No. S044739

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANTHONY G. BANKSTON, Defendant and Appellant	(Los Angeles County Superior Ct. No. VA007955)

APPELLANT'S OPENING BRIEF

ARGUMENTS I AND II, PAGES 64 THROUGH 107
FILED CONDITIONALLY UNDER SEAL

Appeal from the Judgment of the Superior Court
for the County of Los Angeles

HONORABLE NANCY BROWN, JUDGE

MICHAEL J. HERSEK
State Public Defender
State Bar No. 142065

221 Main Street, 10th Floor
San Francisco, CA 94105
Telephone: (415) 904-5600

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

STATUTES

JURY INSTRUCTION

I

THE TRIAL COURT'S FAILURE TO CONDUCT A PROPER *MARSDEN* INQUIRY REQUIRES REVERSAL

A. Relevant Facts

On March 11, 1991, more than a year before the start of appellant's first guilt-innocence trial, appellant made a *Marsden* motion before Commissioner Peter Espinoza. (2RT 222-223; 1CT 213.) Notwithstanding appellant's personal request that the motion be resolved promptly, the commissioner continued the matter. (2RT 22-223.) The following week, the prosecutor refused to stipulate to Commissioner Espinoza hearing appellant's *Marsden* motion. (2RT 225.) Over appellant's objection, the commissioner declined to hear the motion and transferred the case "... for pre-trial conference/trial setting and a *Marsden* motion." (1CT 214.)

Later that same morning, appellant appeared before Judge Robert W. Armstrong with defense counsel, Los Angeles County Deputy Public Defender Jerry Seiberling. Judge Armstrong, who knew nothing about this case, inquired as to what issue was to be decided. Mr. Seiberling stated that appellant had told the Commissioner that he wished to proceed in pro. per. (2RT 227.) Although appellant had made no such request of the commissioner, appellant agreed when Mr. Seiberling asked whether this was correct. (*Ibid.*) Defense counsel added that Commissioner Espinoza had put the case over for a determination of appellant's motion to represent himself. (2RT 228.) This was also an incorrect statement. (2RT 222-223, 225; 1CT 213-214.) Mr. Seiberling further stated that appellant had told him earlier that day that he wanted to represent himself. (2RT 227-228.)

Judge Armstrong, who had appellant's case file before him, attempted to "straighten out" what motion was pending. The court started

by asking Mr. Seiberling whether he was aware of any conflict of interest that would prevent him from continuing as appellant's attorney. Defense counsel responded, "No." (2RT 228.) The court then turned to appellant and attempted to clarify matters, telling appellant (erroneously) that he had two choices: (1) appellant could have Mr. Seiberling removed and new counsel appointed, but only if he could demonstrate a conflict of interest between himself and present counsel; or (2) appellant could represent himself. (2RT 228-229.)

Judge Armstrong then emphasized to appellant that he had to prove an actual conflict of interest to succeed on a motion to have counsel replaced. The court explained that a conflict of interest does not arise simply because a defendant disapproves of counsel or the way counsel is handling the case. Rather, "[a] conflict is a situation where an attorney represents someone whose interests are opposed to you." (2RT 228.) Judge Armstrong then gave a specific example of the kind of conflict he was talking about: "For instance, supposing the attorney was the attorney of record for a witness who was scheduled to testify against you. Well, the attorney would be in the position where it would be difficult for him to tear into his own client, to cross examine him vigorously in your behalf, because of his loyalty to the client and the case on which he represents him. [¶] That would be a conflict." (2RT 229.)

The court continued: "In that kind of situation, Mr. Seiberling would instantly appreciate that conflict and remove himself from the case and say not only he but his office could not continue to represent you. That's why I made the preliminary inquiry of him. So I can't find from what he said that there is any conflict." (2RT 229.) Judge Armstrong added, however: "If you feel there is a conflict that you want to present, you just want to let me

know what the nature of it is, I would ask the district attorney to leave the courtroom so you could tell me privately what you felt the conflict was without disclosing anything to the prosecution." (2RT 229.) The court then reiterated his view of appellant's choice: "However, if there isn't any conflict, you have a constitutional right to represent yourself." (*Ibid.*)

After Judge Armstrong explained that proceeding in pro. per. would be a "foolish choice," and asked appellant how far he went in school (2RT 230), appellant asked that the prosecutor be excused so that he could explain his disagreement with his attorney, and why he felt compelled to represent himself. (2RT 231.) The court explained that a motion for self-representation was not a proper basis for excluding the prosecutor. Appellant said: "I am opting to represent myself because there is a lot of things that's irrelevant to my case that been asked that I feel have no basis me being found not guilty, or whatever. I have to choose to represent myself. That's what I'm stating." (*Ibid.*) Judge Armstrong then asked the prosecutor to leave the room so that he could conduct a "modified *Marsden*" hearing. (2RT 231-232.)

At the start of the *Marsden* hearing, Judge Armstrong asked appellant: "What's your problem?" (2RT 233.) Appellant stated that trial counsel was not investigating his innocence, and that he felt he had to represent himself because nobody would fight for his freedom more than he. (*Ibid.*) Judge Armstrong responded that defense counsel was a capable and experienced attorney, but added that the court knew nothing about the case and was "not able to evaluate what's appropriate and what's not." (2RT 234-235.) The court then told appellant that he could represent himself if he wanted to, but cautioned that appellant had no real chance of successfully preparing himself for trial, and that he would be unfairly

matched against a trained and experienced prosecutor. (2RT 235.)

Appellant stated he had discussed his view of the charged crimes with his attorney, and was emphatic that he did not commit them, "Period." (2RT 236.) Appellant explained further why he felt he had to represent himself: "I'm saying through all the discussions we had so far, I am not satisfied right now. I feel that I have a better chance of fighting this myself. Even if I do get the death penalty or life without parole, I be [sic] more comfortable [than] sitting here every night wondering why did I let him defend me." (*Ibid.*) Appellant added, "I just hoping with my strong desire to prevail in this case, I can research adequately to present some kind of defense that's going to be favorable to me–more favorable than what I been getting with [defense counsel]. [¶] Even though this case been in this court for so long, it haven't been courtroom hours. I think I been rolling – rolling with the current and postponement every time I come here. Whatever prepared between then and now, I have no idea." (*Id.* at p. 239.)

After gaining appellant's assurances that he would be prepared to go to trial within approximately 100 days, Judge Armstrong relieved appointed counsel. (2RT 238-240; 1CT 215.) Appellant went on to represent himself in his capital trial.

B. The Court Erred By Failing To Conduct A Proper Marsden Inquiry, Which Resulted In Appellant Proceeding To Trail Without The Representation Of Counsel

Under the Sixth Amendment right to assistance of counsel, "[an] appellant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and appellant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Jones* (2003) 29

Cal.4th 1229, 1244-1245; *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1025 [summary denial of defendant's motion for new counsel violated Sixth Amendment]; *Hudson v. Rushen* (9th Cir. 1982) 686 F.2d 826, 829 [same].) Put another way, "[t]he decision to allow a substitution of attorney is within the discretion of the trial judge unless there is sufficient showing that the appellant's right to the assistance of counsel would be substantially impaired if his present request was denied." (*People v. Smith* (1985) 38 Cal.3d 945, 956, citation and internal punctuation omitted.)

To effectuate this right, a court must give the defendant an opportunity "to relate specific instances of attorney misconduct or inadequacy." (*People v. Cruz* (1978) 83 Cal.App.3d 308, 316; *Bland v. California Dept. of Correction* (9th Cir. 1994) 20 F.3d 1469, 1476, overruled on another point in *Schell v. Witek, supra,* 218 F.3d at pp. 1024-1025.) The determination of a motion to substitute attorneys is discretionary, but a "court cannot thoughtfully exercise its discretion in this matter without listening to [defendant's] reasons for requesting a change of attorneys." (*Marsden, supra,* at p. 123; *People v. Leonard* (2000) 78 Cal.App.4th 776, 787.) Thus, a court that denies a defendant an opportunity to be heard in support of his request for substitution of counsel necessarily abuses its discretion, requiring reversal of the judgment. (*People v. Hildalgo* (1978) 22 Cal.3d 826, 827; *People v. Lewis* (1978) 20 Cal.3d 496, 498; *Marsden, supra,* 2 Cal.3d at pp. 124, 126; accord *United States v. Torres-Rodriguez* (9th Cir. 1991) 930 F.2d 1375, 1381, overruled on other grounds in *Bailey v. United States* (1995) 516 U.S. 137.)

