancy Rosenfeld's motion. Rather, his claim encompasses the whole trial. The numerous actions of the bailiff, i.e., the gun holster snapping, his "making eyes" with at least two of the jurors, his facial expressions, his sighs, his laughing out loud at defense evidence, his statement that Appellant should be required to testify, and his communications to the jury that the trial was a mere formality (AOB 772) contributed to an atmosphere where Appellant could not get a fair trial. These actions have to be understood in light of the fact that even one of Appellant's advisory counsel (Mark Chambers) also seemed irritated by the proceedings and how Appellant was conducting himself in court. (AOB 769.) Compounding the situation were the numerous times where the jurors were made to feel that they had something to fear from the defendant given the prosecution's action when Appellant got close to him, and the bailiffs' actions when Appellant came near the jury. (AOB 766-767.) The various times when the spectators stared at the jurors in ways that made them feel uncomfortable has to be thrown into the mix as well. (AOB 767-768.) On top of this is the failure of the trial court to control these situations.

All of these matters combined to create the surreal atmosphere in which Appellant's trial was conducted – completely the opposite of the high seriousness with which a capital trial should be carried out. Considered in their totality the proceedings in this trial were "inherently suspect." (*People*

v. Santamaria (1991) 229 Cal.App.3d 269, 280.) Since this is so, the verdicts and sentence of death must be reversed even if Appellant "cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced" (*id.*, at p. 280, citing *Sheppard v. Maxwell, supra*, 384 U.S. 333, 351-352), so long as he can show a reasonable probability of prejudice. (*Ibid.*, citing *Gordon v. Justice Court* (1974) 12 Cal.3d 323, 329.) Respondent completely fails to acknowledge the multi-faceted character of Appellant's claim, as well as the difference that this makes to the prejudice showing, asserting incorrectly that Appellant's claim fails because he has not shown that "there is a substantial likelihood that any of the jurors were biased." (RB 263-264, citing *People v. Nesler* (1997) 16 Cal.4th 561, 578-579, 581.)

Appellant has shown in other parts of the AOB that there were numerous reasons for Judge Gill to know there was a reasonable probability Appellant was not competent to stand trial. He has also shown it was error for Judge Gill to permit Appellant to represent himself in light of what he observed of Appellant's behavior at trial. It is no wonder that a direct consequence of allowing such a mentally compromised defendant to go to trial and to represent himself was a defense that the bailiffs, the prosecutor, and other court personnel thought was strange and even laughable, put on by a defendant whom they held in utter contempt. However, having allowed Appellant to represent himself, it was incumbent upon the trial court to hold a trial where the jury came to its conclusions about whether the prosecution bore its burden of showing beyond a reasonable doubt that Appellant was guilty, using solely evidence from the witness stand. Even more important, it was critical that the jury assess whether Appellant deserved the ultimate sanction for his acts from the evidence – not from the

obvious disdain with which the court personnel held Appellant. This did not happen. There is a reasonable probability that the jurors were influenced by the bailiffs's actions, by the actions of others in the courtroom, and by the trial court's failure to control them. Reversal is required.

* * * * *

SECTION E

SELF-REPRESENTATION BY A MENTALLY COMPROMISED DEFENDANT IN A CAPITAL CASE

Argument XX demonstrated that allowing Appellant to represent himself in the trial of this capital case violated the Eighth and Fourteenth Amendments of the United States Constitution by permitting him to waive counsel, when facts suggested that his mental incapacity threatened his right to a fair and reliable capital trial, without determining whether Appellant's mental impairment prevented him from effectively representing himself. (AOB 805-822.) He also showed that this Court must revisit its holdings in *Bradford, supra*, 15 Cal.4th 1229, 1364, and *Welch, supra*, 20 Cal.4th 701, 741-742, that *Faretta v. California, supra*, 422 U.S. 806 (*Faretta*) categorically prevents the implementation of Penal Code section 686.1 requiring that a defendant not be permitted to represent himself at a capital trial. (AOB 822-823.) Respondent addresses this claim at RB 266-269.

Respondent first asserts there is no indication in the record that Appellant suffered from a severe mental illness such that he was unable to carry out the basic tasks needed to put on a defense. (RB 266.) Appellant has responded to this assertion in section III.b.5 of this brief, *ante*.

