ISSUES IN THE INTERFACE BETWEEN THE RIGHT TO SELF-REPRESENTATION AND THE RIGHT TO COUNSEL

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I. INTRODUCTION

Abraham Lincoln said "A man who represents himself has a fool for a client." More recently, it has been stated that "a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney." (Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years after Faretta* (1996) 6 Seton Hall Const. L. J. 483, 598.) As lawyers, we tend to share these sentiments. Trial attorneys shake their heads sadly at the criminal defendant who wants to represent himself or herself. Appellate attorneys shudder at the thought of the lengthy transcripts filled with frivolous motions and redundant or irrelevant questioning which must be carefully reviewed lest there be a seed of an issue that the unwitting defendant stumbled upon. Despite our general disapproval of this practice, it has for over 35 years been the law of the land that criminal defendants may exercise the constitutional right to represent themselves at trial. (*Faretta v. California* (1975) 422 U.S. 806, 833-834 [95 S.Ct. 2525,. 45 L.Ed.2d 562].) Appellants in criminal cases do not have this right on appeal, as the United States Supreme Court has held that the Sixth Amendment does not apply to appellate proceedings, and consequently " . . . any individual right to self-representation on appeal based on autonomy principles must be grounded in the Due Process Clause." (*Martinez v. Court of Appeal of California, Fourth Appellate District* (2000) 528

U.S. 152, 161 [145 L.Ed.2d 597, 120 S.Ct. 684].)

II. ***FARETTA V. CALIFORNIA***

In this landmark case, the defendant Anthony Faretta was charged with grand theft in Los Angeles County Superior Court. Although the public defender was appointed to represent him, Faretta asked well in advance of the trial date for permission to represent himself as a result of his belief that the public defender's office was "very loaded down with . . . a heavy case load." The trial judge told Faretta it was a mistake and that he would not receive any special treatment. Nevertheless, the judge permitted Faretta to waive the assistance of counsel, though he stated that the ruling might be reversed if it appeared that Faretta was unable to adequately represent himself. Several weeks later, still before trial, the judge *sua sponte* held a hearing at which he questioned Faretta about the hearsay rule and state law regarding challenging potential jurors. After the session, the judge ruled that Faretta had not made a knowing and intelligent waiver of his right to the assistance of counsel and had no constitutional right to defend himself. The earlier ruling permitting Faretta to represent himself was reversed and the public defender reappointed. During the trial, the judge required that the defense be conducted only through appointed counsel. Faretta was subsequently found guilty by a jury and sentenced to prison.

The Court of Appeal affirmed the conviction and the California Supreme Court had no interest in the case. The United States Supreme Court granted certiorari, ultimately deciding that the California courts had deprived Faretta of his constitutional right to conduct

his own defense. In its opinion vacating the judgment and remanding the case, the Court pointed out that the Sixth Amendment "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." (*Faretta v. California, supra,* 422 U.S. at p. 819.) The Court noted:

> "[i]t is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, the right to self-representation -- to make one's own defense personally -- is thus necessarily implied by the structure of the Amendment. [Footnote.] The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."

(*Id*., at pp. 819-820.) Having determined that the Sixth Amendment implies the right of self-representation, the Court acknowledged that

> " . . . in most criminal prosecution defendant could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' [Citation.]"

(*Id*., at p. 834.) The Court stated finally that because a defendant choosing to represent himself relinquishes many of the traditional benefits associated with the right to counsel, in

order to represent himself he must knowingly and intelligently forgo those relinquished benefits. (*Id*.,at p. 835.) He should be made aware of the dangers and disadvantages of self-representation so that the record establishes that he "'knows what he is doing and his choice is made with eyes open.' [Citation.]" (*Ibid*.) *Faretta* held that when a competent, literate defendant makes a timely, knowing, voluntary, and unequivocal waiver of the right to counsel, then the trial court must permit him or her to proceed without assistance of counsel. (*Id*., at pp. 835-836.)

Although criminal defendants have this right at trial, it is not popular with trial courts for obvious reasons. The criminal defendant who is unskilled in trial tactics and largely unschooled in the law will in almost all cases consume much more court time and patience in conducting his defense than an attorney would. As appellate counsel, it is our duty to ensure that where a defendant properly and timely made the request to represent himself, his rights were observed.