Here, appellant made a *Marsden* motion when he appeared before Commissioner Espinoza, and the matter was transferred to Judge Armstrong for a hearing on that motion. At that point, the court was required to

provide appellant an opportunity "to explain the basis of his contention and to relate specific instances of counsel's inadequacy." (*People v. Cole* (2004) 33 Cal.4th 1158, 1190; accord *Smith v. Lockhart* (8th Cir. 1991) 923 F.2d 1314, 1320, quoting *United States v. Hurt* (D.C. Cir. 1976) 543 F.2d 162, 163.) But that did not happen.

Rather, when appellant appeared in superior court for the hearing on his motion, Judge Armstrong instructed appellant that a *Marsden* inquiry was limited to whether appellant and appointed counsel had an actual conflict of interest, such as occurs when counsel discovers that he has represented a witness who may be called to testify against his client. (2RT 228-229.) That explanation of *Marsden* was plainly erroneous. Indeed, while the existence of a conflict of interest based on an attorney's divided loyalties certainly would require substitution of counsel if a defendant were to raise that issue in the *Marsden* context (see e.g., *Wood v. Georgia* (1981) 450 U.S. 261, 271-272 ; *Cuyler v. Sullivan* (1980) 446 U.S. 335, 348; *Holloway v. Arkansas* (1978) 435 U.S. 475, 476-487), this Court has repeatedly explained that a *Marsden* inquiry requires a thorough and careful inquiry into whether appointed counsel is providing effective representation or whether there has been a breakdown in the attorney-client relationship. For example, in *People v. Fierro* (1991) 1 Cal.4th 173, 204-206, this court found no *Marsden* error because "the court carefully inquired into defendant's reasons for requesting substitution of counsel" and found "there was no basis to conclude that counsel was not providing effective assistance or that a breakdown in the attorney-client relationship had occurred such that defendant's right to effective assistance would be substantially impaired." (Accord, *People v. Memro* (1995) 11 Cal.4th 786, 857.)

Moreover, this is not a case where the court merely set out a plainly erroneous standard to evaluate appellant's *Marsden* motion, but then later conducted a proper inquiry. To the contrary, at the *Marsden* hearing Judge Armstrong told appellant that he had no intention of considering whether appointed counsel was providing appellant effective representation. After first expounding upon the general duties of a defense attorney, the court told appellant: "I don't know anything about this case. I just got this file cold. So I sure am not able to evaluate what's appropriate and what's not. But Mr. Seiberling has also been an attorney for many years and has tried a lot of important cases, murder cases. So whatever he wants to look into, I – I, as a judge, would certainly not restrict him and say, Mr. Seiberling, you can only make this inquiry, you can't go over here or over here, because the whole field is open to him. He is a capable and experienced attorney." (2RT 235.)

These comments further demonstrate that the court misunderstood its duty under *Marsden.* Judge Armstrong was tasked with conducting a thorough inquiry into whether Mr. Seiberling was providing effective assistance of counsel in appellant's case, and whether there had been a breakdown in Seiberling and appellant's relationship. Instead, the court relied on his personal impressions of counsel's reputation and experience, and then limited his role to deciding whether appellant could prove a conflict of interest. That is not the *Marsden* standard at all. (Cf. *People v. Fierro*, *supra*, 1 Cal.4th at pp. 204-206.) And not surprisingly, the effect of the court's erroneous constraints on defendant's *Marsden* rights resulted in

appellant concluding that he had no choice but to represent himself.[50]

This case is strikingly similar to *People v. Munoz* (1974) 41 Cal.App.3d 62, 64, where the defendant complained that his appointed counsel believed he was guilty and that counsel did not want "to fight the case." There, the trial court assured the defendant that his appointed counsel would behave differently in the courtroom than he had in their private conversations, and that counsel would do a good job. (*Ibid.*) The appellate court reversed, observing that "... the ratio decidendi of the high court's opinion [in *Marsden*] tells us that the judge's obligation to listen to an indigent defendant's reasons for claiming inadequate representation by court-appointed counsel is not a pro forma function. It tells us also that under some circumstances a court's ruling denying the request for a substitution of attorneys without a careful inquiry into the defendant's reasons for requesting the substitution is lacking in all the attributes of a judicial determination." (*Id.* at p. 66, punctuation and citation omitted.)

The *Munoz* court concluded that the lower court's failure to ask counsel any questions and "ascertain in what particulars the attorney was not providing appellant with a competent defense was tantamount to a refusal on the part of the court to adjudicate a fundamental issue." (*Ibid.*; see *People v. Miranda* (1987) 44 Cal.3d 57, 77, abrogated on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn.4 [citing *Munoz* and encouraging trial courts to "probe" and "ask follow-up questions" to

---

[50]Indeed, the trial court's failure to conduct an appropriate *Marsden* inquiry deprived the court of its opportunity to reconcile appellant and his attorney. (See *Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1170 [where defendant and attorney become embroiled in conflict, trial court should "take the necessary time and conduct such necessary inquiry as might have eased (the defendant's) dissatisfaction, distrust, and concern"].)

effectively exercise discretion and aid reviewing court].)

Here too the court made no effort to ascertain the reasons underlying appellant's request for new counsel and claim of dissatisfaction.[51] This is true despite the fact that appellant, in explaining why he felt he had no choice but to represent himself since there was no actual conflict of interest like that described by the court, pointed directly to the causes of his dissatisfaction with appointed counsel: appellant repeated that he was innocent and counsel was not adequately investigating the charges. (See, e.g., 2RT 231, 233, 236, 239; see also 3RT 325, and 4RT 419.)[52] Also as in *Munoz,* Judge Armstrong made no inquiry of Mr. Sieberling, save a single

---

[51]The hearing was held specifically so that appellant could explain why he felt he had to proceed in pro. per., given the choice between proving an actual conflict of interest and going to trial without counsel. At no point during the hearing did Judge Armstrong correct his earlier misstatement and explain that appellant could obtain new appointed counsel if he could demonstrate that he was receiving deficient representation, and at no point did Judge Armstrong make any inquiry into the reasons underlying defendant's stated dissatisfaction with appointed counsel. To the contrary, Judge Armstrong stated he had no intention of doing so. (2RT 234-234.)

[52]Later, appellant explained to Judge Bascue: "... What I'm saying is I'm not the perpetrator of these crimes. The reason I elected to go to pro per – to go pro per is because of the way the Public Defender didn't plan presenting a defense." (2RT 325.) Then, when he first appeared before Judge Brown – who would go on to conduct both of his trials–appellant repeated what he had told Judge Armstrong six months earlier: "... I was dissatisfied with my current – I mean my former counsel, the way he wanted to present the case at trial which I was saying that I'm innocent. And it seemed like to me, my words were falling on deaf ears, so I elected to go pro per March 31st." (3RT 419.) Neither Judge Bascue nor Judge Brown explored these statements, nor did they attempt to correct Judge Armstrong's error in telling appellant that he had the stark choice between proving a conflict of interest to obtain new counsel or proceeding in pro. per.

question: Whether counsel believed that he and defendant had a conflict of interest. (2RT 227-228.)[53] Of course, Judge Armstrong's approach to appellant's *Marsden* motion was in keeping with his stated, but erroneous, view that appellant had to establish an actual conflict of interest to obtain new counsel, and not whether counsel was providing competent representation.

This Court's decision in *People v. Lewis, supra*, 20 Cal.3d 496, is additionally instructive. In *Lewis,* the defendant sought new counsel because his attorney was not handling the case in a manner that would vindicate his innocence. (*People v. Lewis, supra*, 20 Cal.3d at p. 497-498.) The trial judge in *Lewis,* like Judge Armstrong here, commented on defense counsel's good reputation and expressly declined to consider the defendant's reasons for his claimed dissatisfaction with appointed counsel. (*Ibid.*) This Court reversed, holding: "On this record we cannot ascertain that defendant had a meritorious claim, but that is not the test. Because the defendant 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 defendant an opportunity to do so denied him a fair trial." (*Id.* at p. 499, quoting *Marsden, supra,* at p. 126.)

Here, as in *Lewis*, we cannot ascertain whether appellant had a meritorious *Marsden* claim because the court so mishandled the motion.