Respondent next asserts that Appellant's argument that the United States Constitution requires a mentally incapacitated defendant be represented at a capital trial is foreclosed by this Court's holding in *People v. Taylor, supra,* 47 Cal.4th 850, 878, that *Indiana v. Edwards, supra*, 554 U.S.164 ("*Edwards*") "does not support a claim of federal constitutional error in a case like the present one, in which defendant's request to represent himself was granted." (RB 267.) Respondent ignores Appellant's argument that in *Taylor* this Court read *Edwards* too narrowly. (AOB 440-

441, 805, fn.167.) Appellant showed that in *Massey v. Moore, supra*, 348 U.S. 105, 108, the United States Supreme Court held that: "No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and *who by reason of his mental condition stands helpless and alone before the court*," (emphasis added) and that *Edwards, supra*, 554 U.S. 164, 177, affirmed *Massey* for precisely this point. *Massey*, in a holding that was reaffirmed in *Edwards,* thus stands for the proposition that in some cases a mentally handicapped defendant must be represented. This Court's decision in *Taylor* thus reads *Edwards* too narrowly. Respondent does not address Appellant's argument and, indeed, cites *Massey* nowhere in its brief.

Next, Respondent quotes *Taylor*'s statement that "the autonomy interest motivating the decision in *Faretta* – the principle that for the state to 'force a lawyer on a defendant' would impinge on "'that respect for the individual which is the lifeblood of the law'" (*Faretta, supra*, 422 U.S. at p. 834) – applies at a capital penalty trial as well as in a trial of guilt. (RB 267, citing *People v. Taylor, supra*, 47 Cal.4th at p. 865.) Though not saying so explicitly, Respondent appears to argue that considerations of "autonomy" and "respect for the individual" rule out requiring counsel for capital defendants who are mentally impaired. Appellant disagrees for two reasons. First, the United States Supreme Court repeatedly has held that the autonomy interest delineated in *Faretta* may be limited by Fourteenth Amendment requirements of due process and a fair trial, including in the situation where a mentally impaired defendant is unrepresented by counsel. Second, the Eighth and Fourteenth Amendment requirements of reliability at the guilt and penalty phase of a capital trial take precedence over the right to self-representation for such a defendant.

As to the first issue, Appellant showed in the AOB the many ways in which the Sixth Amendment protection of individual autonomy through the right of self-representation has been limited in light of the Fourteenth Amendment requirements of a fair trial. (AOB 807-808.) *Faretta* itself recognized limits to the right of self-representation. It noted that a judge can terminate self-representation, e.g., when a defendant "deliberately engages in serious and obstructionist misconduct." (*Faretta, supra,* 422 U.S. at p. 834, fn. 46.) A judge can appoint standby counsel, even over a defendant's objection, to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. (*Ibid.*) United States Supreme Court cases after *Faretta* recognized more limits to the right of self-representation. In *McKaskle v. Wiggins, supra,* 465 U.S. 168, the Court held that a pro se defendant's Sixth Amendment right to self-representation was not violated by standby counsel's unsolicited participation in the defense, even over the defendant's objection. (*Id.* at pp. 176-177, 180.) In *Martinez v. Court of Appeal of Cal., Fourth Appellate District* (2000) 528 U.S. 152, 163 (*Martinez*), the Supreme Court held that there is no right of self-representation on appeal. In so holding, the Court noted that *Faretta* itself had recognized that the right to self-representation is not absolute. (*Id.* at p. 161.) "Even at the trial level ... the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." (*Id.* at p. 162.)

Most importantly, in *Edwards, supra* 554 U.S. 164, the Court specifically held that the right to self-representation was not infringed when the trial court refused to allow Edwards, a mentally impaired defendant, to represent himself at trial. (*Id.* at p. 174.) The Court recognized that, before

permitting a defendant to represent himself at trial, the states may impose requirements beyond the mere capacity to waive the right to counsel. (*Id.* at p. 178.) Where self-representation "undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial," the government's interest in preserving the latter outweighs a defendant's interest in acting as his own lawyer. (*Id.* at pp. 176-177.) The Court in *Edwards* also held that courts must act to preserve constitutional processes such as a fair trial: "As Justice Brennan put it, '[t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes.' [*Illinois v.*] *Allen* [(1970)] 397 U.S. [337] 350 [conc. opn. Brennan, J.]." (*Edwards, supra,* 554 U.S. at pp. 176-177, parallel citations omitted.) This Court itself has recognized that after *Edwards* the "absolutist view of the right to self-representation" has been rejected. (*People v. Lightsey, supra*, 54 Cal.4th 668, 694-695, citing *Edwards*, *supra*, 554 U.S. at p. 178.)