III. THE REQUIREMENTS

A. Timeliness

The California Supreme Court has held that " . . . in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial.." (*People v. Windham* (1977) 19 Cal.3d 121, 127-128.) Obviously, what is reasonable for a criminal defendant might not be even close to reasonable for a trial

judge who wants to keep his calendar moving. There is no "bright line" rule demarking a reasonable time. (*People v. Clark* (1992) 3 Cal.4th 41, 99.) The trial court may deny a *Faretta* motion as untimely when made before the jury is empaneled if it finds the motion was made to delay or obstruct. The fact that granting a *Faretta* motion will necessitate a continuance which will prejudice the prosecution may be evidence of a defendant's intent to delay. (See *People v. Burton* (1989) 48 Cal.3d 843, 853-854 [denial of *Faretta* motion upheld when brought a day before voir dire and defendant would need a continuance]; *People v. Morgan* (1980) 101 Cal.App.3d 523, 531 [denial affirmed when granting it would involve a continuance for preparation].) A trial court may not deny a *Faretta* motion simply because it is made on the day trial is to begin, but a showing that a continuance would be required and that the resulting delay would prejudice the prosecution may be evidence of a defendant's dilatory intent. (*People v. Moore* (1988) 47 Cal.3d 63, 80; see *People v. Scott* (2001) 91 Cal.App.4th 1197.) Denial of an untimely *Faretta* motion is an abuse of discretion where the defendant is prepared to proceed and does not request a continuance. (*People v. Rogers* (1995) 37 Cal.App.4th 1053, 1057.) In fact, in all cases where denial of a *Faretta* motion has been upheld due to untimeliness, there was a request for a continuance or some other delaying tactic, or a demonstrated proclivity to substitute counsel, or both. (See *People v. Nicholson* (1994) 24 Cal.App.4th 584, 592.) It is an abuse of discretion to deny a *Faretta* motion when the defendant did not request a continuance and the court did not consider whether a delay would be necessary. (See *People v. Rivers* (1993) 20

Cal.App.4th 1041.)

If the motion is made after a reasonable time before trial has passed, the court does not have to grant the motion, but has the discretion to grant or deny it. (*Windham, supra,* 19 Cal.3d at pp. 128-129.) Among the factors the court may consider are whether the defendant has brought the untimely motion for purposes of delay (*Burton, supra,* 48 Cal.3d at pp. 852-854; *People v. Douglas* (1995) 36 Cal.App.4th 1681); whether the defendant is prepared to begin trial at the appointed time without a continuance to prepare for his or her defense (see e.g. *Moore, supra,* 47 Cal.3d at pp. 78-81; *People v. Caird* (1998) 63 Cal.App.4th 578; *Rogers, supra,* 37 Cal.App.4th at p. 1057); and whether the defendant can show reasonable cause for the lateness of the request (*Moore, supra,* at p. 79; *Windham, supra,* at p. 128, fn. 5.) *Faretta* motions have been ruled untimely in a variety of situations. (See *People v. Frierson* (1991) 53 Cal. 3d 730, 742 [*Faretta* motion on the eve of trial untimely]; *Burton*, *supra*, 48 Cal. 3d at p. 853 [motion made after the case was sent to the trial department for trial and both counsel announced ready untimely]; *Morgan, supra,* 101 Cal. App. 3d at p. 531 [motion made just before jury selection]; *People v. Hall* (1978) 87 Cal. App. 3d 125, 132-133 [motion made on date trial was set to begin].)

In the event the court does grant a request made the day before trial is set to begin, the court must grant a request for a continuance of at least five days. (*People v. Wilkins* (1990) 225 Cal.App.3d 299, 305-308; Pen. Code, sec. 1049 [requiring five days to prepare for trial].) However, the court may advise the defendant that his request to represent himself

will be granted, but a continuance will not be. A court does not violate a defendant's right to represent himself by making him choose between representing himself and proceeding to trial immediately, and going forward with the trial immediately but with counsel assisting him. (*People v. Valdez* (2003) 32 Cal.4th 73, 103.)

B. Unequivocal Request

To invoke the right of self-representation, the defendant must make an unequivocal request to represent himself. (*People v. Marshall* (1997) 15 Cal.4th 1, 20-21; *People v. Welch* (1999) 20 Cal.4th 701, 729, overruled on other grounds in *People v. Blakley* (2000) 23 Cal.4th 82, 89; *People v. Weeks* (2008) 165 Cal.App.4th 882, 886.) The reason for this requirement is to ensure that a defendant does not inadvertently waive the right to counsel. An "insincere request or one made under the cloud of emotion may be denied." (*Marshall, supra,* at pp. 21-23; see also *People v. Tena* (2007) 156 Cal.App.4th 598, 607-609.) Courts have found requests for self-representation to be equivocal when made as a momentary caprice or as the result of thinking out loud (*People v. Skaggs* (1996) 44 Cal.App.4th 1, 51 [defendant's statement "I'd like to go pro per if I could," was part of his explanation of his problems with his attorney and was not an unequivocal request to represent himself]); when it is made to present one motion only and then be represented by counsel again (*Meeks v. Craven* (9th Cir. 1973) 482 F.2d 465, 467); is a continual vacillation between being represented and representing himself (*United States v. Bennett* (10th Cir. 1976) 539 F.2d 45, 49-51); or is a request for self-representation with co-counsel or advisory counsel. (*People*