---

[53]Appellant recognizes that a trial court need not interrogate every trial attorney who is the subject of a *Marsden* motion. But questioning an attorney is required where, as here, a satisfactory explanation for counsel's conduct or attitude toward his client is necessary in order to determine whether counsel can provide adequate representation. (See *People v. Penrod* (1980) 112 Cal.App.3d 738, 747.)

(See *People v. Hill* (1983) 148 Cal.App.3d 744, 755 [failing to make an adequate inquiry makes appellate review impossible]; *People v. Munoz, supra,* 41 Cal.App.3d at p. 66 [same].) For this reason, "*Marsden* error is typically treated as prejudicial per se, since the very nature of the error precludes meaningful appellate review of its prejudicial impact. [Citations.]" (*Hill, supra,* at p. 755, citing, *inter alia, People v. Lewis, supra,* 20 Cal.3d at p. 499; *People v. Ortiz, supra*, 51 Cal.3d at p. 988 [per se reversal]; see also *United States v. Williams* (9th Cir. 1979) 594 F.2d 1258, 1260-1261 [reversing without considering prejudice]; but see *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1400-1401 [*Marsden* error not reversible per se, trial court may be ordered to conduct *Marsden* hearing on remand].)

Indeed, a harmless-error analysis of any sort would be inappropriate where, as in this case, the error contributed to appellant's decision to choose self-representation over proceeding with what he thought would be ineffective representation by the only attorney available to him. (See *Hendricks v. Zenon* (9th Cir. 1993) 993 F.2d 664, pp. 670-671 [per se reversal for denial of counsel on appeal, where denial of motion for substitution of appointed appellate counsel – without appropriate inquiry – forced appellant to represent himself].) That is, beyond the obvious fact that the lack of an adequate *Marsden* inquiry resulted in a record insufficient to assess prejudice, the trial court's mishandling of appellant's complaints about his trial attorney resulted in the actual denial of the defendant's Sixth Amendment right to counsel, which is a structural error that is not subject to prejudice analysis. (See *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 148-150, discussing *Arizona v. Fulminante* (1991) 499 U.S. 279.)

But even were this Court inclined to conduct a harmless error analysis, reversal would be required. Absent an adequate record of appellant's complaints as to counsel's inadequacies, and absent the trial court applying the proper standard in evaluating appellant's motion, the State cannot meet its heavy burden that, beyond a reasonable doubt, the error did not contribute to defendant's decision to proceed in pro. per. at his capital trial, and thereby contribute to the verdicts that resulted in a judgement of death. (*Marsden, supra,* at p. 126; see also *Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, the entire judgment must be reversed.

* * *

II

APPELLANT WAS DENIED HIS RIGHT TO COUNSEL AND DUE PROCESS WHEN HE PROCEEDED TO TRIAL IN PRO. PER. WITHOUT VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY WAIVING HIS RIGHT TO COUNSEL

As discussed in more detail above, when appellant first appeared in the superior court on his *Marsden* motion, Judge Armstrong gave appellant a legally erroneous choice: he could either have the public defender replaced upon demonstrating an actual conflict of interest between himself and his counsel, or he could proceed in pro. per. (2RT 228-229.) Appellant – faced with the untenable option of proceeding with what he believed was ineffective representation or no counsel at all – stated that he had no choice but to represent himself at trial. (2RT 231.) Judge Armstrong then granted appellant pro. per. status, and appellant proceeded unrepresented by counsel.

The High Court has made it abundantly clear that before permitting a defendant to proceed in pro. per., a trial court must satisfy itself that the defendant's waiver of his constitutional rights is knowing and voluntary, and that the decision is uncoerced. (*Godinez v. Moran* (1993) 509 U.S. 389, 400, 401, fn. 12.) Here, appellant was unconstitutionally coerced into self representation by the court's legally erroneous explanation of appellant's options, as well as the court's mishandling of appellant's *Marsden* motion, as discussed in more detail in Argument I, above. In addition to the fact that appellant's decision to represent himself was coerced from the outset, the record as a whole indicates that appellant was otherwise grossly misinformed by the trial court about his right to counsel, and that he proceeded to trial on his own without knowingly and intelligently waiving that right.

A. Factual Background

After misadvising appellant about his rights under *Marsden* – by telling appellant that he could be relieved of appointed counsel only upon a showing of an actual conflict of interest – Judge Armstrong stated that the option of self representation would be a "foolish choice." (2RT 230.) The court then determined that appellant had no legal training, had never represented himself before, and had attended only high school. (*Ibid.*) Judge Armstrong also explained that appellant needed an attorney to protect his rights, adding that the court could only "try to see that you get a fair trial." (*Ibid.*) Appellant stated that he had no choice but to represent himself at trial, and that he wanted to explain his difficulties with his trial counsel out of the presence of the prosecutor. (2RT 231.)

At the *Marsden* hearing, Judge Armstrong cautioned that appellant had no real chance of successfully preparing himself for trial, and noted that he would be unfairly matched against a trained and experienced prosecutor. (2RT 235.) Appellant again stated that he was innocent of the charges, and he repeated that he was not satisfied with the representation he was receiving. Appellant added that if ultimately convicted and sentenced to death, he would feel better knowing that he had proceeded in pro. per. rather than with then-appointed counsel. (2RT 236.)

After reviewing the charges with appellant and gaining assurances that appellant would be prepared to go to trial within the following 100 days, Judge Armstrong granted appellant pro. per. status and relieved appointed counsel. (2RT 238-240; 1CT 2015.) The court then told appellant that he could have Mr. Seiberling reappointed at any point in the future were appellant to change his mind due to the complexity of the case. (2RT 246.) From that point on, appellant proceeded in pro. per. The court

did not attempt to establish that appellant's waiver or his right to counsel was knowing, intelligent and voluntary, nor did the court admonish appellant as to the charges against him or the rights he was giving up by electing to proceed in pro. per.

Five months later, on August 25, 1993, appellant moved for appointment of advisory counsel and appeared before Judge James A. Bascue for consideration of that motion. (2RT 317(4).) The court stated it was not inclined to grant appellant's motion for advisory counsel, adding that the court normally provides standby counsel in death penalty cases. (*Ibid.*) While considering the motion, the court noted that appellant had not completed a waiver-of-counsel form. Judge Bascue directed appellant to complete a counsel-waiver form that evening. (2RT 317(1)-(5); 1CT 256.)

The next day, appellant appeared with Mr. Jackson Chandler, an attorney that appellant sought to have appointed as standby and advisory counsel. After a discussion with Mr. Chandler about how he came to know appellant (2RT 319-324), Judge Bascue returned to the issue of the counsel-waiver form. (See 2CT 305-310.) The court drew appellant's attention to the first paragraph on the top of page two of the form (2RT 319; 2CT 306), noting that appellant had not initialed the box that he would have to proceed "without the aid of lawyer" [sic] were the court to allow him to proceed as his own attorney. (2RT 324). Indeed, appellant had not initialed *each* of the four paragraphs that stated he would have to proceed at trial without the assistance of counsel. (See 2CT 306-307.) Judge Bascue addressed, in seriatim, the un-initialed and interlineated paragraphs on the counsel-waiver form.

Turning first to paragraph Number 2 on the counsel-waiver form, Judge Bascue stated that appellant would have to conduct his defense

without the aid of a lawyer *were the court to deny his request for advisory counsel.* (2RT 324; 2CT 306.) Appellant said that he understood, but that he did not initial the box "...because of a voice like saying to you right now," which the court understood to mean that appellant anticipated the appointment of advisory counsel. (2RT 324.)

Judge Bascue next asked why appellant had not initialed the box next to paragraph Number 6, which stated: "I understand that if I accept appointed counsel, an experienced trial lawyer will be assigned to try my case." (2CT 307; 2RT 324.) Appellant said that he understood this, but that his concern was not just having experienced counsel appointed, but instead having an attorney who shares his view on the defense: "What I'm saying is I'm not the perpetrator of these crimes. The reason I elected to go to pro per – to go pro per is because of the way the Public Defender didn't plan presenting a defense." (2RT 325.)

Considering paragraph Number 8, where appellant modified the admonition that he would have to proceed "without the assistance of a lawyer or the court," defendant again stated that he was seeking to proceed with "the advise [sic] of a competent lawyer" by requesting advisory counsel. (2RT 325.) As for Number 10, Judge Bascue asked whether appellant understood that the court would appoint a lawyer were appellant to lose his pro. per. privileges during trial. Appellant answered: "Yes, I understand. But my whole concern revolves around be appointed somebody who don't share my feelings on the defense. That's what I'm concerned about." (*Id.* at p. 326.) The court responded that appellant does not get to choose appointed counsel. (*Id.* at pp. 326-327.) Appellant again replied that he understood, but added that he was concerned about being able to communicate well with counsel picked by the court. (*Id.* at p. 327.)