Using the opinion in *Edwards* as a touchstone, Appellant showed in the AOB the ways in which allowing a mentally impaired defendant to represent himself prevents a fair trial. (AOB 809-815.) In *Edwards*, the Court noted that a defendant might be competent to stand trial and yet lack the mental capacity to carry out the basic tasks needed to present his case without the help of counsel. (*Edwards*, *supra*, 554 U.S. at 175-176, citing N. Poythress, R. Bonnie, J. Monahan, R. Otto, & S. Hoge (2002) *Adjudicative Competence: The MacArthur Studies* p. 103.) The Court noted that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if

he can play the lesser role of represented defendant." (*Id.* at p. 176, citing Brief for APA et al Amici Curiae State of *Indiana v. Edwards*, 2008 WL 405546, *26.) Finally, the Court stressed the importance of establishing competence in self-representation to ensure the dignity of the person who wished to represent himself – that is, the very dignity that *Faretta* was intended to protect. "A right of self-representation will not affirm the dignity of a defendant who lacks the mental capacity to conduct his [own] defense," the Court observed. (*Edwards*, *supra*, 554 U.S. 164, 176.) On the contrary, "the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling." (*Edwards*, *supra*, 554 U.S. 164, 176.) Respondent does not address the merits of Appellant's argument in the AOB that in light of *Edwards*, *supra*, this Court must revisit its holdings that *Faretta*'s right of self-representation prevents the enforcement of section 686.1.

Turning to the second issue, Eighth Amendment considerations also demand the limitation of the right to self-representation in capital cases. The United States Supreme Court announced in *Gregg v. Georgia* that under the Eighth Amendment the death penalty cannot be imposed under procedures that create a "substantial risk" that it will be imposed in an "arbitrary and capricious way." (*Gregg v. Georgia* (1976) 428 U.S. 153, 188.) In *Beck v. Alabama* (1980) 447 U.S. 625, 638, the Court held that a prohibition against giving a lesser included offense instruction in a capital case was unconstitutional because it diminished the reliability of a guilt determination. And in *Strickland v. Washington, supra,* 466 U.S. 668, 704, the Supreme Court observed that "we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and the accuracy of factfinding."

The *Faretta* opinion acknowledged that most defendants will receive a better defense with counsel's guidance than by their own unskilled efforts. (*Faretta, supra,* 422 U.S. at p. 834; see also *Martinez, supra,* 528 U.S. at p. 161 [even where counsel's performance is ineffective, it is reasonable to assume that it is more effective than what an unskilled appellant could provide for himself].) The opinion recognized that the right of self-representation "seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel." (*Faretta, supra,* 422 U.S. at p. 832.) For this reason, a strong argument could be made that the whole thrust of those decisions "must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant." (*Id.* at p. 833.) The opinion in *Faretta* summarily rejected that argument, however, reasoning that the defendant, and not his lawyer or the State, bears the consequences of a conviction, so the defendant must be free to decide personally whether to utilize counsel for his defense. (*Id.* at p. 834.) Ultimately, *Faretta* traded the essential protections afforded by the right to counsel for a defendant's interest in "free choice." (*Id.* at pp. 815, 834.) But neither in *Faretta* nor in any other decision has the United States Supreme Court held that the right to self-representation extends to the penalty phase of a capital trial.

The AOB proves that self-representation by a mentally compromised defendant in *either* the guilt or the penalty phase of a capital trial offends the Eighth Amendment. In capital cases, there are interests at stake other than those personal to a defendant. Inherent in the Eighth Amendment prohibition against cruel and unusual punishment is the principle that the State must not arbitrarily inflict a severe punishment. (*Furman v. Georgia,*

supra, 408 U.S. at p. 274 (conc. opn. of Brennan, J.).) Accordingly, the Eighth Amendment demands that substantive and procedural safeguards be in place to ensure that the trier of fact can make the requisite individualized sentencing determination. The assistance of counsel is one of those procedural safeguards, as the role of counsel is to render a trial reliable. (*Strickland v. Washington, supra,* 466 U.S. at pp. 688, 694.) In his opening brief, appellant cited *Powell v. Alabama, supra*, 287 U.S. 45, 69, for the proposition that in a death penalty case a person facing criminal charges "requires the guiding hand of counsel at every step in the proceedings against him," and then detailed the numerous ways in which counsel was required to assure the reliability of a death penalty sentence. (AOB 816-820.) Because the death penalty must be imposed in accord with the Eighth Amendment (see, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 599), and the right to self-representation must bend in favor of the state's interest in the integrity of even a noncapital trial (*Martinez, supra,* 528 U.S. at p. 162), the former takes precedence at a capital trial.