v. Marlow (2004) 34 Cal.4th 131.) A request may also be deemed equivocal if it is made out of anger, frustration, ambivalence, or for the purpose of delay or to frustrate the orderly administration of justice. (*Marshall, supra,* at p. 23; *People v. Watts* (2009) 173 Cal.App.4th 621, 629.)

A conditional request for self-representation is not necessarily deemed equivocal. A defendant who moves to represent himself only as an impulsive response to the denial of a *Marsden* motion may be deemed equivocal. (*Valdez, supra,* 32 Cal.4th at p. 103.) A request which arises from the defendant's frustration at repeated requests by his attorney for continuances or from his desire to avoid psychiatric examinations may be deemed equivocal. (*People v. Danks* (2004) 32 Cal.4th 269.) If a defendant makes a motion to represent himself, then appears uncertain upon being questioned by the court, the request may be denied as equivocal. (*People v. Phillips* (2006) 135 Cal.App.4th 422.)

Appellate counsel obviously will want to characterize the request as unequivocal and avoid any waiver or forfeiture problems. The right to represent oneself does not attach until it is asserted. Consequently, the failure to assert it can waive the issue for appeal. (*People v. Kenner* (1990) 223 Cal.App.3d 56, 59-62; *Skaggs, supra,* 44 Cal.App.4th 1.) Thus, even where an unequivocal request is made, if new counsel is appointed and the defendant fails to raise the self-representation issue again, or if new counsel states that the defendant has changed his mind even absent a personal statement to that effect by the defendant, the request is effectively abandoned and therefore any appellate issue is waived. (*Sandoval v.*

Calderon (9th Cir. 2000) 241 F.3d 765.)

C. A Defendant's Decision to Represent Himself Must be Knowing and Intelligent

1. Generally

In determining whether the defendant's request to represent himself is knowing and intelligent, the focus of the query is not whether he is competent to represent himself, but whether he has the mental capacity to waive the right to counsel with a realization of the probable risks and consequences of that action. (*Faretta v. California, supra,* 422 U.S. at p. 835.) A lack of legal qualifications or skills is not a valid reason to deny the request. A self-representing defendant is not required to be able to perform as competently as a lawyer; he is only required to be competent to stand trial and to knowingly waive counsel. (*Godinez v. Moran* (1993) 509 U.S. 389, 401 [113 S.Ct. 2680, 125 L.Ed.2d 321]; *People v. Nauton* (1994) 29 Cal.App.4th 976, 979.) The reason for this requirement is to determine whether the defendant truly understands the significance and consequences of his decision, and to ensure that the decision is not coerced. (*Godinez v. Moran, supra,* at p. 333 fn. 12.) The hearing to make the determination may not be a perfunctory one. The record must show that the defendant made a knowing and intelligent election. (*Faretta, ibid.*; *People v. Wrentmore* (2011) 196 Cal.App.4th 921, 930; *Curry v. Superior Court* (1977) 75 Cal.App.3d 221, 225.)

The only real requirements for a valid waiver of the right to counsel are: "(1) a determination that the accused is competent to waive the right, i.e. whether he/she has the mental capacity to understand the nature and object of the proceedings against him/her, and

(2) a finding that the defendant is able to make an intelligent and voluntary waiver, i.e. whether the defendant understands the significance and consequences of his/her decision, and whether the decision is uncoerced." (*Godinez v. Moran, supra,* 125 L.Ed. 2d at pp. 331-332; *People v. Poplawski* (1994) 25 Cal.App.4th 881, 894.) Reasons for denying a defendant's request for self-representation that have been found invalid where the defendant is able to make a knowing and intelligent waiver of the right to counsel include but are not limited to: lack of fluency in English (*Poplawski, supra,* at p. 891, fn. 1); lack of education or work experience (*People v. Robinson* (1997) 56 Cal.App.4th 363); severity of charges (ibid.); lack of familiarity with law and legal procedures (*People v. Silfa* (2001) 88 Cal.App.4th 1311); or where the jail had placed restrictions on the defendant as a result of jail disciplinary issues. (*People v. Butler* (2009) 47 Cal.4th 814.) As long as the defendant has the mental capacity to waive the right to counsel and to understand the probable risks and consequences of that action, he must be permitted to proceed in pro per.