Referring to Mr. Chandler, who had remained in the courtroom during this exchange, appellant stated that he found someone who could ". . . concern himself with obtaining my freedom, so to speak." (*Ibid.*)

Judge Bascue inquired whether appellant understood his speedy trial rights, and that he would lose his pro. per. privileges were appellant to abuse the dignity of the court; appellant responded in the affirmative to both questions. (2RT 327.) When the court told appellant that an attorney stepping into the case later would be at a disadvantage, appellant repeated: "That's my whole point of trying to get appointed advisory and standby counsel that I'm compatible with because while I was fighting the case with the public defender, I spoke with the court – court –", at which point Judge Bascue cut appellant off, saying that he wanted to deal with appellant's waiver first, and then they would turn to the "peripheral counsel issues." (2RT 328.)

After additionally admonishing appellant that he would have to follow the sheriff's and court's policies, and that appellant would lose any ability to claim on appeal that he suffered ineffective assistance of counsel at trial, Judge Bascue concluded that, based on the form and the discussion of it, appellant had made a knowing and intelligent waiver of his right to counsel. (2RT 329-330.)

Judge Bascue then denied appellant's motion for advisory counsel, as well as appellant's request to appoint Mr. Chandler to serve as standby counsel. The court then appointed another attorney (Al DeBlanc) to serve as standby counsel–who was, a week later, removed after the court discovered he was unqualified to handle a death penalty case–and transferred the case to Judge Brown. (*Id.* at pp. 332-336; 1CT 257.)

Later that same day, appellant appeared for the first time before Judge Brown and revived his request for appointment of advisory counsel. Judge Brown began by asking appellant why he wished to represent himself. Appellant stated: "Yes, I was dissatisfied with my current – I mean my former counsel, the way he wanted to present the case at trial which I was saying that I'm innocent. And it seemed like to me, my words were falling on deaf ears, so I elected to go pro per March 31st." (3RT 419.) Appellant explained that he had asked Judge Bascue to appoint advisory counsel, and repeated that request. Judge Brown denied appellant's request for advisory counsel, explaining in various ways–each erroneous–that while California law allows for appointment of standby counsel, it does not provide for the appointment of advisory counsel, even in capital cases. (*Id.* at pp. 422-423, 427.)[54]

---

[54]The following week, in proceedings held outside appellant's presence (see Argument III, *post*), Judge Brown vacated Mr. De Blanc's appointment on the grounds that he was not qualified to accept the appointment. (3RT 428-429.) The court then appointed Mark Borden to serve as standby counsel. In so doing, Judge Brown told Borden that appellant's request for advisory counsel had been denied because "... in the state of California right now there is legal authority that there is no such animal as advisory counsel. So if I appoint you or substitute you in for Mr. De Blanc, it would be as standby counsel only which means you sit in the courtroom, but you do not talk to the appellant under any circumstances whatsoever." (3RT 430.) Then, despite the fact that appellant had moved for advisory counsel, appellant's newly appointed standby counsel agreed with the court and argued against his client's desire for advisory counsel, stating that serving as advisory counsel would be the "[w]orst of all possible worlds." (3RT 435.)

When appellant eventually arrived at the hearing, he repeated his request for advisory counsel, asked the court to file his written motion for advisory counsel, and asked the court to reconsider appointing Mr.

(continued...)

Nearly three weeks later, on September 13, 1993, Judge Brown informed appellant that she had erred in denying appellant's request for advisory counsel, and she appointed Mark Borden to serve as both standby and advisory counsel. (3RT 451-452; see also, 3RT 447.) The court added that she did not have transcripts of the earlier proceedings before Judge Armstrong. (3RT 466.) Those transcripts contained, inter alia, the proceedings related to appellant's *Marsden* motion. Then, after delineating Mr. Borden's duties as advisory counsel, Judge Brown questioned appellant about the counsel-waiver form that he had filled out in Judge Bascue's court.

Judge Brown noted that appellant had not initialed certain items on the form and had placed questions marks next to others. (3RT 458-459.) Appellant indicated that the form stated that self-representation meant he would have to proceed without the assistance of counsel, and he explained that he intended to proceed *with* the assistance of advisory counsel. (*Id.* at p. 459.) Without clarifying the difference between appellant's Sixth Amendment right to counsel and appellant's right to advisory counsel, Judge Brown merely altered the counsel-waiver form, which appellant had

---

[54](...continued)
Chandler to serve as standby counsel, at least. (3RT 438-439; 1CT 261-265.) Judge Brown accepted and then denied appellant's written motion, and then also denied his request for standby counsel of choice. (3RT 438-440; 1CT 261.)

Then, on September 7, 1993, Judge Brown conducted another proceeding outside appellant's presence, during which the court told Mr. Borden that she would revisit appellant's request for appointment of advisory counsel. She explained that if advisory counsel were appointed, she would expand Mr. Borden's appointment to include that role. (3RT 446-449.)

completed two weeks earlier when he appeared before Judge Bascue, by interlineating the phrase "and without the aid of a lawyer" because she had, in fact, appointed advisory counsel. (*Id.* at p. 460; 2CT 306.)[55] Judge Brown made similar interlineations to other parts of the form, and then ultimately asked appellant to fill out a second form containing identical interlineations. (3RT 462, 477-479; 2CT 301-304, 307.)

After appellant completed the second interlineated counsel-waiver form, Judge Brown admonished him generally about the rights he was giving up. Noting that appellant had been represented by the public defender earlier, the court asked whether appellant understood that he had a constitutional right to be represented by counsel at all stages of his trial; appellant responded affirmatively. (3RT 479.) Judge Brown told appellant that advisory counsel could sit at counsel table, but would not be heard in the courtroom; appellant responded that he understood. (*Id.* at p. 480.) At that point, Judge Brown stated that appellant had properly waived his right to counsel. (*Id.* at p. 480-481.) The court added that she would obtain the transcripts of the proceedings before Judge Armstrong and review them.

---

[55]For example, Judge Brown interlineated the text of paragraph number 2 as follows: "If the Court grants this petition and if I am permitted to represent myself, I understand I will have to conduct my own defense **by myself ~~and without the aid of lawyer~~** [sic]." (2CT 306, original bold.) The court similarly interlineated the text of paragraph 8 as follows: "I understand that if I am permitted to represent myself it will be necessary for me, **WITHOUT THE ASSISTANCE ~~OF A LAWYER~~ OR THE COURT**, to follow all of the technical rules of substantive law, criminal procedure and evidence." (2CT 307, original capitalization and interlineation, bold supplied.)

B. Appellant's Waiver Of Counsel Was Not Voluntarily Made Because The Trial Court's Failure To Conduct A Proper *Marsden* Hearing Forced Appellant To Choose Between Ineffective Representation And No Representation

A defendant has a constitutional right to counsel at all critical stages in a criminal proceeding. (*Mempa v. Rhay* (1967) 389 U.S. 128, 134.) That right may be waived by a defendant who wishes to represent himself at trial. (*Faretta v. California* (1975) 422 U.S. 806, 807.) Any such waiver requires a defendant to relinquish "many of the traditional benefits associated with the right to counsel." (*Id.* at p. 835.) For that reason, trial courts must indulge every reasonable inference against waiver of the right to counsel. (*Brewer v. Williams* (1977) 430 U.S. 387, 404; *People v. Roldan* (2005) 35 Cal.4th 646, 683.)

Where a defendant has expressed an intention to proceed in pro. per., the trial court must satisfy itself that the defendant is competent to waive his right to counsel, and that any waiver of his constitutional rights is knowing and voluntary. (*Godinez v. Moran, supra,* 509 U.S. at p. 400; see also *Patterson v. Illinois* (1988) 487 U.S. 285, 292 n. 4 .) Indeed, the very purpose of the "knowing and voluntary" inquiry is to determine whether the defendant actually understands the significance and consequences of the decision to proceed without counsel, and whether that decision is uncoerced. (*Godinez v. Moran, supra,* 509 U.S. at p. 401, fn. 12.)