Respondent asserts that the law "remains that a criminal defendant has a right to self-representation even though many may perceive that it is not in his/her best interests to do so." (RB 269.) Yet, it is not only the best interests of the defendant that are at stake in a death penalty trial – the federal constitution also requires that the standards of Eighth Amendment reliability be met. *Lockett v. Ohio, supra*, 438 U.S. 586, held that the Eighth Amendment requires that the jury in a death penalty case be allowed to consider "any aspect of a defendant's character or record ... that the defendant proffers as a basis for a sentence less than death." (*Id.* at p. 604.) Making the case for life at the penalty phase requires a thorough mental health history and a scouring of the defendant's past looking for signs of

mental illness as a basic prerequisite to building the defense's case for life. (See *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (2008) 26 Hofstra Law Review 677, 689; see also *Porter v. McCollum* (2009) 558 U.S. 30, 39 ["[i]t is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an obligation to conduct a thorough investigation of the defendant's background," quoting *Williams v. Taylor* (2000) 529 U.S. 362, 396].) Guilt phase strategy must be coordinated with the case for life. (*Ibid.*)

A mentally impaired defendant often strongly resists being labeled as such, making it impossible for that defendant to investigate his mental health history, much less present the information to the jury while also ensuring that the guilt phase presentation is coordinated with penalty strategy. A mentally impaired defendant can be so compromised in this regard that he presents nothing regarding his mental health history, so the jury does not get the information it needs to make its life and death decision. This fundamentally interferes with the central premise of the *Lockett* individualized consideration requirement: without a full accounting of the defendant's "mitigating factors stemming from the diverse frailties of humankind," (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304) a "reasoned moral response" (*Penry v. Lynaugh* (1989) 492 U.S. 302) by the sentencer is impossible. Without counsel, there is no assurance that a jury will have received and considered all information it needs about the defendant. Hence, the Eighth Amendment requires limitations on a capital defendant's right to self-representation.

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SECTION F

TRANSFER OF CASE FROM JUDGE TO JUDGE

In Argument section XIX of the AOB, Appellant showed that the repeated transfer of his case from judge to judge violated his due process rights to an informed decision-maker who properly could exercise his or her discretion in full light of the facts. (AOB 775-804.) Appellant detailed the 23 judges who sat on the case, many of whom made critical decisions without a full picture of Appellant's mental capacity and condition and showed that the resulting litigation was piecemeal and resulted in uninformed decisions that violated Appellant's right to due process, a fair trial and a reliable death verdict. (AOB 775-801.) Appellant also showed that the shifting roster of judges prevented any judge from having the necessary facts to determine the issues of Appellant's mental competence to stand trial or to represent himself and his mental capacity as related to waiver of counsel and that, therefore, no deference is due based on a trial court's presumed superior ability to see and evaluate the defendant. (AOB 802-803.)

Respondent counters these arguments, raising four contentions. (RB 264-266.) The RB first argues that Appellant forfeited any claim of "error based on the trial court's lack of familiarity with the record by failing to object on that ground at trial," i.e. by failing to raise his objection in the trial court. (RB 264, citing *People v. Cowan* (2010) 50 Cal.4th 410, 460.) This Court's decision in *Cowan* does not stand for the proposition that a due process claim grounded in the court's ignorance of the relevant facts is waived by failure to object. Rather, both *Cowan* and the case upon which it relies, *People v. Halvorson* (2007) 42 Cal.4th 379, 429, addressed claims that the appellant's rights were violated due to a judicial assignment that

failed to comport with the requirements of section 1053, which governs assignment to a new judge in substitution for a judge who becomes unable to proceed. Appellant's claim is not based on section 1053, however, so *Cowan* and *Halvorson* are inapplicable.