It is not a voluntary election where a defendant must choose between proceeding with incompetent counsel or representing himself. In such a case, the court must offer to appoint substitute counsel. (*Crandell v. Bunnell* (9th Cir. 1998) 144 F.3d 1213, overruled on other grounds in *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1025.) It is appropriate to deny the motion where the defendant appears to believe that he will be entitled to advisory or standby counsel if he should need it. (*People v. Stanley* (2006) 39 Cal.4th 913.)

2. Where Mental Competence is in Doubt

a. Generally

When a defendant's attorney expresses a doubt as to the defendant's competency to waive counsel, the trial court need not conduct a hearing on the issue if, after observing the defendant and his behavior, the court does not doubt his competency to waive counsel. (*Godinez v. Moran, supra,* 125 L.Ed.2d at p. 333, fn. 13; *Clark, supra,* 3 Cal.4th at pp. 105-108.) If a trial court entertains a doubt as to whether a defendant is competent to exercise the right of self-representation, it should conduct an inquiry or order a psychiatric evaluation. (*People v. Burnett* (1987) 188 Cal.App.3d 1314, 1319.) The relevant question is a narrow one: whether the defendant has the mental capacity to knowingly and intelligently waive counsel. (*Clark, ibid*.)

b. The "Gray Area" Defendant

Although under *Faretta* defendants in criminal cases have a federal constitutional right to represent themselves, the United States Supreme Court held in *Indiana v. Edwards* (2008) 554 U.S. 164, 174 [171 L.Ed.2d 345, 128 S.Ct. 2379] that states may, but need not, deny self-representation to defendants who, although competent to stand trial, lack the mental health or capacity to represent themselves at trial. The California Supreme Court recently dealt with the issue of whether California courts may deny self-representation in these cases. (*People v. Johnson* (2012) 53 Cal.4th 519.) There, the defendant committed two separate violent assaults and was permitted to represent himself. Following pretrial

proceedings, the judge expressed a doubt about Johnson's competence to be tried and appointed an attorney to provide an opinion on competency and to represent Johnson at any competency hearing that would take place. Following a jury trial on the issue of his competency to stand trial, Johnson was found competent, criminal proceedings were reinstated and Johnson resumed representing himself. Two days later, citing *Indiana v. Edwards, supra,* the judge stated "You may be competent to stand trial, but I'm not convinced that you are competent to represent yourself." (*Johnson, supra,* at p. 525.) The court cited instances of Johnson's behavior both in court and in jail, and made findings that Johnson "'has disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety and other common symptoms of severe mental illnesses which can impair his ability to play the significantly expanded role required for self-representation, even if he can play the lesser role of a represented defendants.'" (*Ibid*.) Johnson's self-representation status was revoked over his objection and an attorney was appointed to represent him through sentencing.

The California Supreme Court noted that prior to the *Faretta* decision, criminal defendants in California did not have either a constitutional or statutory right to self-representation in noncapital cases, though the trial court had discretion to grant a request for self-representation. (*Johnson, supra,* 53 Cal.4th at p. 526, citing *People v. Sharp* (1972) 7 Cal.3d 448, 459, 461, 463-464.) After *Faretta*, California courts tended to view the federal right to self-representation as absolute assuming a valid waiver of counsel. (*People v. Taylor*

(2009) 47 Cal.4th 850, 872.) However, the Court held that in the wake of *Edwards*, denying self-representation to California defendants does not violate the Sixth Amendment when such a denial would be permitted by *Edwards*. (*Johnson, supra,* at p. 528.) Moreover, since California law provides neither a statutory nor a constitutional right to represent oneself, a refusal to permit it does not violate any state right. Therefore, the Court held that trial courts may deny self-representation in cases where *Edwards* would permit denial. (*Ibid*.)

In determining the standard to be applied, the *Johnson* Court determined that ". . . the standard that trial courts considering exercising their discretion to deny self-representation should apply is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*Johnson, supra,* 53 Cal.4th at p. 530.) The Court elaborated that when a court "doubts the defendant's mental competence for self-representation, it may order a psychological or psychiatric examination to inquire into *that* question. To minimize the risk of improperly denying self-representation to a competent defendant, 'trial courts should be cautious about making an incompetence finding without benefit of an expert evaluation, though the judge's own observations of the defendant's in-court behavior will also provide key support for an incompetence finding and should be expressly placed on the record.' [Citation.]" (*Id*., at pp. 530-531, italics in original.) The Court cautioned against applying the newly announced standard too liberally: "Criminal defendants still generally have a Sixth Amendment right to represent themselves. Self-representation by defendants

who wish it and validly waive counsel remains the norm and may not be denied lightly. A court may not deny self-representation merely because it believes the matter could be tried more efficiently, or even more fairly, with attorneys on both sides. Rather, it may deny self-representation only in those situations where *Edwards* permits it." (*Id*., at p. 531.)