Here, appellant's decision to represent himself was involuntary and coerced by Judge Armstrong's mishandling of his initial request for substitution of counsel and his complaints about appointed counsel's representation. As discussed in greater detail above (Argument I, *ante*), Judge Armstrong erroneously told appellant that he had to demonstrate an

actual conflict of interest for appellant to succeed on his *Marsden* motion and have his appointed counsel replaced. Judge Armstrong also expressly refused to evaluate whether appellant was, in fact, receiving effective assistance of counsel. (2RT 228-229, 235.) The court's complete failure to discharge its duties under *Marsden* left appellant with a constitutionally-defective choice of proceeding with what he believed was ineffective representation, or representing himself.

The issue in this case is identical to that in *People v. Cruz, supra,* 83 Cal.App.3d 308. There, the defendant moved to represent himself, telling the trial court that he had been previously represented by the public defender on unrelated charges, and that the public defender had failed to conduct investigation into those prior offenses. (*Id.* at p. 317.) After the court questioned the defendant about those prior matters, the defendant stated that he would not accept representation by the public defender. (*Ibid.*) The defendant then repeated his desire to represent himself, at which point the trial court inquired into the defendant's mental competence, gave warnings on the dangers of self-representation, and instructed the defendant on possible punishment. (*Id.* at pp. 317-318.) The trial court then granted the defendant's request to represent himself.

The *Cruz* court concluded that the trial court had mishandled the defendant's complaints against his appointed counsel, which subsequently undermined defendant's waiver of his right to counsel: "The knowing and intelligent waiver of counsel envisions the election between viable alternatives. Defendant's decision to proceed in pro. per. was predicated upon his belief, mistaken or not, that he could not expect effective representation from the public defender's office. This belief was effectively reinforced by the court's failure to fully explore defendant's charges.

Under the circumstances, defendant cannot be said to have been fully apprised of his right to counsel and therefore did not effectively waive that right." (*Id.* at p. 318, citation and footnote omitted.)

Similarly, in *People v. Hill, supra,* 148 Cal.App.3d 744, the defendant proceeded to trial in pro. per. after the trial court conducted only an informal and general inquiry into the defendant's complaints about his third appointed counsel's performance. The appellate court found that the trial court had mishandled Mr. Hill's assertions by failing to adequately evaluate the soundness of his charges. (*Id.* at p. 755.) The *Hill* court concluded that the lower court's failure in this regard resulted in an ineffective *Faretta* waiver, which denied the defendant his right to the effective assistance of counsel at trial. (*Id.* at pp. 755-756.)

Just as in *Cruz* and *Hill*, Judge Armstrong's failure to properly evaluate appellant's complaints about his representation tainted and rendered ineffective appellant's subsequent waiver of his right to counsel. And like *Cruz,* the other related errors – committed by Judges Bascue and Brown – served simply to reinforce, rather than rectify, Judge Armstrong's original mistakes. (*People v. Cruz, supra,* 83 Cal.App.3d at p. 318.)

That is, at no point subsequent to appellant's decision to represent himself did Judges Bascue and Brown even attempt to correct the errors and mis-advice that led to appellant proceeding in pro. per. To the contrary, the waiver forms that Judges Bascue and Brown discussed with appellant, and had him review and initial, did not explain the circumstances under which appellant had the right to replace his appointed counsel. Rather, Judges Bascue and Brown exacerbated Judge Armstrong's errors by adding additional layers of misadvice and legal mistakes. Both judges erroneously denied appellant's motions for advisory counsel, refused to appoint the

standby counsel appellant desired, and only later discovered that the initial standby counsel who was appointed was unqualified to serve in that role. (See Arguments II and III, *post.*)

Indeed, the present case presents an even more egregious example of prejudicial trial court error along these lines in at least three notable ways. First, unlike the trial judges in *Cruz* and *Hill*, Judge Armstrong expressly declined to consider and evaluate whether appellant was receiving effective assistance of counsel. He told appellant, "I don't know anything about this case. I just got this file cold. So I sure am not able to evaluate what's appropriate and what's not." (2RT 235) Second, unlike the defendants in *Cruz* and *Hill*, the trial court affirmatively misinformed appellant on the standard that he had to meet under *Marsden* and its progeny. (*Id.* at pp. 228-229.) And third, the trial court in this case expressly gave appellant a constitutionally erroneous choice between proving an actual conflict of interest to succeed on his *Marsden* motion and representing himself. (*Ibid.*)

The federal courts have also long recognized that a defendant in appellant's situation – forced to choose between proceeding with potentially incompetent counsel and self-representation – faces an unacceptable "dilemma of constitutional magnitude." (*Maynard v. Meecham* (1st Cir. 1976) 545 F.2d 273, 278; *Crandell v. Bunnell* (9th Cir. 1994) 25 F.3d 754, 755 [defendant cannot be forced to choose between incompetent counsel and no counsel]; see *Pazden v. Maurer* (3rd Cir. 2005) 424 F.3d 303, 314-318 [defendant's decision to proceed in pro. per. involuntary where counsel was unprepared]; accord *Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1170.) As a consequence of this dilemma, the federal courts have found ineffective *Faretta* waivers and the denial of the right to counsel where, as

in the present case, the purported waiver resulted from the erroneous handling of a defendant's motion for substitution of counsel. (See, e.g., *United States v. Williams* (9th Cir. 1979) 594 F.2d 1258, 1259-1261 (per curiam); *Sanchez v. Mondragon* (10th Cir. 1988) 858 F.2d 1462, 1465-1467, overruled on other grounds in *United States v. Allen* (10th Cir. 1990) 895 F.2d 1577, 1579 [concluding that *Sanchez* had erroneously applied harmless error analysis to Sixth Amendment violation].)[56]

The Ninth Circuit's decision in *Crandell v. Bunnell* (9th Cir. 1998) 144 F.3d 1213 (hereafter *Crandell II*), is particularly instructive on these points. In that case, the defendant proceeded in pro. per. at his capital trial after the state court failed to conduct a hearing on the defendant's complaints about his appointed counsel, and after the defendant's requests for alternative counsel were denied. (*Crandell II, supra,* 144 F.3d at pp. 1215, 1217.) The defendant explained to the state court that he chose to represent himself because appointed counsel had failed to communicate with him during the prior two months, and because appointed counsel was not putting up a defense. (*Id.* at pp. 1214-1215, also referring to *Crandell v. Bunnell* (9th Cir. 1994) 25 F.3d 754, 755 [hereafter *Crandell I*].) The federal court of appeal observed that the defendant "could not have been

---

[56]Other state courts have recognized that the erroneous denial of a motion to relieve appointed counsel leaves a defendant with the constitutionally repugnant choice of proceeding with potentially incompetent counsel and self-representation. (See e.g., *State v. Moody* (Ariz. 1998) 192 Ariz. 505, 509 [reversing capital conviction where the trial court refused to appoint new counsel and the defendant was left to choose between proceeding with conflicted counsel and self representation; the defendant's decision to proceed without counsel was not voluntarily made].)

forced to choose between incompetent counsel and no counsel at all," and ordered an evidentiary hearing on the question of counsel's competence at the time the defendant proceeded in pro. per. (*Crandell I, supra*, 25 F.3d at p. 755, citing *Lofton v. Procunier* (9th Cir. 1973) 487 F.2d 434, 436.) Following that hearing, the Circuit court concluded that appointed counsel had performed ineffectively, and that the trial court's failure to grant the defendant's motion for alternative counsel resulted in the denial of the right to counsel. (*Crandell II, supra,* 144 F.3d at pp. 1217-1218.)

In *Schell v. Witek, supra,* 218 F.3d 1017, an en banc panel of the Ninth Circuit more recently emphasized the holding in *Crandell II*, succinctly explaining: "In *Crandell*, the defendant was improperly forced to choose between incompetent counsel and no counsel at all. He chose the latter and to represent himself. Under those unique circumstances, we concluded that no showing of prejudice was required because *Crandell* was improperly left with no counsel at all. The inherent prejudice in *Crandell* was therefore the denial altogether of the right to counsel, not the denial of a motion for substitute counsel." (*Schell v. Witek, supra,* 218 F.3d at p. 1026, citations omitted and italics supplied.)