Moreover, the parties (including both the defense and the prosecution) did request the trial court to familiarize itself with the record several times, only to be rebuffed. For example, the prosecution informed Judge Boyle that there were significant prior proceedings related to Appellant's motion to represent himself (79ART-3RT 8-9), but Boyle refused to review them. (80ART 15-16.) In another instance, defense counsel Charles Khoury asked Judge Langford, who was ruling on one of the requests in Appellant's June 5, 1989, motion for self-representation, to take into consideration the pending writ proceedings related to Appellant's competence trial as a signal that appointing counsel for Appellant was necessary. (78ART 5-11, 43-45.) Judge Langford, without informing himself about the issue, refused to do so. Judge Boyle asked if anything was pending from the section 1368 proceedings, and then accepted, without checking into, Attorney Bloom's cryptic report that any competence writ proceedings were only "remotely pending." (79ART 5.) Thus, the defense and the prosecution both made requests for judges to learn the necessary facts, but those requests were rejected. As such, Appellant has not waived the issue.

As explained in section XIX of the AOB argument, the facts the judges needed to know were those related to Appellant's competence to stand trial and to represent himself, and his mental capacity as related to entering a knowing, intelligent, and voluntary waiver of counsel. These were the very facts that Appellant strove to obscure from the trial court,

because he perceived himself as being competent and mentally unimpaired, and he wanted to represent himself. Due to the actions of the Court of Appeal declaring the writ related to Appellant's competence trial moot (see Argument section X of the AOB and section C.I, *infra*), the significant questions about Appellant's competence never received judicial determination. This Court cannot find issues waived due to the defendant's failure to act, when that defendant's competence and mental capacity even now remain in question. This basic fairness principle is particularly compelling here, where the facts missing from the decision makers' awareness were precisely those that the mentally compromised defendant wished to keep hidden from the court.

Respondent next claims that Appellant identifies no authority prohibiting reassignment of a case before trial, absent a showing that the assigned judge cannot proceed. Here again, Respondent cites *People v. Cowan, supra*, 50 Cal.4th 410. Respondent contends that *Cowan* stands for the proposition that due process does not require the same judge to preside over all stages of the proceeding. (RB 265, citing *Cowan*, at p. 460.) Respondent construes *Cowan* too narrowly, and fundamentally misunderstands Appellant's claim. In fact, Appellant cited *Cowan* in support of his argument at AOB 790, and the case supports Appellant's position. In *Cowan*, a new judge was substituted mid-trial. The defendant on appeal claimed a violation of his right to a trial judge familiar with the record, arguing that the newly-assigned judge had ruled on the admissibility of a witness's testimony without first thoroughly reading through the transcript of the witness's prior testimony. This Court rejected that argument and noted that the judge had possessed the pertinent transcript when he ruled, and defense counsel had identified for the judge all of the

relevant portions of the transcript to be considered. Thus there was no error, under the test of whether the judge newly substituted into proceedings "was familiar enough with the pertinent portions of the record to exercise his discretion in an informed manner." (*Cowan, supra,* at p. 461.) The AOB cited *Cowan* for this rule. (AOB 790.) Respondent's contention that changing judges mid-trial does not violate due process is sound, but irrelevant. Respondent rebuts an argument that Appellant never made.

Next, Respondent argues that the presiding judge of the trial court in this case acted within his or her "broad authority" in reassigning the matter "as needed over the five years between Waldon's trial and arrest." (RB 265, citing California Rules of Court, rule 10.603[14] and *Villaruel v. Superior Court* (1973) 35 Cal.App.3d 559, 563.) Appellant acknowledges that a presiding judge has the authority to transfer cases within a trial court. Nevertheless, defendants have a constitutional right to an adequately informed judge (see AOB 791) and the trial court's discretion must be bounded by the defendant's right to a fair trial. A trial court is not a mere observer of the trial process; rather, it has the responsibility to safeguard "both the rights of the accused and the interest of the public in the administration of criminal justice." (*People v. Shelley* (1984) 156 Cal.App.3d 521, 530; see *Powell v. Alabama, supra*, 87 U.S. at p. 52

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[14] California Rules of Court, rule 10.603(a) provides: "The presiding judge is responsible, with the assistance of the court executive officer, for leading the court, establishing policies, and allocating resources in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, maximizes the use of judicial and other resources, increases efficiency in court operations, and enhances service to the public." It cannot be said, given the chaotic way in which Appellant's case repeatedly was re-assigned, that the presiding judges herein allocated resources in a way that "promoted justice."

["However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial"]; *Geders v. United States* (1976) 425 U.S. 80, 87 ["If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings."].) A superior court presiding judge making court assignments is bound by these same considerations.