After *Johnson*, it is important for appellate counsel to carefully review the trial court's findings and what they are based upon when determining whether it can be argued that a so called "gray area" defendant - one who is competent to stand trial but arguably incompetent to conduct his own defense - was erroneously denied his Sixth Amendment right to represent himself.

D. The Necessary Advisements

1. When the Defendant Wishes to Represent Himself at Trial

Before a motion for self-representation by a defendant who will be proceeding to trial may be granted, the trial court must make the defendant aware of the risks of self-representation. Otherwise, the waiver may be challenged on appeal. (*Iowa v. Tovar* (2004) 541 U.S. 77 [124 S.Ct. 1379, 158 L.Ed.2d 209]; *People v. Burgener* (2009) 46 Cal.4th 231 [reversal for failure to advise of dangers and disadvantages of self-representation]; *People v. Jones* (1991) 53 Cal.3d 1115, 1141-1142 [warning required even if advisory counsel is appointed to assist].) Trial courts are not required to ensure that a defendant is aware of any particular legal concepts. On appeal, a reviewing court will determine only 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. Sullivan* (2007) 151 Cal.App.4th 524, 546; *People v. Bloom* (1989) 48 Cal.3d 1194, 1224-1225.) Thus, all that is required is that the trial court ensures that the defendant understands "(1) the nature of the charges against him, (2) the possible penalties, and (3) the 'dangers and disadvantages of self-representation.' [Citation.]" (*Sullivan, supra,* at p. 545.) *Faretta* requires only that the trial court's warnings communicate "powerfully" to the defendant the disadvantages of proceeding without the aid of counsel. (*Id*., at p. 546; *Lopez v. Thompson* (9th Cir. 2000) 202 F.3d 1110, 1118.) At no time is the trial court required to advise the defendant on matters of law, evidence or trial practice, nor must it advise his of the privilege against self-incrimination should it become relevant. The trial court may advise the defendant on these matters so long as it remains neutral as to both sides. (*People v. Barnum* (2003) 29 Cal.4th 1210.)

2. When a Defendant Wishes to Represent Himself in Entering a Plea of Guilty or Nolo Contendere

Where a defendant wishes to enter a plea of guilty or nolo contendere without the assistance of counsel, the trial court must only advise him of the nature of the charges against him, the right to have counsel regarding the plea, and the range of possible penalties. (*Iowa v. Tovar, supra,* 541 U.S. 77 [124 S.Ct. 1379, 158 L.Ed.2d 209.) There is no requirement that the trial court advise the defendant that waiving counsel could mean overlooking a possible viable defense or that waiving the right to counsel will deny him the benefit of an independent opinion on the wisdom of the plea. (*Ibid*.)

3. Subsequent Proceedings

If an amended complaint or information alleging new charges or additional enhancements is filed by the district attorney, it is not necessary for the trial court to obtain a new waiver of the right to counsel, nor must the court advise of the new range of possible penalties. (*People v. Harbolt* (1988) 206 Cal.App.3d 140, 149-151.) The same is *not* true where a defendant has pled guilty or no contest, has been placed on probation, then violates probation. It may not be assumed that the previous waiver of counsel is still valid, and a new one must be secured before allowing the defendant to proceed without counsel. (*People v. Hall* (1990) 218 Cal.App.3d 1102, 1105-1106.)

IV. TERMINATION OR REVOCATION OF A CRIMINAL DEFENDANT'S RIGHT OF SELF-REPRESENTATION

In *Faretta*, the Unites States Supreme Court cautioned that "[t]he right of self-

representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" (*Faretta, supra,* 422 U.S. at p. 834, fn. 46.) Although the instances in which a trial court may revoke the defendant's right to self-representation are limited, such revocation may occur for misconduct outside the courtroom as well as inside of it. (*Butler, supra,* 47 Cal.4th 814; *People v. Carson* (2005) 35 Cal.4th 1, 9-10.) Generally speaking, a defendant's pro per status may be terminated based on any misconduct committed by the defendant that seriously threatens the core integrity of the trial, regardless of where it occurs. (*Carson, supra,* at p. 10.) It is the effect of the misconduct and its impact on the core integrity of the trial, rather than its location, that will determine whether pro per status will be terminated. (*Id.,* at p. 9)