A similar result is required here. The trial court mishandled appellant's complaints about appointed counsel, and misadvised appellant about his Sixth Amendment right to effective counsel. As in *Crandell*, *Plumlee* (discussed in detail in the prior section), *Cruz*, and *Hill*, the trial court's failures left appellant with a constitutionally defective choice between potentially ineffective counsel and no counsel at all, which consequently resulted in an ineffective waiver of his Sixth Amendment right to counsel. Reversal of appellant's conviction is required. (*Cordova v. Baca* (9th Cir. 2003) 346 F.3d 924, pp. 926, 929-930 [ineffective *Faretta*

waiver waives nothing, and reversal automatic if defendant proceeds to trial without counsel]; *State v. Moody, supra,* 192 Ariz. at p. 509; see *Holloway v. Arkansas, supra,* 435 U.S. at p. 489 [automatic reversal required when right to counsel violated].)

C. Appellant Did Not Knowingly And Intelligently Waive His Right To Counsel

In addition to the fact that appellant's waiver of his right to counsel was ineffective because it was not voluntarily made, the record, when taken as a whole, establishes that appellant's waiver was also not knowingly and intelligently made.

A defendant seeking self-representation "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (*Faretta v. California, supra,* 422 U.S. at p. 835, citation omitted.) In determining whether a waiver of counsel is knowingly and intelligently made, the court must draw every reasonable inference against waiver. (*People v. Stanley* (2006) 39 Cal.4th 913, 932; *Brewer v. Williams*, *supra*, 430 U.S. at p. 404.) "The test of a valid waiver of counsel is not whether specific warnings or advisements were given but 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. [Citations omitted.]" (*People v. Bloom* (1989) 48 Cal.3d 1194, 1224-1225.)

To determine whether a purported waiver is knowingly and intelligently made, the trial court must conduct a "penetrating and comprehensive examination into the defendant's apprehension of the nature of the charges, the statutory offenses included within them, the range of

allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." (*United States v. Padilla* (10th Cir. 1987) 819 F.2d 952, 956-57, quoting *Von Moltke v. Gillies* (1948) 332 U.S. 708, 723-24 internal quotation marks and punctuation omitted.) While no specific litany of advisements is required under *Faretta*, this Court has identified the type of penetrating and comprehensive examination that should be undertaken by the trial court when considering a motion to proceed in pro. per.

First, the defendant should be told that self-representation is almost always unwise, and then cautioned as to the *technical mechanics of self-representation*, including that (1) he will receive no special indulgence by the court and must follow all the applicable rules, substantive law, and criminal procedures; (2) the prosecution will be represented by a trained professional; (3) he will receive no more library privileges than those available to any other self-represented defendant, or any additional time to prepare; (4) his self-representation may be terminated if he becomes disruptive; and (5) he cannot afterwards claim inadequacy of representation. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070-1071, discussing *People v. Lopez* (1977) 71 Cal.App.3d 568.)

Second, the trial court should examine the defendant's understanding, if any, of *the substantive nature of the proceedings and the rights he is seeking to relinquish.* With regard to this aspect of the court's evaluation, the court must (1) inquire into the defendant's education and legal knowledge; (2) consider a psychiatric examination in questionable cases; (3) explore the nature of the proceedings and charges, including possible defenses and punishments; and (4) probe the defendant's

understanding of the alternatives to self-representation, i.e., the right to counsel. (*People v. Koontz, supra,* 27 Cal.4th at p. 1071.)

Here, while appellant was arguably advised sufficiently as to the technical mechanics of self-representation, the record shows that the court failed in its duty to ensure that appellant understood the substantive nature of his rights and the capital proceedings. First, the court affirmatively misadvised appellant about the nature of his Sixth Amendment right to the effective assistance of counsel. Second, the court failed to explain the difference between the right to the assistance of counsel, and the right to proceed by way of self-representation with the assistance of advisory counsel, even after it had become clear that appellant was confused about the difference. Third, the court failed to advise appellant about the unique nature of capital proceedings, as well as the capital charges he was facing and the possible defenses available to him. As a result of these failures, this Court can have no confidence that appellant's purported waiver of counsel was knowingly and intelligently made.

1. The Trial Court Affirmatively Misadvised Appellant About His Right To The Effective Assistance Of Counsel

As discussed in more detail above (Argument 1, *ante*), when appellant initially appeared in the superior court, he made a *Marsden* motion. In explaining appellant's counsel rights, the court (Judge Armstrong) told appellant that only an actual conflict of interest – and specifically, one based on divided loyalties – would constitute cause for removal of appointed counsel. (2RT 228-229.) This was erroneous. Defendant had the right to the effective assistance of counsel, which encompasses but is significantly broader than the right to be represented by counsel with

undivided loyalties. (See *Strickland v. Washington* (1984) 466 U.S. 668, pp. 686-688.) This misstatement of appellant's Sixth Amendment right to counsel would have left any defendant with the false impression that he was entitled only to conflict-free counsel – not the effective assistance of counsel – and that counsel's actions or inactions in defending against the charges were otherwise unassailable. Indeed, Judge Armstrong explicitly told appellant that he was "not able to evaluate" appointed counsel's effectiveness, and refused to do so. (2RT 234.)

The issue of appellant's counsel-waiver was revisited many months later when appellant first appeared before Judge Bascue, and then Judge Brown, and requested appointment of advisory counsel. Both judges attempted to perfect the counsel-waiver purportedly obtained earlier by Judge Armstrong – who failed to admonish appellant at all as to the rights he was giving up by choosing to proceed in pro. per. – by having appellant complete a counsel-waiver form.[57] But neither judge reviewed the brief

---

[57]Indeed, Judge Bascue did not question why appellant wished to represent himself. Rather, Judge Bascue was principally concerned with the state of the record. After discovering that appellant had not completed a waiver form and did not have a copy of the pro. per. rules, Judge Bascue said he wanted to be satisfied that appellant made a valid waiver, adding: "I'm going to see that you get [a copy of the self-representation rules], then I'll bring you back. I want them in the file. I don't see a written waiver here. *I want to make sure we're protecting the record.*" (2RT 317-2, emphasis supplied.) Then, after learning that the case was a death case, Judge Bascue reiterated his desire to protect the record: "What I'd like to do is bring this back tomorrow because *I want these waivers in the court file since I don't see those in the file*, then I will send you out [for trial]." (*Id.* at p. 317-3, emphasis supplied.) After stating he wanted to make certain appellant understood his rights and the court's rules, Judge Bascue directed appellant to fill out the waiver form: "Mr. Bankston, look at all of the

(continued...)

transcripts of the prior *Marsden/Faretta* proceedings before attempting to do so, and so neither judge corrected Judge Armstrong's mis-articulation of appellant's Sixth Amendment right to the effective assistance of counsel. This is true even though appellant made it clear to both judges that he had relinquished his right to counsel only because he was innocent and his then-appointed attorney was not intending to defend against the charges. (See, e.g., 2RT 325; 3RT 419.)

Moreover, rather than correcting Judge Armstrong's mis-articulation of appellant's right to counsel, Judge Bascue's comments on appellant's counsel waiver served merely to reinforce appellant's erroneous view of his rights. For example, while discussing what would happen were appellant to engage in misconduct, Judge Bascue warned that he would appoint a competent attorney to take over the case. After appellant reiterated that "[his] whole concern revolves around being appointed somebody *who don't share [his] feelings on the defense*," Judge Bascue added that appellant doesn't get to choose his appointed attorney and that "[i]f at some point there be such a breakdown in communication [with] that attorney, then you would be heard for reappointment or release of that attorney." (2RT 326-327, emphasis supplied.)

---

[57](...continued)
waivers, sign and check everything on the form." (*Ibid.*)

Similarly, when Judge Brown went over appellant's counsel-waiver form (after having already appointed advisory counsel), she seemed most concerned about perfecting the record. Rather than attempting to discover appellant's reasons for desiring to proceed in pro. per., Judge Brown simply told appellant that he had to fill out the waiver form and initial each section, saying at one point,"You have to initial this so that you know that you do have the right to a lawyer to represent you if you want." (3RT 460.)

Judge Bascue's comment regarding replacement of appointed counsel due to a breakdown in communication, while correct in the abstract, erroneously suggested in the context of appellant's stated concern that substitution of counsel required proof of a communication breakdown. In fact, a defendant is entitled to replacement counsel upon a showing that counsel is performing ineffectively, or that there is an irreconcilable conflict that will likely result in ineffective representation. (See *People v. Jones, supra,* 29 Cal.4th at pp. 1244-1245.) The truncated explanation of a basis for substitution of counsel served merely to confirm Judge Armstrong's misstatements about appellant's right to counsel, and thereby could only cement appellant's court-induced misunderstanding that if appellant were to exercise his right to counsel he could do nothing if that counsel then chose not to investigate appellant's claims of innocence.