It is impossible from this record to tell who – if anyone – was exercising authority over which trial judge heard the case. The chaos of assignment and re-assignment that took place clearly shows that none of the presiding judges honored his or her responsibility to ensure that any reassignment of judges in the case comported with Appellant's right to a fair trial. Appellant's AOB list of the many judges who sat on this case shows at least five presiding judges made assignments herein. These five presiding judges allowed the case to bounce back and forth, with no regard to what issues were at hand, or consideration of whether reassignment might place Appellant's due process and fair trial rights at risk.[15] To speak

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[15]As explained in the opening brief (AOB 775-789), Judge Huffman assigned the case to Judge Hayden. Judge Hayden assigned part of the case to Judge Malkus and part of the case to Judge Zumwalt. Zumwalt declared a doubt about Appellant's competence to stand trial, but some judge (unknown) assigned the case to Judge Langford, who was then challenged by defense counsel. Judge Peterson stated his intent to assign the case back to Zumwalt and Judge Hamnes ultimately did so, but Zumwalt was challenged by the prosecution, so someone (unknown) assigned the case to Judge Jones and then Judge Hayden assigned the section 1368 case to Judge Levitt. At some point, Haden had assigned the criminal case to Levitt as well. Judge Levitt was challenged and the case was reassigned to Judge Zumwalt by Judge Hayden. Zumwalt made some rulings and then the underlying criminal case was assigned by Judge Greer to Judge Malkus.

colloquially, there was no one at the superior court who was "driving the bus." Under these circumstances, any discretion of a presiding judge to assign cases was abdicated or abused.

Respondent asserts that Appellant has only repackaged claims of error raised elsewhere in the brief and "attribute[d] them to the judges' lack of familiarity and preparation," without showing any prejudice, or any specific absence of familiarity with the record or judicial preparedness. (RB 265.) Argument section XIX of the AOB demonstrates many ways in which uninformed judging caused the denial of Appellant's fair trial rights – even if Respondent fails to acknowledge it. So, for example, Appellant showed that no judge knew Appellant was unable to assist counsel rationally, because no judge had a full view of Appellant's mental disabilities. He showed that his motion for self-representation was erroneously granted by a judge who knew of almost none of the pertinent facts. Respondent is wrong in asserting that Appellant does nothing more than repackage his other claims of error as claims of uninformed judging. For example, Appellant asserts both that he was incompetent to stand trial,

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After this, yet another judge took charge. Judge McConnell assigned the case to Judge Wagner. Then the case was assigned again by another unknown judge to Judge Revak. Then Judge Greer reassigned the criminal case to Judge Kennedy. Kennedy was allowed to remove himself from the case for reasons that do not appear on the record and Judge Greer reassigned the case to Judge Langford and to Judge Boyle together and then later solely to Boyle, who then left the case. Some unknown judge assigned the case to Judge Wellington and then Judge Greer assigned the case to Judge Gill. As such, judges Hayden, Hamnes, Peterson, Greer and McConnell (and possibly other judges as well) each assigned and then reassigned the case with no regard whatsoever to what issues were before the court and without regard to assuring that appellant's right to an informed decision maker was ensured.

and that he was denied his right to a trial judge who knew enough to ably decide that issue. Similarly, Appellant asserts both that the motion for self-representation was erroneously granted, and that he was denied the right to a judge who had the information necessary to exercise his discretion on the issue.

Moreover, Appellant's AOB Argument section XIX also establishes that this is not a case where this Court can defer to an individual trial judge and his/her face-to-face familiarity with Appellant concerning issues related to Appellant's mental state, because of the fact that the case bounced from judge to judge while those issues were being determined. (Compare *People v. Ary, supra*, 118 Cal.App.4th 1016; *People v. Ary, supra* 51 Cal.4th 510; *Lightsey, supra*, 54 Cal.4th 668; *People v. Robinson, supra*, 141 Cal.App.4th 606.)

Respondent cites this Court's decision in *People v. Espinoza* (1992) 3 Cal.4th 806, 829-830, holding that a trial judge did not err by ruling on a motion for new trial without having heard the guilt phase testimony, and asserts that the circumstances in *Espinoza* mirror those in this case. (RB 265-266.) Appellant cited *Espinoza* as supporting his argument (AOB 790) – an argument that Respondent has misunderstood. In *Espinoza*, the defendant asserted that the judge who ruled on his motion to modify the judgment was in no position to exercise discretion, because he was not the same judge who had heard the guilt phase evidence at issue in the motion. (*Espinoza, supra*, at p. 830.) This Court ruled that the second judge did have sufficient information to exercise his discretion, because he had presided over the entire penalty trial and part of the guilt trial, and had reviewed the transcripts of the rest of the trial. (*Ibid.*) The AOB cited *Espinoza* for this very point, i.e., that no error occurs so long as the newly

assigned judge informs himself or herself adequately about previous proceedings. (ABO 790.) That rule was not followed in this case, which Appellant raises as a source of error.