A. In-Court Misconduct

A trial court may deny a defendant self-representation status, or may revoke existing self-representation status, if the defendant has been disruptive, obstreperous, disobedient, disrespectful, or obstructionist in the proceedings. (*Faretta, supra,* 422 U.S. at pp. 834-835, fn. 46; *Clark, supra,* 3 Cal.4th at pp. 113-116.) Similarly, a defendant who has continuously manifested an inability to conform his or her conduct to the procedural rules and appropriate courtroom protocol may see his pro per status revoked. (*People v. Watts* (2009) 173

Cal.App.4th 621.) Pro per status has been held to be properly terminated for such misconduct as making verbal or physical displays. (*Ferrel v. Superior Court* (1978) 20 Cal.3d 888, 891, overruled on other grounds in *Carson, supra,* 35 Cal.4th 1; *People v. Manson* (1977) 71 Cal.App.3d 1.) For example, in *People v. Welch* (1999) 20 Cal.4th 701, the defendant "belligerently denied awareness of a calendar date that was set in his presence; he turned his back on the trial court when addressing it; he interrupted the trial court several times to argue what the court had declared to be a nonmeritorious point; he accused the court of misleading him; he refused to allow the court to speak and he refused several times to follow the court's admonishment of silence." (*Welch, supra,* at p. 735.) In *Manson, supra,* the defendant yelled epithets at the judge such as "Fuck you, you dog" and pounded on the holding cell door even after he was removed from the courtroom. (*Manson, supra,* at p. 50, fn. 18.) Other misconduct which has held sufficient to warrant termination of pro per status is deliberately delaying trial by pretending to be mentally ill, attempting escape, repeatedly asking for a continuance, and announcing he is not ready for trial for more than a year (*People v. Fitzpatrick* (1998) 66 Cal.App.4th 86); and failing to prepare for trial. (*United States v. Flewitt* (9th Cir. 1989) 874 F.2d 669, 675-676.)

B. Misconduct Outside the Courtroom

Because preparation for trial may take weeks or months, there is plenty of opportunity to abuse the right of self-representation and engage in obstructionist conduct outside the courtroom. (See *Flewitt, supra,* 874 F.2d at p. 674.) A trial court may revoke pro per status

for misconduct occurring outside the courtroom. Acts such as witness intimidation may result in the revocation of pro per status. (*Carson, supra,* 35 Cal.4th at pp. 9-10; *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1149, fn. 15 [describing severe problem of witness intimidation by prison gangs].) "When a defendant exploits or manipulates his in propria persona status to engage in such acts, wherever they may occur, the trial court does not abuse its discretion in determining he has forfeited the right of continued self-representation." (*Carson, supra,* at p. 9.) However, a court may not deprive the defendant of the right to self-representation simply because of misconduct in the jail, even where it poses a security risk that has resulted in restrictions being placed on the defendant in the jail. (*Butler, supra,* 47 Cal.4th 814.) Such misconduct may result in revocation of pro per status only where it seriously threatens the core integrity of the trial. (*Ibid*.)

C. The Procedure for Termination or Revocation of Pro Per Status

The termination of a defendant's pro per status should not be the subject of a motion by the prosecution. (*Carson, supra,* 35 Cal.4th at p. 11, fn. 11.) Although the prosecutor can and should inform the court of any instances of misconduct , it is the responsibility of the court to determine the appropriate sanction. (*Ibid*.) The prosecutor "should serve as an adjunct of the court in discharging its duty to control the orderliness and integrity of the proceedings, not as an advocate for a particular result." (*Ibid*.) It is incumbent on the trial court to document its decision to terminate self-representation with some evidence reasonably supporting a finding that the defendant's obstructive behavior seriously threatens

the core integrity of the trial. "unsubstantiated representations, even by the prosecutor, much less rumor, speculation, or innuendo, will not suffice." (*Id.*, at p. 11.)

Although the California Supreme Court in *Carson* left to the discretion of individual trial courts the decision as to how best to proceed to make an appropriate record, it did state that the record "should answer several important questions." (*Carson, supra,* 35 Cal.4th at p. 11.) These questions include (1) what is the precise misconduct on which the termination decision is based; (2) how that misconduct threatened to impair the core integrity of the trial; (3) whether the defendant has engaged in antecedent misconduct, and if so, what it was; (4) whether any misconduct occurred while the defendant was represented by counsel, and if so, how it was related to the defendant's self-representation; (5) whether the defendant intentionally sought to disrupt and delay the trial; (6) whether the defendant had been warned that particular misconduct will result in termination of the pro per status; and (7) the availability and suitability of sanctions other than termination of pro per status. (*Id*., at pp. 11-12.)