Because appellant was affirmatively misadvised as to the nature of his right to counsel, the very right he was purporting to waive, his waiver of that right cannot be deemed to have been made knowingly and intelligently. (See *United States v. Forrester* (9th Cir. 2008) 512 F.3d 500, 507-509 [misadvice about possible punishment and failure to mention one of the charges resulted in an invalid waiver requiring reversal]; see also *United States v. Erskine* (9th Cir. 2004) 355 F.3d 1161, 1171 [misadvice during *Faretta* colloquy resulted in invalid waiver of counsel requiring reversal].)

2. The Court Did Not Advise Appellant As To The Difference Between His Right To The Assistance Of Counsel At Trial, And His Right To Self-Representation With The Assistance Of Advisory Counsel

The record also indicates that appellant expressed confusion about the difference between his Sixth Amendment right to the assistance of

counsel at trial, and his right to represent himself at trial with advisory counsel. Rather than clarifying the difference between these two legal concepts, and then treating appellant's request for advisory counsel separate from his request to proceed pro. per., the court exacerbated the confusion by conflating the distinct legal statuses.

During the first *Faretta* waiver colloquy, Judge Bascue told appellant only that if his motion for advisory counsel were denied, then he would have to proceed to trial as his own lawyer and without the assistance of counsel. Then, after appellant's motion for advisory counsel was granted, Judge Brown revisited the question of appellant's *Faretta* waiver. Judge Brown added that because appellant had advisory counsel, he would in fact have "the assistance of counsel" at trial, but that appellant would be "lead counsel." Nowhere in this record does the court advise appellant that proceeding by way of self representation with the assistance of advisory counsel would mean that appellant alone would be responsible for his representation and that he would be proceeding without his Sixth Amendment right to counsel. And nothing in the record indicates appellant understood that was the case.

To the contrary, appellant's confusion is apparent in the manner by which he twice filled out the court's standard counsel-waiver forms. On the forms, which appellant first filled out on Judge Bascue's request, appellant did not initial the paragraphs advising him that he would have to proceed without the assistance of counsel if permitted to represent himself. (2CT 306-307.) When specifically asked about these omissions, appellant explained that those paragraphs were un-initialed because he intended to proceed with the assistance of *advisory* counsel. (See, e.g., 2RT 319, 324-325, 3RT 459.)

Judge Bascue recognized appellant's confusion and stated that he wished to deal with appellant's "pro. per. issues first" and then the "peripheral counsel issue" of advisory counsel. (2RT 328.) But the court did not actually proceed in that manner. Rather, as Judge Bascue went through the un-initialed portions of appellant's *Faretta* waiver form, he repeatedly framed the consequences of any waiver of counsel in terms of what would be expected of appellant *if his motion for advisory counsel were denied.* For example, the following exchange occurred during Judge Bascue's review of appellant's counsel-waiver form:

THE COURT: But you did not initial this one. I'm saying that *if I do not grant you advisory counsel*, you will have to conduct your own defense by your self without the aid of a lawyer. [¶] Do you understand that?

DEFENDANT: Yes, I understand but I did not check it because of a voice like saying to you [sic] right now.

THE COURT: Right, going to go through this pro per form. That's the reason we had this advisory counsel issue that you requested. That's the reason you did not check that? Do you understand that *if I do not grant you your advisory counsel status*, that you would conduct your defense by yourself without the aid of a lawyer?" [¶] Do you understand that?

DEFENDANT: Yes.

(2RT 324, emphasis supplied.)

After reading aloud another un-initialed section of the counsel-waiver form explaining that appellant would have to proceed without the assistance of counsel, this exchange occurred:

THE COURT: This goes to the advisory [counsel issue]?

DEFENDANT: Right. I do – Maybe at your discretion, I could

seek advice of a competent lawyer.

THE COURT: Okay. Did you understand that *if I do not grant you your advisory counsel status*, that you would have to follow all the rules, protocol of the court, you would be treated as a lawyer in this court room without the assistance of a lawyer? [¶] Do you understand that?

DEFENDANT: Yes.

(*Id.* at pp. 325-326, italics supplied.)

Thus, in addition to not explaining the difference between the legal status of proceeding with the assistance of counsel and self-representation with the assistance of advisory counsel, Judge Bascue admonished appellant – and appellant understood – that he would have to proceed as his own attorney and follow the court's rules and protocols *if his request for advisory counsel were denied.*[58]

Several weeks later, Judge Brown granted appellant's motion for advisory counsel, and revisited the counsel-wavier form. Judge Brown inquired about the un-initialed portions of the counsel-waiver form that appellant had filled out for Judge Bascue. Once again, instead of simply clarifying the difference between proceeding with appointed counsel and self-representation with the assistance of advisory counsel, and then making certain that appellant understood the full extent of his right to counsel without mention of the separate issue of advisory counsel, Judge Brown

---

[58]Judge Bascue's admonition was not entirely correct: When a defendant waives his constitutional right to counsel he must conduct his own defense and make all tactical and strategic decisions without his Sixth Amendment right to the assistance of counsel, and this is so *regardless* of whether the court grants or denies a later motion for advisory counsel.

added additional layers of confusion as she went through the form.

Judge Brown first told defendant that he would serve as "lead counsel," suggesting that someone, presumably Mr. Borden, would serve as second counsel or co-counsel. Then, the court echoed Judge Bascue's conflation of the legally distinct concepts of proceeding with counsel and self-representation with advisory counsel:

THE COURT:	Here [on the counsel-waiver form] it says if the court grants this petition and I am permitted to represent myself, I understand I will have to conduct my own defense by myself without the aid of a lawyer. Well, since you now have advisory counsel, *you will have the aid of a lawyer, but not as lead counsel.* You are still pro per.
DEFENDANT:	Right.
THE COURT:	And you remain in pro per.
DEFENDANT:	That's the only reason the question mark was there because I did intend on seeking advisory counsel.
THE COURT:	You didn't initial that, so I wanted to make sure that you understood that. *And I'm going to strike out the 'and without the aid of a lawyer.' You are going to have the aid of a lawyer as advisory counsel.*

(3RT 459, emphasis supplied.)

Then, notwithstanding the fact that the counsel-waiver form dealt exclusively with appellant's right to counsel, and had absolutely nothing to do with his right to advisory counsel, Judge Brown inter-lineated the portion of the form that admonished the reader that he would have to proceed "without the aid of a lawyer." (2CT 306; see footnote 55, *ante*.)

Judge Brown turned next to the un-initialed section of the pro. per. form that advised appellant that an experienced trial lawyer would be appointed were he to accept court-appointed counsel. Here, Judge Brown correctly stated that this section of the form referred to appellant's right to have a lawyer actually try his case, not merely serve as standby or advisory counsel. (2CT 307; 3RT 459-460.)[59] Unfortunately, this technically correct statement clarified nothing: it was consistent with the court's erroneous statement that appellant would serve as "lead counsel," while suggesting Mr. Borden would serve in a subordinate counsel role.[60] And then, in the very next breath, Judge Brown returned to misinterpreting the counsel-waiver form by reading into it the fact that advisory counsel had been appointed and removing every mention of appellant having to proceed without the appointment of counsel:

> THE COURT: Then the next one was "I understand if I am permitted to represent myself, it will be necessary for me – and then in caps without the assistance of a lawyer or the court, no more caps – to follow all the technical rules of substantive law, criminal procedure and evidence." And that's not initialed. [¶] Now, what I want to do is strike out "without the assistance of a lawyer" – strike that. I am going to strike out "of a lawyer." So it will read "I understand that I am

---

[59]Specifically, this un-initialed portion of the form stated: "I understand that if I accept court appointed counsel an experienced trial lawyer will be assigned to try my case."

[60]Later, Judge Brown would come back to this point, telling appellant that Mr. Borden would have to be "seen, but not heard" during the proceedings. (3RT 480.)

permitted to represent myself. [sic] It will be necessary for me, without the assistance of the court, to follow all of the technical rules of substantive law, criminal procedure and evidence." So I'm just taking out the part about a lawyer.

DEFENDANT: Right. That's the only part that I was having a problem with.

(3RT 460, quotation marks supplied.)