Finally, Respondent cites *People v. Guerra* (2006) 37 Cal.4th 1067, 1112, for the proposition that "numerous rulings adverse to the defense do not establish bias, especially when – like here – they are subject to appellate review." (RB 266.) Respondent's citation to *Guerra* is off-base because Appellant never claimed that the judges were biased against him. The word "bias" is not used anywhere in Argument section XIX of the AOB. Appellant's contention is not that his due process rights were violated because the judges were biased against him when they ruled, but rather that those rights were violated because the judges were ignorant of the pertinent facts when they ruled.

* * * * *

SECTION G

TRIAL COURT JURISDICTION TO PROCEED WHILE COMPETENCE WRIT WAS UNRESOLVED

In Appellant's Supplemental Opening Brief (SAOB), Appellant shows that the trial court acted in excess of its jurisdiction by moving forward with trial before the writ proceedings in connection with the competence trial were resolved and determined on the merits. At SAOB 13-16, Appellant explains that once a doubt is declared about a defendant's competence to stand trial, a trial court must hold a competence hearing that satisfies principles of fairness and due process before it can exercise jurisdiction to proceed with trying the criminal charges against that defendant. Appellant then, at SAOB 17-31, applies that legal rule to this case and shows that once the Court of Appeal issued the alternative writ in the proceeding challenging the competence verdict, the trial court was in excess of its jurisdiction by proceeding with pretrial matters and trial of the case. Respondent contends in the Supplemental Respondent's Brief (SRB) that the trial court did have jurisdiction to proceed with the case, once the competence verdict was entered in the section 1368 proceedings. (SRB 1-9.)

The competence verdict was issued on September 21, 1987, and defense counsel Khoury filed a motion and supplemental motion for judgment notwithstanding the verdict, raising numerous flaws in the competence trial including that the instruction defining competence to stand trial failed to state that the defendant must be found able to assist counsel in a rational manner. (7CT 1230-1274, 1275-1288.) Judge Levitt denied the motions without explanation (7CT 1423), and on January 19, 1988, defense counsel filed a Petition for Writ of Mandate and Application for Stay in the

Court of Appeal (competence petition), Case No. D007429. (56CT 11918-11996.) The Court of Appeal denied the petition on February 24 (62CT 1206), and on March 15, 1988, defense counsel filed a Petition for Review and Request for a Stay of the Proceedings in this Court, Case No. S004854, from the denial of the petition for writ of mandate in D007429. (55CT 11675-11699.) This Court granted review in Case No. S004854 on May 19, transferring the matter to the Court of Appeal with directions to issue an alternative writ to be heard "when the proceeding is ordered on calendar." (62CT 13989.)

The Court of Appeal issued an alternative writ (hereafter, "competence writ") on May 25, 1988, ordering the San Diego County Superior Court to "grant the relief prayed for or show cause why such relief should not be granted." (7CT 1399.) The prosecutor filed an answer on July 8 (56CT 11998-12083), and defense counsel filed a reply on July 22. (55CT 11802-11894.) In an order issued September 12 on writs filed on other trial court rulings in this case (Court of Appeal Case Nos. D007850 and D007873), the Court of Appeal said that the trial court should proceed with replacing Ms. Russell as counsel and thereafter the Court of Appeal would proceed with resolving the competence writ. (10CT 1932 & fn. 9.) The trial court never did appoint substitute counsel to replace Russell, and on November 3, 1989, Judge Boyle granted Appellant leave to represent himself. (84ART 64.) A few months later, the Court of Appeal discharged the alternative writ and dismissed the petition in Case No. D007429 as having been rendered moot by the determination that Appellant was "competent to represent himself." (62CT 13783.)