D. Sanctions Other Than Termination of Pro Per Status

When considering whether termination is necessary and appropriate, the trial court should consider several factors in addition to the nature of the misconduct and its impact on the trial. First, courts should consider the availability and suitability of alternative sanctions. Misconduct that is removed from the trial proceedings, more subject to rectification or correction, or otherwise less likely to affect the fairness of the trial may not justify complete

withdrawal of the defendant's right of self-representation. The court should also consider whether the defendant has been warned that particular misconduct will result in termination of the right of self-representation. Not every act will be so "flagrant and inconsistent with the integrity and fairness of the trial that immediate termination is appropriate. (*Carson, supra,* 35 Cal.4th at p. 10.)

The United States Supreme Court has stated "We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant . . . : (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." (*Illinois v. Allen* (1970) 397 U.S. 337, 343-344 [25 L.Ed.2d 353, 90 S.Ct. 1057].)

If a pro per defendant becomes so unruly that removal from the courtroom is necessary, and he has stand-by counsel, the trial court must direct that attorney to represent the defendant while he is absent from the trial. (*People v. El* (2002) 102 Cal.App.4th 1047.) If the defendant does not have stand-by counsel, it is still permissible for the court to remove him from the courtroom in a non-capital case. (*Ibid; People v. Parento* (1991) 235 Cal.App.3d 1378.) Additionally, a pro per defendant may voluntarily absent himself from the courtroom. By doing so, he waives any defense and may not thereafter claim ineffective

assistance of counsel. (*Parento, ibid.*) It should be noted, however, that the Ninth Circuit has held that a self-representing defendant may not be removed from the trial where there is no standby counsel to represent him in his absence. Such a removal is a structural defect and results in automatic reversal. (*United States v. Mack* (9th Cir. 2004) 362 F.3d 597.)

V. STANDBY COUNSEL, CO-COUNSEL, AND ADVISORY COUNSEL

Faretta does not entitle defendants to the appointment of co-counsel or advisory counsel to help prepare the defense. (*People v. Crandell* (1988) 46 Cal.3d 833, 864.) A court may appoint standby counsel to aid the defendant and to be available to take over the defense in the event of termination of pro per status. (*Faretta, supra,* 422 U.S. at pp. 834-835, fn. 46.) Such an appointment is strictly within the discretion of the trial court. California Courts of Appeal do not agree whether an attorney from the public defender's office may be appointed for such a duty. The First District has held that a public defender who has been representing a defendant who chooses to represent himself may be appointed as standby counsel even over the objection of the public defender's office. (*Brookner v. Superior Court* (1998) 64 Cal.App.4th 1390.) The Second and Fifth Districts believe that courts are not authorized to make such an appointment. (*Littlefield v. Superior Court* (1993) 18 Cal.App.4th 856, 858, 860; *Dreiling v. Superior Court* (2000) 86 Cal.App.4th 380.)

If standby counsel is appointed, he or she must be careful not to violate the defendant's right to self-representation. A two-part test determines whether this has occurred: (1) no violation has occurred if, in proceedings outside the presence of the jury, the defendant is allowed to address the court freely and disagreements between counsel and the defendant are resolved in the defendant's favor; and (2) in proceedings that take place in the jury's presence, a violation has occurred if standby counsel's intrusions are substantial or frequent enough to seriously undermine the jury's perception that the defendant is

representing himself. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 181.)

A self-representing client is not entitled to co-counsel. This is because once a defendant has chosen to represent himself, he has given up the benefits associated with the right to counsel, including the right to request the appointment of assistant counsel. (*Scott v. Superior Court* (1989) 212 Cal.App.3d 505, 510.) Advisory counsel may be appointed in the discretion of the trial court. (*Crandell, supra,* 46 Cal.3d at pp. 861-862.) Such counsel may be permitted in the court's discretion to question specific witnesses. (*Scott, supra,* at p. 512.)

VI. REVIEW

The Court of Appeal must review the record de novo to determine whether a defendant validly exercised his constitutional right to represent himself. (*Watts, supra,* 173 Cal.App.4th at p. 629.) If a trial court denies a *Faretta* motion as untimely or equivocal, the appellate court must evaluate the decision "based on the '"facts as they appear at the time of the hearing on the motion rather than on what subsequently develops." [Citation].' [Citation.]" (*Moore, supra,* 47 Cal.3d at p. 80, fn. omitted; see also *Marshall, supra,* 15 Cal.4th at p. 25, fn. 2.) The reviewing court must " . . . give 'considerable weight' to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision is made." (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397-1398.)