After removing the references to appellant's right to counsel from the counsel-waiver form that appellant filed with Judge Bascue, Judge Brown had appellant complete a second counsel-waiver form. (2CT 301-304.) While filling out that second form, Judge Brown instructed appellant to "strike out" each of the five references to having to proceed "without the assistance of counsel" – that is, the portions of the form that specifically advised appellant that he would have to proceed without the assistance of counsel were he allowed to proceed in pro. per. – and sign the form, which appellant did. (*Ibid*; 3RT 477-478.)

Appellant was never admonished that he was waiving his Sixth Amendment right to counsel and would be fully responsible for his own representation even though he was proceeding with advisory counsel. To the contrary, appellant's decision not to initial the portions of the *Faretta* waiver forms indicating that he would have to proceed without the assistance of counsel, and his stated reasons for doing so, show that appellant did not appreciate the difference between his Sixth Amendment right to the assistance of appointed counsel, and proceeding by way of self-representation with the assistance of advisory counsel. It is equally clear

that in response to this confusion, Judges Bascue and Brown confused matters more by conflating the two distinct legal statuses.

When, as here, a defendant requests self-representation at trial, but also requests advisory counsel, the trial court must ensure that the defendant has a clear and unambiguous understanding that he is waiving his Sixth Amendment right to counsel and is proceeding without the assistance of counsel even if the court appoints advisory counsel. Absent such assurances the defendant cannot be permitted to proceed in pro. per.

On this record of judicial misadvice and confusion, this Court cannot conclude that appellant knowingly and intelligently waived his Sixth Amendment right to counsel (*United States v. Forrester*, *supra*, 512 F.3d at pp. 507-509; *United States v. Erskine, supra,* 355 F.3d at p. 1171), and that he proceeded in pro. per. in this death penalty case "with eyes open" (*Faretta, supra,* 422 U.S. at p. 835).

3. The Court Failed To Advise Appellant About the Nature Of The Capital Proceedings, And The Meaning Of The Capital Charges Against Him

In addition to the foregoing trial-court failures and missteps in dealing with appellant's *Marsden* and *Faretta* motions, this Court can have no confidence that appellant's counsel-waiver was knowingly and intelligently made because he was not adequately advised regarding the nature of the capital proceedings, the meaning of capital charges, and the possible defenses available to him.

This Court has explained that "[t]he test of a valid waiver of counsel is not whether specific warnings or advisements were given, but 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*." (*People v. Bloom, supra,* 48 Cal.3d at pp. 1224-1225, emphasis added.) The High Court has similarly stated that "the determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) And both the High Court and this Court have recognized that "'death is a different kind of punishment from any other, both in terms of severity and finality,'" and "capital cases raise complex legal and factual issues beyond those raised in an ordinary trial." (*People v. Bigelow* (1984) 37 Cal.3d 731, 743, fn. 7, quoting *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430; see also *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

These long-standing principles necessarily dovetail when a defendant seeks to represent himself in a capital case, and together they require that a defendant be advised and aware of the peculiar disadvantages, risks and heightened complexities of self-representation when his life is on the line. (See *People v. Blair* (2005) 36 Cal.4th 686, 708-709 [defendant's counsel-waiver knowingly and intelligently made in capital case where court sufficiently advised of dangers of self representation and made it clear that death penalty case involves special risks].) That is, in a death penalty case a trial court needs to do more than attempt to take a perfunctory *Faretta* waiver.

Here, notwithstanding the fact that this was a death penalty case, neither Judge Armstrong, Judge Bascue, nor Judge Brown made any

specific reference to the heightened risks and specific complexities of capital litigation. For example, appellant was never informed that a waiver of the right to counsel would also result in the waiver of his right to request a second attorney to assist in preparing and presenting his defense to the capital charges, and to assist in investigating and preparing a case in mitigation, should a penalty phase be necessary. (See generally *People v. Keenan* (1982) 31 Cal.3d 424.) And none of the three judges explored appellant's understanding of the unique complexities attendant to selecting a capital-case jury.

In addition, appellant was never informed – and the record does not suggest that he understood – that there would be *a second jury trial* (a penalty trial) if he were convicted of first degree murder and a special circumstance were found true. (Pen. Code, §§ 190.3, 190.4.) Indeed, there was no discussion at all about the specific complexities of a penalty trial and its unique procedures. For example, there was no mention of the fact that appellant would have to be prepared to respond to a wide range of aggravating evidence, including allegations of uncharged bad acts that were unrelated to the charges and inadmissible at the guilt trial. (Pen. Code, § 190.3; see also CALJIC No. 8.85.) Nor did the court mention that the prosecution would not have the burden of proving the alleged aggravating facts beyond a reasonable doubt. (See *People v. Parson* (2008) 44 Cal.4th 332, 370.)

Similarly, there was no discussion to ensure that appellant understood that he would be responsible for the complexities of investigating, developing and presenting mitigating evidence, which

typically requires that a specially-trained counsel conduct an in-depth investigation and presentation of the defendant's multi-generational social history, his mental-health history, any psychiatric diagnoses, and evidence of his early childhood and family relationships, which may be both relevant to any mental health diagnosis and mitigating in and of itself. (See *In re Lucas* (2004) 33 Cal.4th 682, 723-725; *In re Gay* (1998) 19 Cal.4th 771, 807-808; see also *Wiggins v. Smith* (2003) 539 U.S. 510, pp. 534-536.) Instead, because Judges Bascue and Brown used the same counsel-waiver form that would have been used in a simple drunk driving case, and did nothing to go beyond that form in addressing appellant's purported waiver of his right to counsel, appellant was informed only that he would first have a trial on the charges, and then "a sentencing hearing in the event of a conviction." (2CT 303, 308-309.)

Appellant's lack of understanding about the complexities of capital litigation is extant in the record. For example, appellant told Judge Armstrong that he was compelled to represent himself because his attorney was asking questions of his family members that had nothing to do with his guilt or innocence. (2RT 231, 233.) At that point, Judge Armstrong should have stopped and explained that in a death penalty case defense counsel must investigate possible aggravating and mitigating evidence, which typically includes investigating matters unrelated to guilt or innocence. Instead, Judge Armstrong responded that he knew nothing about the case and was unable to evaluate counsel's actions. (*Id.* at pp. 234-235.)

This record, taken as whole, does not demonstrate that appellant understood the disadvantages and complexities of self-representation in this

capital case. (See *Johnson v. Zerbst, supra,* 304 U.S. at p. 464.) To the contrary, the record shows that when appellant began representing himself he was unaware of critical aspects of capital litigation, including that there might be second jury trial on the issue of penalty, at which he would be responsible for presenting and rebutting a wide-range of evidence, unrelated to the charges. Accordingly, this Court cannot reasonably conclude that appellant knowingly and intelligently waived his Sixth Amendment right to counsel in this death penalty case, and that he did so "with eyes open." (*Faretta v. California, supra,* 422 U.S. at p. 835.)

4. Reversal Is Required

The record in this case shows that appellant's *Faretta* waiver was not knowingly and intelligently made because appellant was affirmatively misadvised about his right to counsel. Appellant did not understand the difference between his right to counsel and his right to proceed by way of self-representation with advisory counsel, and he was affirmatively misadvised about these distinct legal statuses. He was not advised about the nature of the capital proceedings he was facing and the meaning of the capital charges against him. And because appellant's counsel-waiver was ineffective, he waived nothing and proceeded to his death penalty trial without representation and in violation of his Sixth Amendment right to counsel. (*Cordova v. Baca* (9th Cir. 2003) 346 F.3d 924, 926 [defective waiver of right to counsel waives nothing and is of no effect].)

It is well-settled that a denial of counsel at trial requires reversal of a conviction and sentence. A violation of the right to counsel is a structural defect, and harmless error analysis does not apply. (*United States v.*

Gonzalez-Lopez, *supra*, 548 U.S. at pp.148-150; *United States v. Forrester*, *supra*, 512 F.3d at p. 509.) That is, "if a criminal defendant is put on trial without counsel, and his right to counsel has not been effectively waived, he is entitled to an automatic reversal of the conviction." (*Cordova v. Baca, supra,* 346 F.3d at p. 930.) This is because the right to counsel is "so basic to a fair trial that [its] infraction can never be treated as harmless error." (*Chapman v. California*, *supra*, 386 U.S. at p. 23.) And "[s]ince the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 fn.8 ; see also *Rose v. Clark* (1986) 478 U.S. 570, 577 [denial of right to counsel renders trial fundamentally unfair and requires reversal per se].) Thus, because appellant's right to counsel was violated, reversal of his convictions and death sentence is required.

* * *