As shown in the SAOB, the trial court acted in excess of its jurisdiction by proceeding in the case through trial and judgment, without

the competence writ having been resolved and determined on the merits. (SAOB 13-16, citing *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, and *People v. Leonard* (2007) 40 Cal.4th 1370.) The SRB fails to discuss *Marks* and *Leonard* or their significance, arguing that the trial court had jurisdiction to proceed because nothing in section 1368 requires an automatic stay pending defense efforts to obtain extraordinary relief challenging a verdict that the defendant is competent to stand trial. (SRB 5.) Respondent argues that it is not clear that Appellant requested for proceedings to be stayed (SRB 5-6), but this is wrong because Appellant's petition for writ of mandate in Court of Appeal Case No. D007429 and his petition for review in California Supreme Court Case No. S004854 both did, in fact, request a stay. (56CT 11918-11996; 62CT 13989.)

The SAOB at 19 shows that the issuance of an alternative writ of mandate in a reviewing court means the petitioner has made a prima facie showing (*Coy v. Superior Court* (1962) 58 Cal.2d 210, 221), shifting the burden to the real party in interest to rebut the prima facie case. (*Darbee v. Superior Court, San Mateo County* (1962) 208 Cal.App.2d 680, 686.) While the proceeding is under consideration, no stay is needed, no action is ordered, and the status quo remains. (8 Witkin, Cal. Proc. (5th ed. 2008) Writs, § 191, p. 1095.) Similarly, this Court's grant of review gives it authority to transfer the matter to the court of appeal with orders to issue the alternative writ (Cal. Rules of Ct., Rule 8.258(d)), and such transfer conclusively establishes all findings as "necessary to the issuance of an alternative writ." (SAOB 19-20, citing *Atlantic Richfield Co. v. Superior Court* (1975) 51 Cal.App.3d 168, 172.) The SRB fails to address Appellant's arguments and cited authorities and their applicability to this case. (SRB 6-7.) Instead, Respondent argues that the orders granting

review and issuing the alternative writ did not specifically order a stay of the criminal proceedings. (SRB 8.) However, such stay is implicit where the petition for review to this Court requested one and review was granted with no specification that the requested stay was denied.

Finally, Respondent argues that the Court of Appeal had the authority to "dissolve" its alternative writ and dismiss the petition for mootness where the facts upon which the alternative writ was issued no longer existed. (SRB 8, citing *Twentieth Century Fox Film Corp. v. Superior Court* (2000) 79 Cal.App.4th 188, 193.) However, as shown in section C.I of this Reply (196-199, *ante*), the Court of Appeal was in error when it dismissed the competence writ, because Judge Boyle erred in revisiting the *Faretta* motion following Judge Zumwalt's March 1988 denial, Boyle never made any determination that Appellant was "competent to represent himself," and such determination if made would not be equivalent to a section 1368 verdict that Appellant was competent to stand trial.

* * * * *

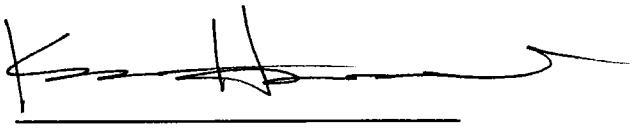
CONCLUSION

For all of the foregoing reasons and those provided in Appellant's Opening Brief, all of the verdicts must be reversed and the judgment of death must be vacated.

DATED: August 21, 2015

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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Attorneys for Appellant

CERTIFICATE OF COUNSEL

(CALIFORNIA RULES OF COURT, RULE 36(b)(2))

I, Karen Hamilton, am the attorney assigned to represent appellant in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates, is approximately 73,625 words in length.

DATED: August 21, 2015

KAREN HAMILTON

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Billy Ray Waldon, a.k.a N.I. Sequoyah***
Case Number: **Supreme Court Crim. No. S05520**
San Diego County Superior Court No. CR82086

I, Marcus Thomas, 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 1111 Broadway, 10th Floor, Oakland, California 94607. I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/X/ placing the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **August 24, 2015,** as follows:

Superior Court of California County of San Diego ATTN: Capital Appeals Unit 220 West Broadway San Diego, CA 92101	Department of Justice Office of the Attorney General Collette C. Cavalier 110 West "A" Street, Suite 1100 San Diego, CA 92101
Billy Ray Waldon, a.k.a. N.I. Sequoyah H-27800 CSP-SQ San Quentin, CA 94974	District Attorney for San Diego County Hall of Justice 330 W. Broadway San Diego, CA 92101
California Appellate Project 101 2nd Street, Ste. 600 San Francisco, CA 94105	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **August 24, 2015,** at Oakland, California.

MARCUS THOMAS