VII. REVERSIBILITY OF FARETTA ERROR

If the defendant made a timely and unequivocal request to represent himself, and was

mentally competent to voluntarily waive the right to counsel, then a denial of the motion results in error that is reversible per se. (*People v. Dent* (2003) 30 Cal.4th 213, 217 citing *McKaskle v. Wiggins, supra,* 465 U.S. at p. 177, fn. 8 [79 L. Ed. 2d 122, 104 S. Ct. 944].) When a motion for self-representation is untimely, self-representation is no longer a matter of right but is subject to the trial court's discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.) For this reason, the improper denial of an untimely motion is assessed for prejudice under the test stated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Rogers, supra,* 37 Cal.App.4th at p. 1058; *Rivers, supra*, 20 Cal.App.4th at pp. 1050-1053.) Under *Watson*, an error is reversible only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*Watson, supra*, at p. 836.)

The situation is somewhat more complicated when the issue is a defective waiver of the right to counsel. The United States Supreme Court has not yet decided whether a defective *Faretta* waiver is reversible per se, though it has stated that the right to be represented by counsel "as with most constitutional rights, [is] subject to harmless-error analysis . . . unless the deprivation, by its very nature, cannot be harmless. [Citation]." (*Rushen v. Spain* (1983) 464 U.S. 114, 119, fn. 2 [78 L.Ed.2d 267, 104 S.Ct. 453]; *Burgener, supra,* 46 Cal.4th at p. 244.) A split of authority exists among California courts, with some holding that the absence of a knowing and intelligent waiver of the right to counsel is reversible per se (see, e.g. *Hall, supra,* 218 Cal.App.3d at pp. 1108-1109; *People v. Lopez*

(1977) 71 Cal.App.3d 568, 571), and others holding that the failure to obtain a knowing and intelligent waiver is prejudicial unless the prosecution can show beyond a reasonable doubt that the defendant would have waived counsel even with proper advisements (see, e.g. *People v. Wilder* (1995) 35 Cal.App.4th 489, 500-502 [applying *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824]]) or that the absence of counsel had no effect on the outcome of the proceedings. (*People v. Cervantes* (1978) 87 Cal.App.3d 281, 293-294.)

There is less disagreement in the federal courts. "With one exception, every federal circuit to have considered the issue has concluded 'that harmless error analysis is inapplicable to failure-to warn *Faretta* violations.' [Citations.]" (*Burgener, supra,* 46 Cal.4th at p. 244.) In *United States v.* Crawford (8th Cir. 2007) 487 F.3d 1101, 1108, it was held that the *Chapman* standard may be applied to a defective *Faretta* waiver at sentencing "in the unique circumstance presented . . . when the district court lacked the authority to impose a more lenient sentence than the defendant received."

The split of authority still exists in California, since the *Burgener* Court expressly stated that it "need not decide which standard of prejudice applies" in that case since the defendant would be entitled to relief even under *Chapman*. (*Burgener, supra,* 46 Cal.4th at p. 245.) However, in an unpublished case decided prior to *Burgener,* the Sixth District held in an opinion written by Justice Mihara that a defective *Faretta* waiver results in error that is reversible per se, stating: "We conclude that, here, where defendant proceeded to trial

without a lawyer and without a knowing and intelligent waiver of the right to counsel, he is entitled to an automatic reversal of his convictions. [citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *Rose v. Clark* (1986) 478 U.S. 570 [92 L. Ed. 2d 460, 106 S. Ct. 3101] (overruled on other grounds in *Brecht v. Abrahamson* (1993) 507 U.S. 619, 637 [123 L. Ed. 2d 353, 113 S. Ct. 1710]; *Penson v. Ohio* (1988) 488 U.S. 75, 87-89, 102 L. Ed. 2d 300; *Johnson v. Zerbst* (1938) 304 U. S. 458, 468, 82 L. Ed. 1461].]." (*People v. Nagy* (June 3, 2005, H026195) [nonpub. opn.].) Thus, until the Supreme Court makes a definitive decision, counsel practicing in the Sixth District should argue that a defective *Faretta* waiver requires automatic reversal.

VIII. CONCLUSION

As attorneys, most if not all of us would always advise a defendant against representing himself. As appellate attorneys, however, those of our clients who have made the decision to do so made it long before we were involved in the case. Our job is either to make sure that their right to elect to represent themselves was properly observed, or to show that they were not appropriately advised before making the decision to represent themselves.